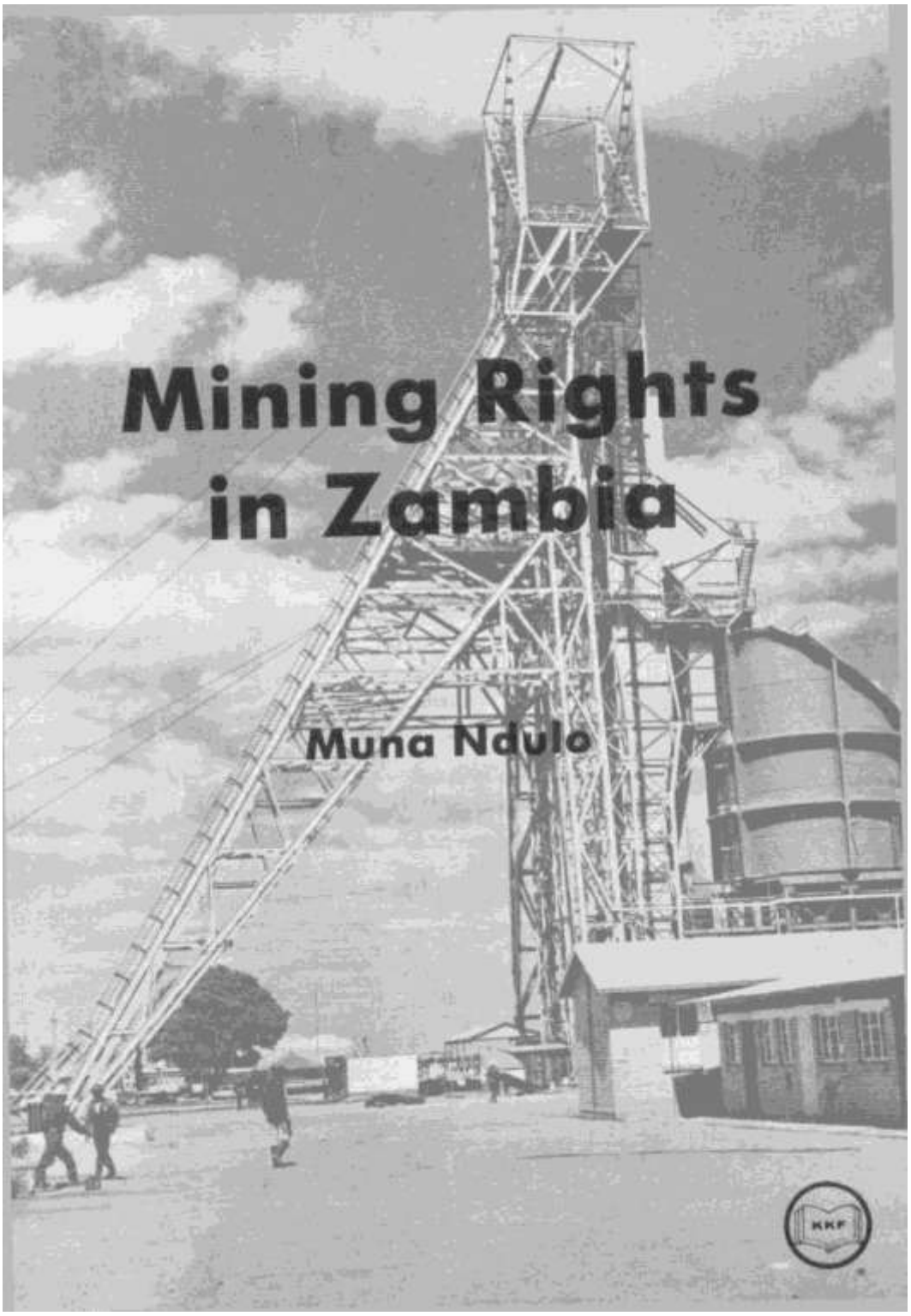
Mining Rights
in Zambia
Muna Ndulo

MINING RIGHTS IN ZAMBIA

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Dedicated to my parents Temba and Julia: They started it all.

PREFACE

A legal framework is required for most human endeavours, whether it be to apply justice or to establish codes of public conduct or to provide facilities for the conduct of social or economic life by regulating and thus enabling such activities to be carried out in an orderly manner. The number of these activities

have proliferated considerably mostly as a result of the extraordinary industrial and social development of the world. Hence, like in all other activities legislation is required to establish rules and regulations to control mining activities. This book is an attempt to provide a detailed study of such a legal framework within which the orderly development and operations relating to the activities of mineral exploitation in Zambia are carried out. The term mining law here is used to mean those enactments which in various ways regulate the acquisition and tenure of mining rights and mining grounds, and the practice of mining-right holders. It relates primarily to the disposition of mining rights and the specific imposts that relate to the exploitation of mineral deposits. The main aspects of mining law cover such things as definition of minerals, ownership of resources, law relating to the right to mine, conditions of governing the issue and holding of mining rights, and the relationship between mineral-and surface-right holders. This is in contradiction to mining regulations, which control the method of working a mine. The term mining regulations covers a broad spectrum and includes such diverse elements as fiscal and monetary policy, labour relations, and safety measures concerning machines and people.

Traditionally writers on the subject of mining law treated it as an aspect of land law. Mining activities today present novel and intricate questions that are based upon developments in technology, multiple use of mineral bearing lands, multiple methods of taxation, and techniques of leasing, financing, and operating mineral properties. While the fixed rules of land law may have provided a skeleton upon which to build, it is generally accepted that mining legislation has departed from them in order to meet the practical requirements of the miners and the mining industry. Thus a body of legal concepts has developed which is peculiar in its application to mining activities. The reader should not therefore fall into the trap of drawing too close an analogy between mining law and land law, for it could lead to erroneous solutions to mining problems. Mining law has acquired a status of its own.

The principal aim of any country’s mining legislation is to encourage the orderly exploitation and development of its mineral resources and to obtain revenues for the development of its economy. To attain these objectives the mining law must help to develop a healthy atmosphere for mining. Mining capital in Zambia is to some extent private and foreign in origin, and, as is known, in general such capital is timid with regard to venturing into most developing countries.[1] Thus this study makes the basic assumption that because of the absence of local sources of capital, foreign investment in the mining industry is

desirable. Since investors invest to make a profit, the need of the private investor to realise a fair return on his investment is recognised, one must also bear in mind that mining investment can only take place on the basis of reasonable consistence in the long-term stabilty of operating conditions, consequently certain aspects of the mining legislation will be evaluated in terms of how it affects the flow of foreign capital.

This book is based on a doctoral thesis written for Oxford University while at Trinity College, Oxford. I wish to express my gratitude to Dr. Alan Milner, Fellow of Trinity College, who supervised the writing of the thesis. His guidance was invaluable. I wish also to thank the British Council and the University of Zambia who generously granted me financial assistance to study at Oxford. In a work of this kind an obvious debt is owed to many people I interviewed or held discussions with when gathering material for this book and those who helped type the manuscript in its various stages. Throughout the period of research and writing my wife, Marjorie and the children gave me warm support and bore many lonely hours. To them I am grateful. Lastly, I wish to thank tjie publishers for their encouragement and for publishing this book, and Zambia Consolidated Copper Minea Ltd for generously subsidising the publication o’f this book.

E.g. Lindlcy, Mines and Minerals, 1914.

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During its Colonial Period, Zambia used pounds, shillings, and pence, which were always equal to British Currency. In 1968 Zambia decimalised its currency on the basis of 10 Zambian Shillings = 1 decimalised Kwacha * 100 ngwee. When most of this duty was completed 1 Kwacha was equal to £0.85. In 1976 and 1978 the Kwacha was devalued. At current exchange rate 1 Kwacha = £. 0955

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I

INTRODUCTION

It is important to place mining rights in their economic context and to show the importance and place of minerals in the Zambian economy. This gives the essential background to understanding the significance and explaining some of the policies that have been involved with respect to mining law in Zambia. It is also important in this preliminary chapter to discuss the system of mining rights in other parts of the world and the sources of law affecting mining rights.

The Political History of Zambia

The country has a land area of 756,309 square kilometres[1] yet it is very thinly populated, its inhabitants numbering only 4.75 million.[2] Unlike the greatest part of Southern Africa most of Zambia was never a conquered colony.[3] In 1889 Rhodes secured a charter incorporating the British South Africa Company and granting it powers to enter into treaties and concessions with African Chiefs.[4] The North-Western part of the country was acquired through various treaties and concessions made with Lewanika, the Chief of Barotseland, by officials of the Company.[5] In 1889 the Barotseland and North-Western Rhodesia Order in Council was passed and it defined the country's boundaries and provided for its administration by the Company. The North-Eastern part of what is now Zambia was acquired through treaties

with African Chiefs in which concessions were made to Sharpe and Thomson as agents of the Company.[6] By 1900 the North-Eastern Rhodesia Order in Council was enacted, and it gave the Company statutory powers of administration.

In the years 1900-1911, the North-Eastern part of the country and the North-Western part were administered separately. However, as time

1. Ministry of Information, Government of the Republic of Zambia, Zambia in Brief, 1970. p.1.
2. Government of the Republic of Zambia, Census Report. 1974.
3. There was a campaign against the Ngoni in 1897, however, see Barnes, Politics in a Changing Society: The Fort Jameson Ngoni, 1954. There are several books on the history of Zambia e.g. Gann, History of Northern Rhodesia; Early Days to 1953, 1964; Hanna, The Beginnings of Nyataland and North-Eastern Rhodesia, 1859-95, 1956, and Wills, An Introduction to the History of Central Africa, 1973.
4. Royal Charter of Incorporation of the British South Africa Company, 29 October, 1889.
5. See, p36.
6. Ibid.

passed it became increasingly apparent that the two territories — both under the British South Africa Company's control and both following a quite similar pattern of development — could be more effectively administered as a single territory. On 4 May, 1911, the two territories were amalgamated by the 1911 Northern Rhodesia Order in Council which revoked both the North-Eastern and North-Western Rhodesia Orders in Council. Its provisions were brought into operation by the Northern Rhodesia Proclamation of 17 August 1911J The country remained under the rule of the Company and governing powers were vested in a Company administration, and a Council of Company Officails, subject to ultimate British control,[8] although this was terminated on 1 February 1924, by the Northern Rhodesia Order in Council. The British government assumed responsibility for the administration of the territory while the status of Northern Rhodesia became that of a protectorate, a situation which obtained until 1 August 1953[9] when the territory was made part of the illfated British Central African Federation. The Federation was dissolved in December 1963, and by 24 October, 1964, Northern Rhodesia became the independent state of Zambia.[10]

Minerals Produced

Zambia is one of the richest métallogénie areas of the world.

TABLE I

TONNAGES OF MINERALS PRODUCED

Mineral	1978 Tonnage	Value in Kwacha
Copper	587,398	612,178,000
Zinc	12,336	24,821,000
Lead	12,878	12,087,000
Cobalt	1,823	35,152,895
Coal	615,145	1,246,000

Source: Zambia Mining Year Book (1978)

7. Northern Rhodesia Proclamation No. 1, of 1911.
8. Royal Charter of Incorporation of the British South Africa Company, 29 October, 1889.
9. Federation of Rhodesia and Nyasaland, Dissolution, Order in Council, 1963.
10. Zambia Independence Order, 1964.

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The main mineral produced in Zambia as can be seen from table 1, is copper. The earliest known reference to copper mining in this general portion of Central Africa was made by Filippo Figafetta in his book, A Report on the Kingdom of Congo.[11] He mentions the mines of Bembe as having been given to the Portuguese by the King of the Congo towards the end of the sixteenth century. From about the eighteenth century, the inhabitants of Zambia and Katanga exported smelted copper in the form of bangles or crosses to ports on both the Atlantic and the Indian ocean coasts of Africa.[12] Africans used iron for their tools, but copper was particularly important for ornaments and as a means of exchange.[13] The presence and use of the metal in Central Africa was known to the earliest explorers.[14] The discovery of the mines by white prospectors was in the majority of cases made easier by the existence of earlier native workings.[15]

TABLE II

WORLD COPPER STATISTICS

Country	Production per thousand tons	ReserveI per mmm
United States of America	1,362	77.J
Russia	1,100	34.9
Chile	1,039	53.8
Canada	644	20.8
Zambia	643	27.2

Source: Zambia Mining Year Book (1978) and Mining Adnual Review (1971)

11. Figafetta, A Report on the Kingdom of Congo, 1969, This book was first published in 1591.
12. Hall, Zambia. 1965, p.10.
13. Gann, 'Northern Rhodesia Copper Industry and World of

Coppers' (1955) 18 Rhodes-Lningstone Journal, pp.1-18.

14. Livingstone, Missionary Travels and Researches in South Africa, 1857.

15. Davey, The Northern Copper (B.S.A.) Company Ltd., Report on the Company's Properties, 1905, p.23. Many prospectors in those days have written to state the same. Brooks for instance points out that prizes of £5 were given for disclosure of any information of a place which showed even minor evidence of copper mining or other metal content and that prospecting camps were usually established near villages, in order to get in touch with local people, Brooks himself discovered some of the mines. See Brooks. 'How the Northern Rhodesian Coppers were founded' 1950 Northern Rhodesia Journal, p.42. Dr Bancroft, a former Professor of Geology at McGill University, who discovered Bancroft mine has stated the same. See Bancroft, Mining in Northern Rhodesia, 1962.

3

Today Zambia is among the leading copper producing countries of the world and has vast deposits of this mineral, containing 13 per cent of the world's known reserves.[16]

Most of the copper in Zambia is mined on what has come to be known as the Copperbelt. This is an undulating area, roughly 144 kilometres in length by 48 kilometres in width. Nine major mines spread all over the Copperbelt are in production,[17] and several copper mining projects are in varying stages of consideration and preparation. Exploratory development at Seberere and Mokambo is being pursued by a Romanian concern and may increase known ore reserves considerably. Kansashi mine near Solwezi was reopened in 1975. A small mine at Jifumpa near Kasempa was opened in 1976 by Mines Industrial Development Corporation Small Mines Ltd. To a lesser extent than copper, Zambia produces other minerals. Zinc, lead, and silver are produced at Broken Hill mine in Kabwe. The mine's grade is among the highest in the world, but the mine has not been operating at full capacity owing to the complexity of its ores. Cobalt is produced as a by-product of copper. Coal is being mined at Maamba in the Southern Province. It is largely for the consumption of the copper mines.[18] Amethyst is produced by Northern Minerals Ltd., one of the largest producers of any semi-precious stone in the world. At present it produces about 50% of the world's amethyst and has the world's largest known amethyst deposit.

Large nickel deposits are now being explored in the Munali prospecting licence area while Iron ore occurences are common and widely distributed throughout Zambia. Only a limited amount of work has been done on the great majority of the deposits where recent tabulation of deposits showed the existence of a minimum of 1,000 million tonnes of mineral grading between 50

and 60 per cent.[20]

16. Mines Industrial Development Corporation, Prospects for Zambia's Mining Industry, 1970, p.20.

17. Chambishi, Chibuluma, Chingóla, Kalengwa, Konkola, Luanshya, Mufulira, Rokana and Bwana Mkubwa. Other possible mines are given in Ministry of Finance, Economic Report, 1972, p. 195.

18. It was developed largely for this purpose after the Southern Rhodesian supplies were threatened.

19. Mines Industrial Development Corporation, Zambia Mining Industry, 1974, p.5.

20. Mines Industrial Development Corporation, Prospects for Zambian Mining Industry, 1970, p.J. Other minerals also produced are listed as cadmium, cement, gold, gypsum, manganese, tin and feldspar.

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Minerals and the Zambian Economy

The Zambian mining industry is of tremendous importance to the Zambian economy. The capital investment is over K6.130 million and it is the most important sector of the economy whose effects are felt even in the remotest districts. Health, education, communications, police — all these as well as the cash-flow from the towns to the ruràl village, are the results of the shared proceeds of the mining operations. As the table below shows, the mining industry accounts for most of the net gross domestic product.

TABLE III

CONTRIBUTION OF MINING INDUSTRY TO DOMESTIC PRODUCT

Year	Gross Domestic Product (Million Kwacha)	Mining industry's Contribution to the Domestic Product (Million Kwacha)	
1973	1628	562	34 %
1974	1820	616	33 %
1975	1562	145	9%
1976	1793	462	26 %
1977	2011	225	11 %
1978	2291	260	11 %

Source: Zambia Mining Year Book (1978)

5
Copper and the other minerals are the country's major exports. Table IV gives the value of copper exports in relation to Zambia's total exports.

TABLE IV
CONTRIBUTION OF COPPER TO EXPORTS

Yeai	Value of Domestic Exports (Million Kwacha)	Value of Copper Exports (Million Kwacha)	
1972	527	491	93%
1973	732	696	95%
1974	841	786	93%
197Ì	518	479	93%
1976	701	660	94%
1977	706	661	94%
1978	649	608	94< 7c

Source: Zambia Mining Year Book (1978)

In 1974, the mines contributed 52% of government revenue. Indirectly, they contribute several further millions, mainly through duty on imports and taxes on mining employees' earnings.

TABLE v
CONTRIBUTION OF MINING INDUSTRY TO REVENUE

Year	Government Revenue (Million Kwacha)	Mining industry's Contribution (Million Kwacha)	
1973	386	108	28%
1974	649	337	52%
1975	433	59	14%
1976	417	5	1%
1977	498	-	-
1978	533	-	-

:: Zambia Mining Year Book (1978)

6
The Mining industry is a leading employer of labour in the country, employing about 15% of all the people who receive cash wages in Zambia. The table below illustrates this:-

TABLE VI
MINING LABOUR STRENGTH

Year	Expatriate	Zambian
1970	4,375	44,094
1971	4,751	44,997

1972	4,600	46,245
1973	4,505	48,287
1974	4,392	51,736
1975	4,493	52,992
1976	4,060	53,082
1977	3,609	55,446
1978	3,245	53,437

Source: Zambia Mining Year Book (1978)

There is no doubt that the importance of mining in the Zambian society transcends its economic value and that it has social and political significance.[21] Further, the process of industrialisation, whether generated by political policies or economic innovation, is widely associated with movements from rural areas to urban centres.[22] The attraction of bright lights and economic pressures combine to bring people out of the rural areas into the towns. About 35% of the Zambian population of 6 million live in the urban centres. Most of this urban population is concentrated on the Copperbelt and the Central Province.[23]

21. Mines Industrial Development Corp., supra, p.6. There are several countries, however, with large dependence on one commodity though to a lesser degree, e.g. Algeria — petroleum, Chile — copper, Zaire — copper, Bolivia — tin, Jamaica — bauxite, Liberia — iron, Venezuela — petroleum, Iraq — petroleum and a few more. See Year Book of International Trade and Trade Statistics, 1966.

22. Kuper, Urbanisation and Migration in West Africa, 1955, p.1.

23. See 1963 and 1969 Census Reports. See also Davies, Zambia in Maps, 1970, p. 11.

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TABLE VII

POPULATION DISTRIBUTION ACCORDING TO PROVINCES

	Year	
Province	1963	1969
Central	505,000	707,000
Copperbelt	544,000	815,000
Eastern	480,000	509,000
Luapula	357,000	338,000
North Western	211,000	227,000
Northern	564,000	541,000
Southern	466,000	499,000
Western	363,000	417,000
8 Total	3,490,000	¿,053,000

Source: 1963 and 1969 Census figures.

Most of the people who live on the Copper belt migrated there in

response to mining labour requirements. In the towns an African entered into social intercourse with his fellow Africans of other ethnic groups and also Europeans and Indians. This situation has brought about profound social changes in the structure of the African society which are beyond the scope of this study.

However, it is important to make the following statement. Whether the mining industry will continue to be of great significance and value to Zambia depends on the future of copper, which in turn depends on basically three factors:-

(a) world demand,
(b) supply trends in the world and
(c) movements in the world copper price.

World demand depends in turn on a host of factors, including the development of techniques of utilisation, trends in supply and the processing of competitive metals such as aluminium.[24] Technical

24. The other possible threat the Nodule Industry has been dismissed. See United States, Department of the Interior Bureau of Mines Mineral Year Book, 1 Metals, Minerals and Fuels, 1971. Copper has a very high degree of thermal and electrical conductivity and is therefore ultimately connected with electrical industry. Electrical uses probably account for about half of the world's consumption and of the balance the building industry takes a considerable proportion probably about 1OT· of total production. See Mining Mirror, 5 December, 1973, p.70; and also 5 No*. 1 Optima p.26.

developments may have on balance a negative influence, as improvements in telephone engineering, for example, especially the use of concentrators, reduce the volume of copper wire needed for a given message volume, while the increased use of microwave techniques and satellites cuts down the need for long distance cables.

The threat posed by aluminium is very powerful. Aluminium is a relatively new metal, whose uses have not yet been fully explored but which already shows a surprising flexibility. One hundred years ago aluminium was a commercial nonentity of the metallurgical world. It was used with copper to form aluminium bronze and for ornaments, but its other uses were specialised, such as the manufacture of artificial teeth. Today aluminium is used extensively in building and bridge work.[25] Furthermore, bauxite is plentiful in the earth’s crust and an innovation which materially reduced the currently expensive cost of its processing would have a major impact on the demand for copper. Also because most of the copper is utilised by the industrialised countries (e.g. Zambia’s copper is mostly

imported by Japan, Britain, France and Germany)[26] its price is dependent on the state of the economies in the industrialised countries. For instance, in 1973, high"prices of the metal prevailed throughout the year,[27] the contrast may be made with 1976 when the industry went through a difficult time. The price of copper fell sieeply owing largely to the world economic recession. It collapsed from a peak £1,400 per tonne on 1 April, 1974 to fluctuate between £500 and just over £600 per tonne from December, 1974 to April 1976; while mining costs have escalated in the aftermath of world-wide inflation. As a result, receipts from copper exports plumetted.[28]

25. Brown and Butler, 'The Production Marketing and Consumption of Copper and Aluminium. The Economist Intelligence Unit, 1968.

26. Industrial Development Corporation Ltd., Zambia Mining Year Book, 1974,
p. 31. See also Webb, Development Strategies for Mineral Exporters. Institute of Development Studies, University of Sussex, 1974.

27. During 1973-1974, Zambia’s two mining companies reached a record level of K920 million in profits, Times of Zambia 31 July, 1975, p.2; and see both Nchanga Consolidated Copper Mines Ltd., and Roan Consolidated Mines Ltd., Annual Reports 1973.

28. At the end of its financial year on March 31, 1975, Nchanga Consolidated Copper Mines Ltd's profit after tax was K58.5 million compared with K113.2 million for the previous financial year. And in the first five months of 1975 the country as a whole earned K222.458.806 from copper, roughly half of 1974’s revenue in the same period. See Times of Zambia, 31 July, 1975, p.2. See also Daniel, 'Increasing strain on Zambia's Copperbelt’ The Guardian, 31 March 1976, p.20.

The Mining Industry And Foreign Investment

A study of the Zambian industry is also a study of the debate on the role of private investment in the developing world, as the industry is largely foreign-financed. Most developing countries, having recently acquired their independence, attach great weight to their independence and watch suspiciously any foreign relationship which may affect the newly won sovereignty. These countries have misgivings about foreign companies because although foreign investment does not necessarily imply political domination — e.g. United States investment in Canada and Western Europe — when the host country is significantly weaker than the lender, political dependence may well follow economic dependence.[29] Foreign investment may also have several other

disadvantages. One such major disadvantage is that it ties an underdeveloped nation's economic cycle to the multinational companies without the country having any control over that cycle.[30] In additon, many of these investments create 'one crop economies', leaving the host nation economically helpless in relation to the world markets. Among the largest investments in developing countries, for example, are those in raw material production such as sugarcane, petroleum, and minerals. All these are largely consumed in the Western European countries. Their level of operation is by and large determined, therefore, by the business cycle in these consuming areas. There is also the problem of the outflow of profits.[31] Allied to the problem of profits going out is the general question of the effect of absentee ownership upon the national economy, the balance of payments and the sentiments of nationalism. Nationals of the host country frequently complain, with some justification that their national wealth is being consumed abroad for others' comfort, and in the case of mining, they complain that they are finally left with 'holes' in the ground.[32] A complementary version of that out-cry is the question 'why do we export copper bars and import electric motors?'

The other problem with foreign investment is that it seeks out those economic activities that yield the highest profit and as sanctioned by the

29. United Nations Report on Multinational Corporation in World Development, Document E/55 00/Rev/84/ESA/6,/1973, p.46; and also Bostock and Harvey; Economic Independence and Zambian Copper, 1972, p.9.
30. Ibid.
31. Ibid. See also United Nations General Assembly Debates (Provisional) 1972, A/C2/SR/1051, p.5.
32. For a general discussion of this problem, see Bernstein, Foreign Investment in Latin America, 1966, p.13.

business ethic, it neglects many activities which may be of social importance.[33] Investors usually aim at maximising profits while the local society aims at maximising some broader measure of social welfare. Foreign investment, however, may have undoubted advantages for the recipient country.[34] An inflow of private capital contributes to the recipient country's development process by helping to reduce the shortage of domestic savings and by increasing the supply of foreign exchange. In this respect Zambia's mines are a very good example.[35] Similarly, it can also be argued that as the investment opera tes, the increase in real income resulting from such investment is greater than the resultant increase in the income of the foreign investor. Thus, the presence of foreign

capital may in this respect allow a large labour force to be employed. Partly it is because it brings physical and finan« ial capital to the country. Such direct foreign investment also includes on-monetary transfers of other resources — technological knowledge, i market information, material and supervisory personnel, organisational experience and innovations in products and production techniques — aj! of which are normally in short supply in the developing world. By being a carrier of technological and organisational change, the foreign investment may be highly significant in providing private technical assistance and demonstration effects that are of benefit elsewhere in the economy. It can also stimulate additional domestic investment in the recipient country that is, if the foreign capital is used to develop the country's infra-structure and such extra investment, may be both local and external.

It would therefore be foolish to condemn foreign capital on the basis of its disadvantages alone. What is needed is a greater awareness among developing countries of its dangers so that they can reject the worst deals while trying to extract much better terms in the future. Many developing countries in recent years have taken measures directed at trying to reduce the disadvantages of foreign capital particularly in the area of the exploitation of mineral resources. Such measures are plausible if they do not hinder further investment in the countries concerned.

33. Ibid.

34. These are discussed at length by several authors, e.g. Fatorous, Government Guarantees to Foreign Investors, 1963. Friedmann, Legal Aspects of Foreign Investment, 1959; and Nwogugu. The Legal Problems of Foreign Investment in Developing Countries, 1955.

35. Practically all Zambian foreign exchange comes from its mining industry. Some writers on economic development see mining as the magic route to fast and sustained economic development, e.g. Kamarck, The Economics of African Development, 1967. For a contrary view; see Frank, Capitalism and Underdevelopment in Latin America, 1971.

11

Mineral Systems Generally

It is of course, impossible, within the limits of this book to treat the mining systems in the different countries of the world, but a brief mention of the major classification of mineral tenure can be made. All the mineral systems employed in the handling of mineral wealth can be reduced basically into two primary classes.[36] First is the lease system, also known as the regalien system. Under this system the state owns the title to

minerals, and the miner derives his right to work the minerals by some form of tenure derived from the state and not from the land-owner. The miner's tenure is seldom equivalent to a property right but is a bundle of rights and obligations, the composition of which varies greatly from country to country. This system has its origin in the rights of kings and feudal lords to the mineral products of the ground and to the disposal of them. It can be further traced to the classical Greek states where citizens and friendly aliens were given the right to mine in return for a payment of one-twenty-fourth part of the profits. The main purpose of this system at its instigation was a means of obtaining revenue. In Roman times permission to mine was granted to explorers on payment of one- tenth part of the produce to the Imperial Roman Treasury and one-tenth part to the owner of the soil.[37] In feudal times the rights of the crown were split up, passing to feudal lords, but Kings gradually repossessed for themselves of their legal rights in respect of mines.[38]

A variation of the same system is what sometimes is termed the dominal system. Under this system the minerals belong to the state and the state holds the right of working them itself or of disposing of them to the highest bidder as it thinks proper. In such a variation perhaps the regalien system of mining rights prevails at present under a more or less constitutionally modified system in the majority of the nations in the world, particularly those in the developing areas of the world.

36. These systems were classified as such quite early, see Alford, Mining Law of the British Empire, 1906, pp. 1-9. See also Shamel, Mining, Mineral and Geological Law, 1907, p.7, who discussed the influence of Roman Law on the systems. The classification excludes communist countries where land and mineral resources are nationalised and mining is carried on as a state industry.

37. Collins, 'World Survey of Mineral Legislation for Land Areas' (1971) 80 Mining Industry, Transactions of the Institution of the Mining and Metallurgy, p.A. 10.

38. Ibid.

The second system is that under which the minerals accede to or go with the ownership of the surface. Under this system any individual under specified restrictions has the right to locate on discovery or otherwise certain limited areas of grounds to hold, work or dispose of the same. This system is referred to as the claim system or the system of 'accession.' It has its origin in the early days of mining in the United States in the first half of the last century. Great numbers of men rushed to the gold fields of California and a few years later to those of

Australia, Canada, New Zealand and South Africa. Its origin was the need for the preservation of public peace in these countries at the time. Some arrangements had to be made on the spot to determine the area of ground on which a man was allowed to work, and the conditions under which he could hold and deal with it. Hence arose the right of the discoverer of workable gold, or other valuable ores or minerals, to claim the ownership of a small plot of ground of limited area on which he expected to make such discoveries, adjacent to those of other persons.[39] Under this system in its modern form, a prospector can obtain private property rights to minerals by discovery and registration of the claim at an office set up for the purpose. It prevails mainly in Western countries.

There are great differences between the two main classifications, which flow from the fact that ownership of minerals is vestfed in different institutions, e.g. the question to whom royalties are payable when minerals are being worked.

In lingland, during the early period of her recorded history, the ownership of the minerals in the earth's crust was a subject of continuous contention between the King and owners of the soil; usually the King being the stronger party, prevailed whenever he or his favourites to whom he might have granted mineral rights cared to assert them. These pretensions, however, were subsequently abandoned as to all minerals except gold and silver, which were called the royal metals, and held to belong absolutely to the Crown wherever they might be found. Such claim to the royal metals falls under the regalien system of mining tenure. It prevails even today in theory, in the law of England but as there is no gold or silver in commercial quantities in England, the regalien rights of the Crown are of a theoretical rather than practical importance. For other minerals, the owner of the surface, wherever situated, is entitled to

39. Alford, supra, p.2.

everything beneath or within it. The right of searching for minerals cannot under common law be exercised except in a few rare instances without the direct consent of the surface landlord or the legal owners of the mining right. This principle is today subject to numerous statutory exceptions.[40] This theory of ownership accompanied the common law of England to ail those countries in which it has been the basis of the legal system. And in some of these, the theory has been of some practical importance. Although the English common law, in respect of mining rights, has in the first instance been applied generally to new territories of the Commonwealth, it has not been continued or adopted. Instead the various colonies and former colonies have by statute enacted how mining rights should be

acquired from the state, which remains the paramount owner of the minerals.[41]

This, however, is not true of Zambia. From the early 1900s to 1964 the mining rights in the country were exercised by a foreign private company, the British South Africa Company, which claimed ownership of minerals throughout the country by virtue of the concessions it obtained from African chiefs. As a result, the Company introduced special and extensive codified legislation on the subject of mining. The rights were then acquired at independence by the Zambian government, which repealed the legislation introduced by the Company and introduced its own extensive mining legislation based on different concepts from that of the Company.

Sources of Law Relating to Mining Rights

In order to understand the diverse origins and applications of Zambian law on the subject of mining, it is desirable to give a brief statement of the different sources from which such law is derived and the extent to which the various sources are important to the subject at hand. The sources of Zambian law in general, and therefore of Zambian mining law, are customary law, the common law of England and the various

40. By statute the property in petroleum existing in its natural condition is vested in the Crown, together with the exclusive right of searching and bring fot and getting such petroleum. See Petroleum (Production) Act, 1934. Furthermore, coal is statutorily vested in the National Coal Board, see Coal Act, 1938 and Coal Industry Nationalisation Act, 1946.

41. This was done quite early in some of these countries, e.g. Australia. For an analysis of its early laws and an example of how this was done see Kemp, Law of Mines and Minerals: Being a Collection of the Statutes Relating there to 1910.

laws, both colonial and post-independence, enacted by Parliament to regulate mining and the acquisition of mining rights.

Customary Law

The first law that ever existed in Zambia was the indigenous law of the tribes. It is generally referred to as customary law — and the great majority of Zambians still conduct most of their activities in accordance with and subject to customary law. Moreover, if all courts of whatever status are considered, far more cases are decided under customary law than under any of the other laws in force in the country.[42] In this regard it should be appreciated that the use of this term ‘customary law’ does not indicate that there is a single uniform set of customs prevailing throughout the country. It is used rather as a blanket description covering many different systems. They are largely tribal in origin, and usually operate only within the

area occupied by the tribe. There are local variations within such an area,[43] but by and large the broad principles in all the various systems are the same. As for mining rights this source of law is not very important because it has been superseded by legislation. But historically land tenure concepts were very important and are still fairly important in tribal areas. They are discussed when considering the validity of the British South Africa Company claims that they acquired mining rights from African chiefs in Chapter five.[44]

Common Law

Like most other former British colonies and protectorates, Zambia is a common law jurisdiction.[45] This description is supported by the history

42. This covers such areas as divorce, contracts, and tort. For a detailed analysis of the cases that come under customary law see Spalding, Hoover and Piper, 'One Nation One Judiciary, The Lower Courts of Zambia' 1970 Zambia Law Journal, p.219.

43. But such divergences as there are can easily be exaggerated as Kuper has so rightly warned, ... 'in the vast continent of Africa there are hundreds of tribes, each with its own history and way of life. This cultural variety is important but it must not be exaggerated. It under-estimates the tremendous effect of past contact and over emphasizes African conversation. Moreover, the piling up of enthnographic details produces an impression of chaos where in fact only variations on a few themes' See Kuper, 'Cultures in Transition' 1952 The Listener, p.212.

44. See p.15.

45. Church, 'The Common Law and Zambia' 1974 Zambia Law Journal, p.l. There are several other studies on the common law and Africa which are very useful on this subject, e.g. Danniels, The Common Law in West Africa, 1964, Chapters 3 and 4; Allott, New Essays in African Law, 1970, Chapters 1—3; and Park, The Sources of Nigerian Law, 1963 Chapters 2 and 3.

of the country as well as by current statutory guide-lines and judicial declarations. And in this sense the Zambian legal system is a product of its history.

The common law system of judicial administration was first introduced by the British in 1889. The Royal Charter of 29 October, 1889, incorporating the British South Africa Company, which also entrusted the administration of Zambia to the Company, authorised it. to administer justice. Section 14 of the Order[46] paved the way)for the introduction of English law into the territory by stating that:

In the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs

and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of land and goods, and testate or intestate succession thereto, marriages, divorces, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the people or inhabitants thereof.

In the Barotseland — North Western Rhodesia Order in Council of 1899,[47] the main purpose of which was to establish an elaborate judicial system in the part of the territory to which it pertained, it was stated that English law was to apply except where otherwise stated in the Order. The North-Eastern Rhodesia Order in Council of 1900,[48] made similar provision for the rest of Northern Rhodesia not covered by the Barotseland Order in Council of 1899. Several other statutes refer to the law of England,[49] but by far the most important is Chapter four of the present laws of Zambia. This piece of legislation, the title of which is the English Law Extent of Application Act, provides that (a) the common law, (b) the doctrines of equity, (c) the statutes which were in force in England on the 17th day of August, 1911, and (d) any later English statutes applied to Zambia, shall be in force in the Republic. For a statute of fundamental significance, Chapter four is uncomfortably vague. There is doubt about the significance of the 1911 date, about precisely which pre-1911

46. Royal Charter of Incorporation of the British South Africa Company 29 October, 1889 in that it allowed the introduction of English law which once introduced would supersede customary law.

47. Barotseland-North-Western Order in Council, 1889, article 6.

48. Nort-Eastem Rhodesia Order in Council, 1900, article 4.

49. See aim the Subordinate Courts Act, Chapter 43 of the Laws of Zambia, s. 14, and The High Court Act, Chapter 50 of the Laws of Zambia, s.9.

English statutes are applicable, about what the doctrine of equity means and most of all there is doubt about whether it embraces the law as developed in the other common law jurisdictions other than England.[30] It is possible to argue that the law referred to can include only English common law, not that developed by any other jurisdiction. The history of the enactment supports this view although past history is increasingly of questionable significance. The title of the Act, as well as the side notes to it also support the view that it refers exclusively to England,[31] although these too are not

necessarily determinative of the issue. So also is this construction favoured by the preliminary definition given in the interpretation and general provision of the statutes,[32] although there is again room for dispute open on this point. So far the practice of Zambian courts is to refer to English cases and decisions from other common law jurisdictions when there is an absence of Zambian authorities and develop the law against the background of the local social conditions. As a result the development of Zambian law has been influenced by decisions of English-speaking courts from many parts of the world.[53] Even more important is the readiness with which Zambian judges run to decisions and reasons of these courts. Such decisions are not technically binding, but in recent years there has been a noticeable increase in respect for them and frequently there seems to be little real difference between referring to them and actually following them as authoritative statements of the law.[34] Similarly when a statute is common to both Zambia and a foreign country the Zambian courts have borrowed from other jurisdictions. In The People v. Chaponda,[55] the issue was whether section

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50. The Common law in this sense is used to describe the whole of the Law except that which has its origin in statutes. There are other senses in which the word is often used as common law as opposed to equity and common law as opposed to customs. See Danniels, supra, p.149.

51. In the side notes the following words appear, 'Extent to which the law of England is in force in the territory.' See The English Law Extent of Application Act, Chapter 4 of the Laws of Zambia.

52. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia defined 'Common Law' as the Common Law of England, see, s.3.

53 In Kachasu v. Attorney-General Selected Judgements of Zambia No.tu oj 1969 several American cases were cited, e.g. Minersville School District v.' Gobits (1950), 310 U.S. 586; Zuvilla v. Mass (1944), 112 Colo. 183; West Virginia Stale Board of Education v. Barnette (1943), 319 U.S. 642. So were several Nigerian cases cited, e.g. Arzika v. Governer of Northern Region [1961] All N.L.R. 379; Cheranci v. Cheranci [1960] All N.L.R. 24 and D P.P. v. Obi [1961] All N.L.R. 186.

54. In Chipango v. Attorney General Selected judgement of Zambia No. 11 of 1971, several foreign cases were cited, e.g. H. Das v. District Magistrate Cutback A.I.R. 056) 1969 S.C. 43; Mohammed Shaft and Another v. State of Jammu and Kashmir A.I.R. (57) 1970, 688; Uganda v. Commissioner of Prisons (1966) E.A. 514 and State of Bombay v. Atmaran 1951 S.C.R. 169.

55. High Court of Zambia, Judgement No. H P.A/101/73.

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of the Zambian Criminal Procedure Code[56] entitled the accused to an acquittal. Reference was made to certain East African cases as there appeared at the time to be no recorded decisions on this point in Zambia.[57] Section 200 of the Kenyan Criminal Procedure Code[58] is word for word the same as its Zambian-counterpart Section 203·. Apart from the technical arguments, there are compelling reasons of practical policy that favour a broad geographical reference for 'common law' in Zambia. There is a strong temptation for a court or a student of law in Zambia to open up the definition and include sources from other common law jurisdiction particularly those within the continent of Africa. The problems faced by developing nations in Africa often have much in common, and are governed by identical or similar statutory provisions and have led to similar approaches towards solutions. In contrast, English law has not changed greatly in recent times and remains geared to the problems and attitudes of a much different society. There are times too, when other non-English sources may prove valuable for Zambia. Sources from such diverse jurisdictions as America or Australia, both because of the substantive insights they may offer and merely because their use itself may bring room for manoeuvre into the law, in any case in so far as these are all common-law jurisdications, they fit into the sources of law potentially permitted by a liberal interpretation of Chapter four of the laws of Zambia.

There is also a clear need in a discussion of mining rights to consider sources of law from other jurisdictions and occasionally, even those outside the common law, even though they can at most only be persuasive; after all, mineral occurences are spread unevenly across the world. The main source of Zambian common law, Britain, is, except for its modern coal industry, not a great mining country; consequently it has not experienced some of the problems that arise as a result of having an active mining industry and lying in a mineralised region. And even if it had, it follows a system of mineral tenure distinct from that of Zambia (which presents distinct mineral problems) and is not a poor nation desperately

56. Criminal Procedure Code, Chapter 160 of the Laws of Zambia.

57. The East African cases of R.v.Jiwannath and Ammk Sigh [1944] E.A. 62, and Musa and Another v. R. [1962] E.A. were referred to.

58. Criminal Procedure Code, Chapter 175 of the Laws of Kenya. Another example of this practice in Zambian courts is Patel v. Attorney-General Selected Judgements of Zambia, No, 13 of 1970 where Public Prosecutor v. Venkata (1961) A.C. 104

and Awolowo v. Federal Minister of Internal Affairs [1962] All N.L.R. 117, were cited.

trying to attract foreign capital in order to exploit its mineral resources as Zambia is. A country like Zambia has much more in common with countries like Botswana and South Africa, in relation to some aspects of mining legislation, than with Britain. Thus in this book, in the absence of Zambian decisions on the points at issue, legislation and cases from other mining jurisdictions whose mining system is based on the same principles as the Zambian legislation are sometimes referred to. The reason for this is that the common law is a very important source of law in this book. The whole of the common law of England, both mining and non-mining, as it existed in 1911 as Chapter four of the laws of Zambia specifies, is in force in Zambia in so far as it can be applied.

Legislation

By far the most important source is, however, the legislation concerning mining enacted in Zambia both by the colonial government in the early 1900s and more recently by the post-independence parliament. The first major enactment was the 1912 Mining Proclamation,[59] and this has been followed over the years by repealing, replacing and extending legislation, the 1958 Mining Ordinance,[60] the 1969 Mines and Minerals Act.[61] The Mines and Minerals Act of 1976,[62] the Income Tax Act,[63] the Copper (Export) Tax of 1966,[64] the Mineral Tax Act of 1970, and numerous Income Tax (Amendment) Acts.[65] In addition there are several statutes, sections which affect mining rights in fairly significant ways such as the Water Act.[66]

59. Mining Proclamation, No. 1 of 1912.
60. Mining Ordinance, No. 13 of 1958, s. 108.
61. Mines and Minerals Act, Chapter 329 of the Laws of Zambia.
62. Mines and Minerals Act, No. 32 of 1976.
63. Income Tax Act, Chapter 668 of the Laws of Zambia.
64. Copper (Export) Tax Act, Chapter 669 of the Laws of Zambia.
65. Mineral Tax Act, 1970. As amended by the Mineral Tax (Amendment) Act, No. 11, 1973 and the Mineral Tax (Amendment) Act, No. 10 of 1975.
66. Water Act, Chapter 312 of the Laws of Zambia.

THE BASIS OF THE BRITISH SOUTH AFRICA COMPANY CLAIMS TO MINERAL RIGHTS IN ZAMBIA

The Historical Background to the Granting of the Concessions

Two principal factors account for the British South Africa Company's activities in Zambia. These are first the persistent tradition handed down from remote antiquity that vast deposits of gold lay ready for the miner somewhere in Africa, and secondly the desire to acquire more land for the British Empire. In this respect the turning point for Zambia was in 1867, when a missionary from Inyati made a journey northwards to the Zambezi, his aim being to reach the Victoria Falls. He was accompanied on the trip by one Hartley. On the trip they noticed several disused mine shafts and learnt of a gold trade that was going on between the local inhabitants and the Portuguese.[1] On their return to the Transvaal, Hartley reported their findings to Mauch, a geologist. Later in the same year Hartley and Mauch went North and together identified the reefs which were later called the Tati and the Northern gold field mines.

On their return they published exaggerated reports of what they had seen in an effort to encourage Transvaal miners to move north. They reported for instance that in Mashonaland, part of present-day Zimbabwe, they had traced one gold-bearing lode for 130 kilometres.[2] These discoveries by Mauch and Hartley made the whole gold hunt seem conceivably worthwhile. The Transvaal miners easily reached Tatjlland tried to obtain concessions from the local chiefs but they found it difficult to obtain them as the local chief, Mzilikazi, was opposed to the mining of gold by Europeans. Eventually, however, the miners were allowed to dig on a temporary basis without any formal agreements.

1. The Portuguese had by the ISth century established themselves on the East Coast of Africa and carried on a gold trade particularly around Sofala. See Exelson; The Portuguese in South-East Africa 1600—1970, 1960; and Wills, supra Chapters 1 and 2.
2. Hole, The Making of Rhodesia. 1928, p.3. Hole was a British South Africa Company Official in Southern Africa.

In 1868 Mzilikazi died and Lobengula succeeded him; within a few months of his installation, he granted two mineral concessions. On 9 April, 1870, he gave Barnes a verbal grant of the Northern Gold fields (an area bounded by the Gwelo and Hunyani river — today the rich midlands area of Zimbabwe) and confirmed this in writing the next year.[3] The concession granted Barnes the right to prospect for gold. He formed no exploration company, however, and never utilised his concession. Then on 29 April, 1870, Lobengula gave another concession to the London and Limpopo Company in the Tati area between the Shashi and Ramahlane rivers. The concession granted mineral rights, permission to operate machinery, erect buildings and make a road to Shashi; in return, the Company was to pay Lobengula £60 per

annum.

Rhodes and Mineral Concessions

In 1871 Rhodes arrived in Kimberely, then a rapidly growing mining town around the recently discovered diamond fields. He began by working on his brother's mining claim, but after a short time turned to buying and selling claims. Within a few years, he amassed a large fortune and formed a company, De Beers Ltd., which gained control of most of the Kimberely diamond mines.

Rhodes was greatly inspired by the vision of a united Africa under the British flag and attempted to persuade the British government to acquire most of Africa as a colony. When his efforts failed, he conceived the idea of floating a private company to implement his ideas. He set out to win the support of the Dutch in the South, for he respectrd this influential group, and knew that without its support the attainment of his dream was not possible. The unification of South Africa became his immediate goal but the independent attitude of the Transvaal Boers under Kruger's leadership proved an obstacle. Kruger's aim to preserve the Transvaal for the Boers was strengthened by the discovery of rich gold deposits on the Witwatersrand, which greatly increased the wealth and prestige of the Transvaal. Rhodes, in an attempt to outflank Kruger, decided to go north and find more gold.

In 1887 Lobengula had entered into a treaty with the Transvaal government. It was an elementary agreement which simply laid the basis for perpetual peace and friendship and regulated matters such as

3. Ibid., p.3.

extradition, but its signing disturbed Rhodes. He persuaded Sir Hercules Robinson, the British High Commissioner in South Africa to send one John Moffat to negotiate an understanding between Lobengula and the British government. Moffat concluded a treaty with Lobengula, its main stipulation being that Lobengula would never make further agreements with any power except Britain without the previous knowledge and sanction of Her Majesty's High Commissioner for South Africa.[4] The conclusion of the treaty was commmunicated to Lord Knutsford, the Secretary of State for the colonies who . gave authority to Sir Hercules Robinson to ratify it. To maintain the British advantage, in 1888 Rhodes' De Beers Company dispatched Rudd to Lobengula, with instructions to obtain a mineral concession. This led to the conclusion of the Rudd concession on 30 October, 1888.[5] It granted Rudd complete and exclusive charge over all metals and minerals situated in the Matebele Kingdom principalities and dominions, together with full permission to do all things that were necessary to win and

procure the minerals. In return for handing over the complete mineral rights of the Kingdom, principalities, and dominions, Lebengula and his heirs were to get the sum of one hundred thousands rounds of suitable bail cartridges and a steam boat with guns suitable for defensive purposes, or in lieu of the steam boat the sum of five hundred pounds at the election of Lobengula. The guns and the money were to be given as soon as mining commenced in the territory. Lobengula never got the gun boat and the rifles arrived in a defective condition. He did, however, get his payment of one hundred pounds a month while he lived.

The Rudd Concession is a simple document consisting of one long sentence'. It is signed by Lobengula using his seal, on the one part, and Rudd on the other.[6] Two witnesses' signatures appear on the document, belonging to Helm and Dreyer. There is an endorsement by Helm certifying that the document was fully interpreted and explained to Lobengula and his council and that the constitutional usages of the Matebele were complied with prior to the execution of the concession.

4. A fascimilc of the treaty is contained in Hole, supra, p.34.

5. Ibid., p.3.

6. A fascimile of the treaty is contained in Hole, supra, p.74 and in Hole, Southern ' Rhodesia, 1909, p. 103.

The Granting of the Charter

With the Rudd concession in hand, Rhodes brought about the amalgamation of a number of financial groups interested in developing the lands north of the Limpopo river, into the British South Africa Company, and approached the British government with a request for a Royal Charter. His reasons were set out in the Royal Warrant and were mainly that (a) the existence of a powerful British Company would be advantageous to the commercial and other interests of the United Kingdom and her colonies; (b) the company would carry into effect diverse concessions and agreements which had been made by chiefs in the region and such other concessions and treaties as the petitioners should obtain and

(c) that if the concession obtained could be carried out, the conditions of the natives could be improved and their civilisation advanced.[7]

Rhodes' request was opposed by English Liberals who maintained that a Royal Charter would confer a practical monopoly of Southern Africa resources upon a handful of Cape Town and London capitalists. The conservative view, on the other hand, supported the company which they thought ought to be able to draw into its nets most of what was worth having in Southern Africa. The

British government was unwilling to be involved in the expense of running overseas territories. Rhodes eventually won over some of his opponents and persuaded a few to accept seats on the Company's Board of Directors. He was also fortunate in that Sir Hercules Robinson, the British High Commissioner at the Cape, supported him and recommended a charter company as the cheapest way of annexing the territory. The Charter was granted on 29 October, 1889,[8] framed to a great extent on the precedent of the Charter granted to the British North Borneo Company. Under the Charter, the Company was authorised and empowered to hold, use and retain for the purpose of the Company the full benefit of the concessions and agreements it had already acquired in so far as they were valid.[9] It was further authorised and empowered, subject to the approval of one of the Principal Secretaries of State, from time to time to acquire by any concession, agreement, grant, or treaty all or any rights, interests, authorities,

7. Hole, supra, pp 107—111.
8. Royal Charter of Incorporation of the British South Africa Company, 29 October, 1889.
9. Ibid., see the preamble.

jurisdictions and powers of any kind or nature whatever including powers necessary for the purposes of government and the preservation of public order in or for the property, comprised or referred to in the concessions or affecting other territories, lands or property in Africa. The Company was empowered to make ordinances which were subject to the approval of the Secretary of State. It was also empowered to carry on mining and other industries and to make concessions for mining and other rights. The area of operation for the Company was defined as the area of Southern Africa lying to the north of British Bechuanaland and to the north and west of the South African Republic and to the west of the Portuguese dominion of Mozambique and east of Angola.[10] The Charter was to be reviewed at the end of twenty years and thereafter at the end of every succeeding ten years. The Company later drew up a deed of settlement, dated 3 February, 1891, which set out the objectives of the Company,[11] reflecting the powers granted to it by the Charter.

After the grant of the Charter, Rhodes occupied the part of Mashonaland around the area later named as Salisbury in Zimbabwe. He was also determined to extend the influence of the British South Africa Company, as far north and east as possible. Thus at the Second Meeting of the Company on 29 November, 1892, Rhodes pointed out that the Rudd concession was obtained with the idea that the north would have to be taken with the

hinterland of the country.[12] f Hence in 1890 his emissaries Selous and Colquhoun obtained a concession from Mutasa Chief of the Manica. It was a comprehensive concession to the Company granting exclusive mineral and commercial rights to the Company in return for help against outside attack and assistance in education and the spread of Christianity.[13] At about this time too Lippert obtained a concession from Lobengula which the British South Africa Company purchased from him in 1892. It conferred on Lippert more or less the same powers as the Rudd concession did on Rudd earlier with respect to minerals, but had additional clauses granting all land in Lobengula's Kingdom.[14]

10. As originally drawn, the Charter covered the area south of the Zambezi river. On 5 March, 1891, the Charter was amended to include the area north of the Zambezi.

11. Deed of Settlement, 3 February, 1891.

12. British South Africa Company Second Annual Meeting, 29 November, 1892,
British South Africa Company Blue Books, 1892.

13. A copy of the concession is reprinted in Hole, supra, p. 107.

14. Baxter, 'The Barotse Concessions' (1951) 2 Northern Rhodesia Journal, p.39.
See also Letter from Coillard to Hunter, 15 August, 1890 in C.O. 5/2/11, which read, 'The King Lewanika is most anxious to solicit that the protection of the British government should be extended to him and his people.'

The Lewanika Concessions

After gaining control of the then Rhodesia, Rhodes moved further north to what is now Zambia, reaching it through Barotseland. The Chief of the Barotse, Lewanika, had through a letter written by Coillard, a missionary, to Sir Sidney Shippard, Administrator for Bechuanaland, on Lewanika's behalf already requested British protection on 8 January, 1889.[15] There have been many attempts to explain why Lewanika wanted protection. It has been suggested that Lewanika thought that British protection might save his kingdom from both the Portuguese advances from the east or west and the attacks by his powerful Matebele neighbours in the South.[16] Alternatively, it has been said he might also have hoped that British proctection would secure his position as a Lozi ruler — a position which had been threatened by a serious rebellious faction within the Kingdom. The influence of Coillard, who is said to have thought highly of Britain and had close personal links with England through his British wife was important. Coillard was worried by the German annexation of South-West Africa, and feared the approach of white gold seekers and adventurers without what he considered proper government to

deal with them, since he viewed the structure of the Barotse state with distrust, imbued with paganism. Ultimately, it was on the advice of Coillard and Khama of Bechuanaland that Lewanika sent his request for protection to the British government. At the same time that Lewanika was asking for British protection, a number of South Africa companies were in Barotseland asking him for mineral concessions. He was very reluctant to grant a concession to any of them as he preferred to have his country declared a British protectorate. In April, 1889, there arrived in Barotseland one Henry Ware from Kimberely.[17] He had been sent by the King and Nind consortium with instructions to try to obtain a mineral concession from Lewanika. In the negotiation Ware, knowing that Lewanika was anxious to be put under British protection, made great play with the promise of the protection of the Queen. He also gave Lewanika considerable gifts in the form of guns, blankets and clothes. On 27 June, 1889, an agreement was concluded granting Ware the:-

16 Halt, Zambia, 1965, P-63. Coillard attributes the initiative for soliciting British protection mainly to Lewanika who, according to him was driven on to do so by the realisation that his hold on his kingdom was tenuous, Coillard, On the Threshold of Central Africa, 1897, p.329

17. Baxter, supra, p.39.

Sole absolute and exclusive right to dig, mine and quarry for precious stones, gold,' silver and all other minerals and metals of whatever description for the term of twenty years, in the area extending east from the river Magila, the boundary to the north to cattle path leading to Maccikunninboe, the boundary to the South to the Zambezi river.[18]

The area as described in mostly present day Ila country in parts of the Southern Province of Zambia. Lewanika was to get two hundred pounds a year and a royalty of four per cent on all minerals or precious stones that were mined in the area. Ware ceded this concession to Nind and King on 11 October, 1889 and it was bought by Rhodes for nine hundred pounds and ten thousand shares in the British South Africa Company.

Rhodes then sent Lochner to negotiate with Lewanika for a more comprehensive agreement than the Limited Ware Concession. In the negotiations Lochner too invoked the name of Queen Victoria, knowing like Ware before him that Lewanika had asked the Queen to declare his country a protectorate. He told Lewanika that he was an ambassador from the Queen and had been sent to offer her protection for Barotseland — not merely a concession but an alliance between the Barotse nation and the British government.[19] If the Chief chose to reject such an offer, he warned that it

would be taken as an unfriendly act, suggesting that the Queen might even be driven to force her friendship on Barotseland.

Any suggestions that the British South Africa Company was not the same entity as the British government were quickly glossed over. Lochner

18. See Baxter, 'The Concessions of Northern Rhodesia' (1963) Occassional Papers of the National Archives of Rhodesia and Nyasaland, pp.3—4, for copies of the concessions.

19. Later the colonial office admitted that Lochner may have made too free a use of the Queen's name. See Letter from Colonial Office to Foreign Office, 19 October, 1891, No. 169 in F.O. Con. 6/78.

pointed out that the president of the Company was the Duke of Aber- corn, whose Duchess was a member of the Royal Household, and that another director, the Duke of Fife, had a father-in-law who was the heir to the British throne. Whenever he wrote a letter to Lewanika during this time he used 'On Her Majesty's Service' envelopes, obviously to reinforce his representations that he was acting for the Queen.[20] There is also evidence that during the negotiations Lochner organised a party to celebrate the Queen's birthday. One report indicated that the date on which the party was organised was one month after the Queen's official birthday, but a British South Africa Company report, gives the date as the 24th of May.[21] At the party, sports were organised and oxen were killed for the consumption of guests — all the Barotse Councillors and the Chief — and at night fireworks were organised.

One month after the party, on 22 June, the Barotse National Council gathered to consider the request for a concession. After the National Council had deliberated for several days, Lochner hired one Mokoatsa from Khama's Kingdom, to deliver a message which purported to have come from Khama.[22] In it he urged the Barotse people to put themselves in the hands of the Queen and went on to say:

Barotse, I have tasted delicious food and I have shared it with you. What have you done with it?

I have sent messengers like Mokoatsa.

How have you received them? Today, I hear sinister rumours, you speak again of revolution.

Take care Lewaika is my friend, and if you dare to make attempts against his life or power, I am Khama, you will see me with your eyes and hear me.[23]

Mokoatsa went on to tell them that the British South Africa Cqmpany was made up of the Queen's men who had been given the job by the British government of spreading civilisation in .the heart of Africa. The Mokoatsa plot played a significant part in

making Lewanika agree to the
27
20 Johnsons, Reality Versus . Romance in Southern C · · 893, p. 145.
21 Compare the reports in Hall, . supra, p.68 and thosi in Holt
22 Mokoatsa was well known to . Lochner to be a reg- ir mes
23 See Letter from Lochner to . British South Africa Company, . African South. 392.

Lochner concession. Lochner himself admitted this in a letter to the Company, in which he wrote:

Macquetsie, Khama's messenger, was of the greatest possible help to me, as of course the Barotse listened to him more readily than they did to me, he made an excellent speech, told him that if I was successful, sometime back, I would ask the Company to make him a good present, he stated that if the Company would give him a wagon nothing would please him more.[24]

Another influence was the concurrence of the missionaries. This is shown by Coillard's own admission and also the extent to which the missionaries were blamed when Lewanika later repudiated the concession.[25] Coillard himself wrote after the concession was granted that Lewanika had acted on the advice he had given him, feeling that it,was coming from a friend.[26] Lochner too in a letter to the British South Africa Company stated that had it not been for the influence Coillard had secured over the King, his mission would have been impossible.[27]

The Lochner concession was concluded and signed on 27 June, 1890. Two versions of the concession are accessible, both in the Colonial Office papers. The substance of the two copies of the concessions, however, is the same.[28] In the concession the Chief gave the British South Africa Company:

24. Ibid.
25. Coillard Journal, 22'May, 1891, C.O. 51/11.
26. Ibid.
27. See letter from Lochner to Harris, 9 April, 1890, No. 320 African South, 392.
28. The copy left in Lewanika's possession contained the following clause not contained in the version Lochner took back to Rhodes. 'The Company further agreed that it will forthwith under the King's supervision and authority assist in the establishment of propagation of the Christian religion and the education and civilisation of the native subjects of the

King by the establishment maintenance and endownment of such churches, schools and trading stations as may be from time to time mutually agreed upon by the King and the Resident Representative.' See Letter from Middleton to Salisbury, 27 October, 1890, Enclosure in No. 158

F.O. 403/157. This of course was never done. See letter from Governor Stanley to Colonial Office, 25 September, 1924, C.O. 795-99.

28

The sole absolute and exclusive and perpetual rights and power over the whole of the territory of the Barotse nation, or any future extension thereof including all subject and dependent territories ... to search for diamonds, gold, coal, oil and all other precious stones, minerals or substances.[29]

The Company in return promised Lewanika British protection from outside attack, to appoint a British resident, to pay the Chief mineral royalties, an annual sum of £2,000 and supply him with a gun boat and guns. The concession described the area it covered in rather vague terms stating it as:

The whole of the territory of the Barotse nation and any further extension thereof, including all subject and development territory.[30]

In the text of the concession it was provided that the concession had to be considered as a treaty between the Barotse nation and the government of Her Britannic Majesty Queen Victoria. This gives weight to the argument that at all times Lewanika thought that the concession was being made with the Queen and Lewanika considered this very important.[31] This is evidenced by the fact that the Chief gave two magnificent elephant tasks, which are a token of submission in African customs to the Queen though they never reached her.[32] Coillard too seemed to have believed that the concession was with the Queen, for he was later to write:

29. See copy in No. 320 African South 392.

30. Ibid. This description of the area not in terms of physical features, left the area covered vague. It left such questions as what amounted to the Barotse Kingdom and whose future extensions of the Barotse Kingdom unanswered.

31. Yeta in a letter to the Colonial Office 22 March, 1922. 'We were assured that whatever dealing we were going to make with the Company would be regarded as being made with Her Majesty' C.O. 795-90. Also Rev. Jalla who worked in Barotse at the time of the concessions swore an affidavit that 'Lewanika meant that whatever rights (he) gave them believing the British South Africa Company to be asking for the Crown and not as a Commercial concern' Northern Rhodesia Government, British South Africa Claims to Mineral rights in Northern

Rhodesia" (White Paper), 1964, p. 14.

32. Johnson, supra and also Mathers, Zambezia 1891. A book published in the Company's interest revealed that the two fine tusks of ivory each weighing considerably over 1001b (45.5kg) were hung in the Board room of the British South Africa Company's office in Capetown.

If the British protectorate has been used simply as a blind, I emphatically protest against it and regret if I have unwittingly been a dupe or an accomplice in such transactions.[33]

As agreed under the concession, the Company sent one Corydon to take up the post of British Resident in Barotseland. He arrived on 27 September, 1897, with instructions to obtain a new concession from Lewanika, which would give the Company more powers than it had acquired'under the Lochner concession. Corydon persuaded Lewanika to travel to the Victoria Falls to meet Captain Lawley, the Company Administrator of Matebeleland. In June, 1898, a concession was agreed upon between Lewanika on the one hand and the British South Africa Company on the other.[34]

The Lawley concession was not confirmed by the British government but another concession negotiated between Lewanika and the Company in October, 1900 and repeating the provisions of the Lawley concession was approved by the British government in 1901.[35] The concession was approved subject inter alia to the following conditions: (a) that the concession was not deemed to confer upon the British South Africa Company any rights inconsistent with the provisions of the 1899 North- Western Rhodesia Order in Council or with any laws enacted by the High Commissioner and the British South Africa Company charter and (b) that the privileges conferred in the concession were not to be alienated by the Company without the written consent of the British government.[36]

The new concession granted absolute and perpetual rights and powers to the Company to (a) carry on any manufacturing, commercial or other trading business; (b) search for, dig, win and keep diamonds, gold, coal, oil and other precious stones, minerals or substances; (c) construct, improve, equip, work and manage public works, railways, tramways, roads, bridges, lighting, waterworks and all other works and convenience of general or public utility; (d) carry on the business of banking in all its branches; (e) buy, sell, refine, manipulate, mint and deal in precious stones, special coins and all other metals and minerals; (f) manufacture

33. Letter from Coillard to the British South Africa Company, 5 June, 1891, Coillard Journal C.O. 51/11.

34. Baxter, supra, p.41.

35. This concession was nftpntvtd on the 23 November, 1901.

African South No. 1146.
36. Ibid.

and import arms and ammunition of all kinds and (g) do all such things as are incidental or conducive to the exercise, attainment or protection of all or any of the rights, powers and concessions granted and to carry out administrative rights to deal with and adjudicate upon all cases between white men and Africans. Cases between Africans only were to be dealt with by the Chief. The Chief was promised payment of an annual sum of eight hundred and fifty pounds which was stated to include the annual payment of two hundred pounds due to Lewanika under the Ware Concession.

It would appear that even though the Lochner concession was not mentioned specifically, it was the intention of the British South Africa Company to make some substantial changes to it. The reduction of the annual subsidy to eight hundred and fifty pounds seems to be one such change. The Company, however, received all the rights it had gained under the Lochner concession. The 1900 concession stated that it covered all the areas of Lewanika's territories but at his insistence it did not cover Barotseland proper, that is the area between Sesheke and Lealui where the Lozi live. In this concession too there was a provision similar to that in the Lochner concession to the effect that the agreement was to be considered as a treaty of alliance made between the Barotse nation and the government of Queen Victoria.

In 1909, the British South Africa Company obtained their last concession in the Barotse area. Unlike the earlier concessions, it did not grant mineral rights but granted it land right« throughout Lewanika's territory except in Barotseland proper itself.

The North-Eastern Concessions

In the North-Eastern part of the country, Johnson, Administrator of the Nyasaland Protectorate, financed by and at the suggestion of Rhodes, undertook concession-seeking journeys in 1889. He enlisted Alfred Sharpe, a solicitor, on the mission and entrusted to him the important task of obtaining a concession from Msiri the ruler of Katanga. Sharpe claimed to have within a very short time, made extensive journeys throughout the Luangwa region and then on to Katanga. He obtained concessions from a number of small chiefs and Kazembe, the Lunda Chief in the Luapula valley but did not obtain one from Msiri, the ruler

of the copper-rich region of Katanga or with Mpezeni of the Ngoni since both these Chiefs refused to make any agreement with him. He also obtained concessions from Nsama and a Chief named

Mwapi.[37]

Rhodes, unaware that Johnson had sent Sharpe, but anxious to acquire Katanga, because of its copper deposits, acted independently and sent Thomson on a similar mission. Thomson travelled through the upper Kafue and Luapula regions and obtained a number of concessions from the chiefs he met, but because of ill-health he never reached Msiri in Katanga. Nevertheless, he managed to obtain concessions from the following Chiefs: Kabwiri, Kawende, Katara, Mansala (female chief), Thitambo, Msiri (not the same as the one referred to above), Kalonga, Simesi, Nguemba, Manyesha, Chamira, Chipepo, Cheria and Mlembwe.[38] Most of these concessions contained the same provisions except for certain negligible variations. In the main, the chiefs accepted the British flag, placed themselves under the protection of the Queen and granted the Company the sole right to search, prospect, exploit, dig for and keep all minerals and metals and the sole right to construct, improve, equip, work, manage and control all kinds of works and conveniences of general and public utility and the right to employ all commercial privileges of whatsoever kind, and lastly, the Company was given the right to do such things as are incidental to the exercise, attainment or protection of all or any of the rights, powers and concessions granted. The chiefs agreed not to enter into any treaty of alliance with any other person, or company. In all the concessions it was stated that they should be understood to be in the nature of a covenant between the chief and the Queen of Britain. Some of them did not, however, grant mineral rights and went no further than a grant of exclusive commercial rights. In return for the grant of such considerable interests contained in the concessions, the chiefs were paid varying sums of money, though none exceeding fifty pounds.

In general the concessions appear to have been based on a precedent supplied by the British South Africa Company. It will be sufficient to quote the main part of the concessions to give a general picture of the sort of documents that are being referred to. The main part of the concessions concluded between Mwapi and Sharpe for example, read:

37. North-Eastern Rhodesia (1895-1911) File No. N.E./A3/8/3 (National Archives), Lusaka.

38. Ibid. The whole operation seems to have been rushed — Thomson signed all these treaties between 10 September and*27 December, 1890.

32

I the under-signed, Mwapi, Chief of Lukusasi country, do hereby concede to the Royal British South Africa Chartered Company, Ltd., the exclusive mining rights over the extent of territory

which I possess, which is bounded as follows: On the East and South by the watershed between the Lukusasi river and its head-waters and the Luangwa river on the north, the north-western and the west, by the watershed of the Lukusasi river ard on the South by the South Latitude 13°.40 or there about[39]

These documents, noting the one quoted above were fairly technical even by modern standards. It was therefore unlikely that any African chief at the time could have comprehended the meaning of words such as 'latitude' or indeed the meaning of mineral rights as distinguished from land rights. And since these tidy European concepts have no counterparts in tribal customary law, as is shown later, it is probable that no amount of interpreting could have made the chiefs appreciate the significance of the documents. Hence there is reason to suspect that most of the concessions were obtained by deception. Some of them refer to chiefs who have never been in existence in Zambia. One chief in a concession is oddly described as paramount chief of the countries of Senga and Ilala two different tribes living hundreds of kilometres apart.[40] Another incidence is the concession with Nansala, called Chieftain of the Lobisa country of Mbalala. In fact, it appears that she was merely a village head-woman who was put forward by the people because they did not want to disclose the real chief. There is also the treaty with Mwambwiri said to be the paramount chief of the Kiwende of no known tribe.

As further evidence that the chiefs were not informed of the true nature of the documents they were signing, there is in colonial records made at the time of the signing of the concessions, the evidence of a Dr Swan concerning the methods employed by Sharpe to obtain concessions. He wrote:

39. ZA/19/File No. 35 (National Archives), Lusaka.

40. This chief is named as Tshavira. Also neither Simesi nor Kalonga were chiefs of the Lamba tribes attributed to them in the concessions.

One day a Mr. Sharpe turned up with a paper which he asked me to get Mushili to sign. I read the paper through and found that it made over the mineral and land rights of that country to the Company. I said I will take it to the Chief, but I think he is going to be very angry when I translate it to him. Mr. Sharpe told me not to translate it and asked me to just get him to sign it. He said that since Mushili wa< ny friend he would do anything for me.

• ' as a Christian 1 could not do such r-?ed to the document being read, the Chief was very angry and expelled S om the country[41]

There is also evidence of one Mwebela, who claimed to have been a witness at the meeting between Thomson and Chief Mushili,

obtained in 1964 by the Zambian government. In which he stated:
The Whitemen came with their book and they asked Mushili to put his thumb print in the presence of ...
Musepelo, Kanamina, Mukwemba and myself, Mwebela and told the chief to look after that book carefully.
They used black stuff, that black stuff was put against that one and then on the paper. I do not remember them making any cross on the paper. There was not a meeting of all the people of the village they said;
As all the chiefs have run away from us, so we want you to accept us by putting this mark on the book, and we recognise you as the only chief here.
The Mupundus, they were interpreting they did not talk about land. They did not talk about Iyela (metals).
I know what was talked about; if they did talk about it, I would have known.[42]

There is reason, therefore, to suspect that many of the concessions were obtained by various deceptive methods. Quite apart from the inadequacy

41. Northern Rhodesia Government, British South Africa Company's Claims to Mineral Rights in Northern Rhodesia, (white Paper), 1964, p.15.
42. Evidence deposed by Mwebela, a nephew of Chief Mushili, collected by M.I.O. Faber, 1 September, 1964, Maxwell Stamp Papers, 1964.

of the money said to have been paid to the various chiefs, nobodv knows whether in fact they were ever paid as there is no evidence to substantiate Sharpe\s and Thomson's claims ftiat they were. In 1892 the concessions were sent to the Colonial Office which asked Johnson to report on whether they should be recognised by the Secretary of State.[43] Earlier, on 18 July,. Johnson had issued a circular establishing a legal procedure for registering and recognising concessions within the British sphere of influence. Under this system, no concession would be registered unless it received his sanction.[44] Before he could approve a concession, it had to conform to the following conditions: (a) the chief who gave the concession must have been the real ruler of the country covered and not merely some sub-chief; (b) the purchaser must have given what Johnson considered a fair price. In each case in which he was satisfied that the claims fulfilled the conditions he had laid down, he issued a certificate of claim which after approval by the British Government, recognised the validity of the concession

It is doubtful that Johnson had any legal authority to set up this procedure.[45] He was not authorised by the British government nor by any law in existence at the time. It is even doubtful

that Johnson had authority to issue certificates of claim in the region covered by Thomson and Sharpe, as the British Nyasaland Protectorate of which he was administrator did not extend to these areas which were simply in what was n called the British sphere of influence, though the Company could ac e concessions under its Royal Charter subject to the approval ot he Secretary of State for the Colonies. One cannot therefore come to an easy conclusion as to the legal effect of these certificates of da m although by 1893 Johnson issued such certificates recognising Sharpe and Thomson concessions, thereby he established the basis of the Br . sh South Africa Company's claim to mineral rights in Zambia east of f he Kafue and in what became known as the Katanga pedicle across the Congo (Zaire) border. The claims were recognised by the British government in 1894 on the basis of the certificates issued by Johnson.[46]

43. African South, No. 1146.

44. ZA/19/File No. 35 (National Archives), Lusaka.

45. Krishnamurthy, 'The Thomson Treaties and Johnson's Certificate of Claim' (1969) 8 African Social Research, p.50. See also letter from Johnson to the Foreign Office, 19 August, 1893, F.O. 2/66.

46. ZA/19/File No. 35 (National Archives), Lusaka.

35

In discussing Johnson's decision to issue the claims it is doubtful that he could have subjected the Thomson and Sharpe concession to close scrutiny. He could not possibly have satisfied himself that some of the vendors had the authority to dispose of what they disposed of in these concessions.[47] Indeed, there is evidence that Johnson himself seemed to doubt the legitimacy of the concessions, for in a letter to the Colonial Office he urged it to recognise as much of the contents of these concessions as was legally admissible, and went on to say that 'the fact that certain points might have to be rejected was not sufficient reason for non-recognition of other parts'.[48] It seems most likely that Johnson acted under pressure from the British South Africa Company officials, particularly Rhodes. In connection with a land dispute at the same time as the Thomson and Sharpe treaties were before Johnson, Rhodes wrote to Johnson in these terms:

I would impress this point upon you ... the Chartered Company have been paying and are still paying £10,000 a year to you for nothing. It is even prepared to increase its subsidy to £15,000 a year but in justice to its shareholders, the Company must have secured to it the reversionary rights of the land and the minerals both within the protectorate and sphere without it[4]®

The British South Africa Company asserted a right to the ownership of, or exclusive control over, all the minerals

throughout Zambia on the basis of the concessions, a consequent right to alienate these minerals in any way it wished, and a right to levy royalties on all minerals won by whoever won them. The Company held the rights for over sixty years.[50] During this period attempts were made to divest the Company of its claims.

47. In some concessions no witnesses are given, in others no interpreters, in other still the chiefs do not exist. As monopolies they were against the Charter. They have also been severely critised by historians, Hanna, supra, p.115, Gann, supra, p.63, and Slimm, 'Commercial concessions and politics during the colonial period: The Role of the British South Africa Company in Northern Rhodesia, 1890-1964' 1971, African Affairs, p.21.

48. Letter from Johnson to Foreign Office, 17 October, 1894, F.O. 2/67 and Hanna, supra, p. 115 quotes him as having referred to them as absurdly worded.

49. Letter from Rhodes to Johnson, 4 April, 1893. British South Africa Company Papers, Central African Archives, (Microfilm in library of Royal Commonwealth Society, London).

50. Financially, the Company earned over £170 million and the British government collected £40 million in taxes, Northern Rhodesia Government, British South Africa Company claims to Mineral Rights in Northern Rhodesia, (White Paper), 1964, p.24.

CHALLENGES TO THE BRITISH SOUTH AFRICA COMPANY CLAIMS

The British South Africa Company always asserted that its title to the mineral rights of Zambia in addition to having its origins in the concessions (discussed in the previous chapter,) was confirmed by the Company's long continued possession of them,[1] as well as subsequent legislation and agreements. While the Company's enjoyment of the title before 1924 is referable to the administrative position which it held in later years, it seems this relied on its influence with the Colonial Office. During the period after 1924 its ownership of mineral rights was subject to frequent protests from local chiefs, colonial officials and other sympathisers. The protest ended only with the transfer of the rights to the Zambian government in 1964.

Early Challenges to the Claims

Lewanika and the Claims

Within Barotseland itself it seems soon after the conclusion of the concessions, there was widespread discontent. The ordinary people are reported to have accused Lewanika of having sold the country.[2] Lewanika himself laid the blame for their conclusion on the missionaries who, (as pointed out in the last chapter), acted as his advisers during the negotiations for the concessions.[3] The awareness among the Lozi of what had transpired

seemed to have been partly due to a white trader, George Middleton, who was present in Barotseland at the time of the negotiations of the concessions. During his trips to Mafeking for supplies, he came to a conclusion that the British South Africa Company was not the

1. Williams, supra, p.3. But act of ownership exercised over mines only give rise to a presumption of ownership, or if exercised during the statutory period, may support a statutory title in the absence or inadequacy of rebutting evidence. Sec tairweather v. Si. Marybone Property Co. Ltd., (19631 A.C. S10; Ashton v.

Stook (1877), 6 Ch.D. 719; and Wild v. Holt (1842), 11 L.J. Ex. 285

2. Mainga, Bulozi Under the Luyana Kings, 1973, p. 182.
3. Cited by Caplin, A Political History of Barotseland 1878-1965, London University . Ph.D., thesis, 1968, p. 147. The chief denounced Coillard as a liar, secret agent ;md, thief.

same thing as the British government and was no more than a mining Company, and informed Lewanika about his findings.[4] The Chief instructed Middleton to write to the Queen. The letter dated 27 October, 1890[5] denounced the Lochner concession on the ground that: (a) the objects of the Company were not explained to Lewanika; (b) that Lewanika, being illiterate, could not read his copy of the concession; (c) that the terms of the written agreements were opposed to his wishes and those of his people; (d) that he was opposed to granting any monopoly and the ceding of his country in perpetuity with sole, absolute and perpetual rights of administration commerce, industry and entire natural resources to a commercial association, and that he never realised that the document he was signing was nothing less than that: (e) that Lochner pretended to be an envoy of the Queen and threatened him that his refusal to sign the concession would entail trouble and the Queen would compel him to enter into a treaty and (f) that Lewanika signed the document under the impression that it would secure him personal protection of the Queen and the British government.

The letter further stated that since the concessions were obtained under misrepresentation and insufficient explanation Lewanika was cancelling the concessions. In the same letter, the Chief repudiated the Ware concession and alleged that he had only given Ware permission to search for gold in the Batoka country and the concession was subject to an agreement that if and when gold was discovered the Chief would determine the mining area. The Chief then expressed his indignation at the sweeping nature of the agreements and the very exclusive terms of the rights stated to have been conceded by him to the

Company. Thus, it would appear both parties to these concessions, soon after their conclusion, were giving the documents different interpretations as to what they purported to
Ibid.
5. Letter reprinted in Baxter, 'The Barotse Concession', (1952) 2 Northern Rhodesia Journal, p.44
stand for and convey. Company officials dismissed this letter as having been the work of Middleton,[6] but later events seem to suggest that
Lewanika had something to do with the letter himself. In November, 1890, he sent another letter to the Queen, the main part of which was a request for British protection, but part of the letter denied the granting of the concession that had been obtained from him. The relevant part of it read:

> I was told that the said Company was known to the Queen and her government and had received such powers that any treaty or alliance I made was in the light of as good as a treaty or an alliance made with your Majesty's government. On the strength of this, I had no hesitation in conceding to them the whole of my country.
> What I wanted was not money but protection, not the protection of a mining and mercantile company, nothing else, it is because the Company made use of the Queen's name that they won my consent to make the concessions of my country to them.[7]

In this letter Lewanika went on to express his fears about what would happen if his people came to know about these concessions, which suggested that his people might not have been as well consulted as had been suggested by the Company.

The letter of 27 October was not replied to but that of November was answered by the British High Commissioner for Bechuanaland. In this reply Lewanika was told that the Company was acting under a royal charter and that he was under British protection.[8] This advice appears to have been given despite the earlier admission by the British government that the situation was otherwise and that Lochner in his negotiations did use the Queen's name improperly.[9]

6. Ibid.
7. Letter from Lewanika to the Queen, 1 November, 1890, in No. 119 F.O. con. 6178. Letter also reprinted in Baxter, supra, p.47.
8. Baxter, supra, p.47
9. See p.32

The Settlers and the Concessions

When the 1912 Mining Proclamation was being drawn up, the British South Africa Company suggested the inclusion of a preamble which appears to have been intended to give statutory

backing to its claims to mineral rights.[10] The settler representatives questioned the need for a preamble and alleged that it was an attempt by the company to secure its claims to mineral rights.[11] The colonial office appears to have wanted to avoid the inclusion of the preamble,[12] although with the insistence of the Company, a preamble was indeed included.

Continued protests against the Company's claims led in 1920 to the Secretary of State asking the Law Officers for an opinion on whether or not the Company was right in its claims that the mineral rights of the territory belonged to it by virtue of the concessions obtained from native chiefs.[13] The Law Officers advised on 19 June, 1920, that the Company was indeed right in its contention with regard to mineral rights.[14] Because of the summary nature of the opinion, it is not possible to discuss it any further.

In the same year settlers took up the matter with the British government, they argued that on economic grounds the lard and minerals of Northern Rhodesia belonged to the Crown and should be used for the benefit of the country.[15] This was expressed later in a resolution passed in June of 1920 requesting the British government to refer the question of ownership of mineral rights to the Judicial Committee of the Privy Council.[16] They also sent a petition to the Queen asking her to use her influence to restore the mineral rightsofNorthern Rhodesia to the people

10. Report of the Commission Appointed to Enquire into the Financial and Economic Position of Northern Rhodesia, 1938 Colonial No. 143, p.301. Also see letter from the Company to the Colonial Office, 13 Feb., 1911. It categorically stated that they intended to have a mining law which reinforced its claims, C.O. 417-506
11. The Pim Report, ibid.
12. C.O. 417-506.
13. Letter from the Secretary of State for the Colonies to the Law Officers, 6 May, 1920, C.O. 795-95.
14. Report of the Law Officers, 19 June, C.O. 795-95
15. The Pim Report, supra.
16. It was passed on the 29 June. It read 'This Council, after consideration of your... advises that the whole question of ownership of the land and mineral rights in Northern Rhodesia be submitted without delay to the Judicial Committee of His Majesty's Privy Council', see Letter from the High Commissioner to the Secretary of State for the Colonies, 7 September, 1920, African South No. 162

of the country.[17] At this stage the reaction of the Company was that the position was covered by the Northern Rhodesia Order in

Council of 1911, which it stated recognised the continued existence and validity of its concessions explicitly by the reference to them in section 40 of the Order in Council[18] This it is submitted was wrong in that section 40 vested the land and mineral rights in the Company as administrator and clearly this was enough to sustain its claim that it owned the rights in its private commercial capacity.[19]

In response to the settlers' protests, Mr Winston Churchill, then Colonial Secretary, in 1921 appointed an advisory committee under Lord Buxton, to inquire into the position of the Company in both the Rhodesias.[20] In its report the Committee recommended among other things that the question of the Company's claim to mineral rights should be referred to the Privy Council for determination and expressed its own doubts about the validity of the Company's claims.[21] It emphasised that because of the number of interests involved and the obscurity and complexity of the position it was imperative to have a decision which would finally bind all parties and acknowledged that such a settlement could in the nature of the case only be obtained through a legal decision which would not be open to challenge. This conclusion by the Committee was reached after a careful consideration of the full documentary information supplied to it by the Colonial Office and the Company, and the hearing of witnesses including the chairman of the Company.[22]

The Company's Attitude to a Reference to the Privy Council

The Company, while agreeing that an authoritative decision was necessary, did not consider that a reference to the Privy Council was required and suggested instead that in order to avoid long and expensive legal proceedings its claims should be settled by agreement with the

17. Pim Report, supra.
18. Letter from the Company to the Colonial Office, 1 December, 1920 African South No. 164.
19. In any case in R.v. McCaulay, 11920], A.C. 715, it was held that rights cannot be separately enjoyed where, they are in 'in addition to'.
20. Report of the Committee Appointed by the Secretary for the Colonies to ConsiderCertain Questions Relating to Rhodesia, Cmd, 1471, 1921. Throughout this study it is referred to as the Buxton Commission.
21. Ibid, clause 12.
22. This is expressly stated in the introductory part of the Report, Ibid., pi.

Crown.[23] The basis of this argument was an earlier reference to the Privy Council of a Southern Rhodesian land case. The long delay which occur- ed in the Southern Rhodesian reference was in

great part due to the war which broke out just as the proceedings began and there was no reason why the Northern Rhodesian case could not be disposed of far more rapidly. In any case settlement on the lines suggested by the company as the report of the committee pointed out would have been ignoring vitally interested parties such as the local population whose opinion on the matter was more important than any time that would be saved.

The British South Africa Company, it would appear, was not anxious to have the matter adjudicated upon by the Privy Council because on the basis of the Southern Rhodesian experience it was not confident about the outcome of such a reference.[24] There the Company had claimed that it owned land on the basis of a land concession granted to Lippert by Chief Lobengula as referred to already. On 17 April, 1914, the Legislative Council of Southern Rhodesia passed resolutions to the effect that: (a) the ownership of the unalienated land in Southern Rhodesia was not vested in and was never acquired by the British South Africa Company as its commercial or private property, hence any powers conferred on the Company in respect of land in Southern Rhodesia was conferred on it as administrator of the territory for the time being; (b) that if by the exercise of powers conferred on it in respect of land, the Company acquired ownership of the land, such ownership was so vested in it as an administrative and public asset only, and the Company other than in its capacity as a government and administration nad no title to the lands or to any revenues derived therefrom and (c) that on the Company ceasing to be the government and administration of the territory, all unalienated land at such time should be the property of the government and its possession and administration should pass to such government as public domain.[25] The Colonial Office by Order in Council dated 16 July, 1914, referred the resolutions to the Privy Council and asked it to ascertain

23. Letter from the Company to the Colonial Office, 30 November, 1920, Buxton commission Report, Annexure vol. 147, 1921. See also Memorandum forwarded by the British South Africa Company on 3 March, 1921, The Rhodesian Problem, C.O. 879. African South No. 120, p.274.

24. In re Southern Rhodesia, 11919J, A.C.211

23. Ibid., pp.229-230

whether the contentions were well founded.[26] The Privy Council affirmed the first and second resolutions and denied the third. TheCompany’s claim was refused even in respect of land of which it had made grants to itself. The Privy Council took the view that the Lippert concession was a personal contract between Lobengula and the Company though entered into by the

concessionaire with the Paramount Chief and stated further that: Like other legal documents, its effects must depend upon the construction of its terms according to ordinary legal rules; it is indeed of importance to the Company's case largely because it confers private rights, and it is not in any sense a mere public act or act of State.[27]

This decision seems to have influenced the attitudes of the Company to the question of referring the mineral rights dispute to the Privy Council. It can be said to have thrown some light on the likely position in Zambia.[28] Although the problem concerned land rights, it had great similarities to the mineral position in Zambia. The Lippert concession in its terms was very similar to the Lewanika concessions, the only difference being that it purported to have conveyed land rights and not mineral rights as was the case with the Lewanika concessions. Another fundamental point in common between the 1914 questions and the ones relating to minerals was that there was no express grant of land or mineral rights by the Crown to the Company. Indeed there was nothing that could be in, any way construed as an implied grant, and the Privy Council expressly refused to accept the argument that by his mineral and land concessions Lobengula had sold his country out and out.

The Company's counsel in his argument in the case stated that the Company owned the whole of the land under the concession from Lobengula, just as it held the minerals[29] — which implied that he proceeded on the basis that the Company's land rights and its mineral rights stood or fell together. The Judicial Committee decided that land

26. Ibid.
27. Ibid., per London Summer, p.236.
28. It has impliedly been acknowledged by Company officials that the circumstances were so very similar that there was a high probability of an unfavourable decision, See Williams, Mining Law of Northern Rhodesia, 1963, p.150.
29. In re Southern Rhodesia, supra, p.236.

belonged to the Crown by reason of conquest. In Zambia, as there was no conquest, there was a distinct possibility that the Privy Council could reach a conclusion that the land and minerals still belonged to the native population. The Company denied that its concessions in Northern Rhodesia were open to the same objections as urged against the Lippert concessions in Southern Rhodesia since the Company argued, these contained ample provision for the protection and benefit of the subjects of the chiefs, both with regard to land and minerals. Apparent is the fact that about this time the Company began to argue that what it had acquired was not title to minerals but a title to mineral

rights, i.e., right to authorising the mining and taking away of minerals over the whole territory. In the context of the Southern Rhodesia case the analogy would be to argue that what they had acquired was not land, a matter which was adjudicated upon, but rights to the use ofi the land. And the Company started to assert more forcefully that whatever it had acquired in the concessions was of no practical importance as legislation had supplemented and completed the Company's title.[30]

The recommendation of the Buxton Committee was accepted by the Colonial Office.[31] And its implementation got as far as the drawing up of questions to be presented to the Privy Council.[32] However, the decision by the Colonial Office was strongly opposed by the Company,[33] but was welcomed locally by settlers and by Yeta, the new Barotse Chief, who immediately requested that the natives be given a chance to present their case and pointed out that it would be a great injustice if this was not done.[34] For hitherto unclear reasons, the Colonial Office did not act further on the recommendation. No information is available in Zambia or publicly elsewhere about the negotiations between the Company and

30. Williams, supra p. 150

31. Letter from the Secretary of State to the High Commissioner, 15 August, 1921, which read, *1 am now able to state that Her Majesty's government has accepted the Report of the Buxton Committee on Northern Rhodesia. Further, I am making arrangements for a reference to the judicial Committee of the Privy Council', in African South 1083-1096. 120.

32. The question drafted read 'Whether the British South Africa Company in its commercial capacity is entitled for its own benefit to the whole or any part of the mineral rights in Northern Rhodesia', see letter from the Colonial Secretary to the Company, African South No. 172.

33. Letter from the Company, to the Colonial Office, 15 October, 1922. It read... 'It would surely be an unprecedented course for the Crown to commit itself to embarking on costly litigation without knowing that any dispute exists for a legal tribunal to decide.' African South No. 148.

34. Letter from Yeta to High Commissioner for South Africa, 22 March, 1922, African South No. 189. See also Yeta's letter to Churchill, Colonial Secretary, 10 October, 1922. African South No. 190.

the Colonial Office which preceded it or the reason which led to the reversal of Mr Churchill's earlier decision that the matter should go to the Privy Council. But the failure to act is widely attributed to the Company's influence over the Colonial Office.[35] After the 1922 election, Churchill left the Colonial Office and

was succeeded by Mr Ormsby- Gore, a friend and relation by marriage of the British South Africa Company chairman of the time, Sir Dougal Malcolm. The new Colonial Secretary closed the matter and dropped the reference to the Privy Council.

The other recommendation of the Buxton Commission was that Southern Rhodesia and Northern Rhodesia should be administered directly by the Crown.[36] As a result of this the Company put forward proposals for a comprehensive settlement covering both Rhodesias. It included one that the Company should be recognised as owning the mineral rights it acquired in Northern Rhodesia.[37] In return the Company volunteered to relinquish its powers of government but wanted to be reimbursed for its administrative expenses over the years.[38] The Colonial Office accepted the proposals and the Company was paid £3^{3}/4 million. The Colonial Office recognised its claims to mineral rights based on the concessions it obtained from African chiefs and embodied the recognition in the Devonshire agreement of 1923,[39] which was later put into force by the 1924 Northern Rhodesia Order in Council.[40]

1938 Yeta Agreement

When Lewanika died he was succeeded by Yeta, who continued to protest about the concessions. In both 1921 and 1923 he sent vigorous petitions to the Colonial Office demanding that the Company should

35. Hall, supra, p.40. See also Northern Rhodesia Government, The British South Africa Company's Claims to Mineral Royalties in Northern Rhodesia, Rhodeisa (White Paper), 1964, pp.24-25.
36. Buxton Commission Report, supra, clause 12.
37. Letter from Colonial Office to British South Africa company. Letter No.1, 10 July, 1923, Cmd., 1924.
38. See correspondence Regarding a Proposed Settlement of Various Outstanding Questions Relating to the British South Africa Company's Position in Southern and Northern Rhodesia, July, Cmd, 1914.
39. Agreement between the Secretary of State for the Colonies and the British South Africa Company for the settlement of outstanding questions relating to Southern and Northern Rhodesia, 29 September, 1923, Cmd, 1924, clause (g).
40. Northern Rhodesia Order in Council, 1924.

relinguish its claims to mineral rights.[41] In them he argued that the Company had been given mineral rights in their capacity as a government of the day and not as a private company in a commercial sense. He stated:

We were assured that whatever (dealings we were going to make

with the Company would be regarded as being made with Her majesty and her imperial government, and what surprises us today is this that the Company claims that all rigHts granted to it have been granted td it as a commercial concern, and not as agent for the Crown.[42]

In 1926 Yeta challenged the Company's claims. He granted Minerals Separation Ltd., the right to prospect and work for minerals for five years in the Kashendeko area, and the Dongwe Lalafuta area of Zambia.[43] This grant was ratified by the Colonial Office and the Northern Rhodesia· government in 1929. The British South Africa Company brought an action in the High Court of Northern Rhodesia against Yeta and Minerals Separation Ltd. The Company claimed that the Chief was not entitled to grant prospecting rights in any area covered by the concessions of 1900 and 1909, and that consequently the 1926 grants to Minerals Separation Ltd., were void. Later the Company proposed a settlement out of court. This led to the 1938 British South Africa Company and Barotsdand Agreement,[44] in which the Company and the Chief agreed that the company recognises: (a) the sole and exclusive right to minerals belonging to the Barotse Chief and Council in two areas of land totalling about 10,400 square kilometres which the Company had agreed under the 1900 concession to devote to the exclusive use of the Chief and his people, provided, however, that in these latter areas there should be no alienation of the mineral rights to any third party unless and until the Company had approved in writing the terms to be offered to such third party; (b) within the remainder of the areas reserved from prospecting under the concessions of 1900 and 1909, the sole and ex-

41. Africm Sthgk N6.113. The protest! were written with the bdp of counciUon * win were aHfe when the concession« were drawn up.

42. Letter from Yeta to Colond Flair, Resident Commissioner, C.O. 795-95.

43. The information on this dispute is based on letters hi C.O. 795-95.

44. Agnssaant between the British South Africa Company and Yeta and Members of the Barotse Council and Others, 12 August, 193«, C.O. 795-95.

elusive right to minerals was to be vested in the Company but no prospecting or mining was to take place without the consent of the Chief or his successors, to which consent he could attach any conditions he pleased regarding royalties; (c) The Dongwe Lalafuta concession was declared void, but the British South Africa Company, with Yeta's consent, were to make a new and similar grant for a period not exceeding five years in the same

area, to Minerals Separation Ltd., if it applied for such a grant within two years, from the date of the agreement with royalties of £2.50 per annum payable to be received by the British South Africa Company but to be transmitted to Yeta, and (d) in the rest of the territory covered by the concessions of 1900 and 1909, the sole and exclusive rights of minerals were to be vested in the British South Africa Company as a result of the agreement judgement was entered in the High Court by consent in favour of the company on 1 March, 1938.[45]

The Agreement made no attempt to define the extent of the areas covered by the 1900 concessions. Though a map was attached, it was agreed that no inference was to be drawn from it to the extent of the Lewanika concessions of 1900 and 1909 and that no admission was made as to the accuracy of the map in the agreement.[46] During these negotiations, Yeta appears to have desired legal advice but this he does not seem to have got as the Colonial Office had stated earlier that:

it is an invariable rule that when a native chief is received by the High Commissioner he should be accompanied only by his own followers and a representative of the government.[47]

This agreement seems to be another instance of the Company's insistence on settling the question out of court. In practice Yeta exercised the rights he wanted to, as the prospecting grant to Minerals Separation Ltd., was re-issued and the royalty payment were payable to him and not to the British South Africa Company.

43. It should be noticed that the court in this conient judgment declared that what the Company held was the sole exclusive right to the •minerals', which is contrary to the views expressed above by the Company regarding the character of those rights. See Williams, The Mining Law of Northern Rhodesia, supra, p.5.

46. Letter from Colonial Office to British South Africa Company, C.O. 795-95.

47. In 1921 Yet* had written to Prince Connaught asking that he be accompanied by legal advisers in such matters. See Letter 30 March 1921, C.O. 417-283 but Governor Stanley replied in the terms mentioned in the text. See Stanley to Yeta, 30 March. 1921, C.O. 4I7-6J9.

The Legislative Council, Governor Young, and the Company's Claims

The Legislative Council

In 1924, with the end of the Company's rule in Northern Rhodesia, a Legislative Council was instituted in the territory

in an attempt to give settlers a say in the running of the country. It quickly became the centre of opposition to the Company's continued ownership of mineral rights. On 20 July, 1927, a motion demanding the investigation of the matter was introduced.[48] In support of the motion it was charged that the claims were baseless as the concessions obtained from African chiefs were even on the lowest form of reasoning inequitable. It was complained that the price alleged to have been paid for the acquisition of the rights and the administrative duties performed were not commensurate with the rights given, and doubts were expressed about the areas the concessions covered. The Governor defended the Company's claims and stated that the concessions, having been recognised by the Colonial Office in 1923, could not be challenged.[49] He believed that they could be challenged only if it appeared that a considerable portion of the territory was not covered by the concessions of which the Colonial Office had taken cognisance. He discouraged Council members from raising doubts about the concessions as they would have the effect of raising doubt as to the validity of the mining rights given to the developing companies and could discourage the flow of capital into the country. This was not a very accurate statement of the problem, as what was-at issue had little to do with operating mines. The Company itself was not directly concerned with mineral production. The issue was as to who was supposed to be issuing permits allowing others to engage in mining operations and more important to whom the royalty was payable i.e., to the Company or to the country in which the minerals were located.[50]

48. The motion was introduced by Mr Strike. It read, 'that the claims of the British South Africa Company to the mineral rights in this territory call for a searching investigation by the government.' See Northern Rhodesia Legislative Council Debates, July, 1927 p. 164

49. Ibid., p. 169. This was Governor Maxwell.

50. In fact later on one of the leading Mining groups in the country, Anglo-American Corporation Ltd., publicly supported the government efforts to recover the rights. See Chairman's remarks, Annua! Stockholders Meeting, 7 May, 1964.

In the 1930s interest in the mineral rights rose sharply. The mining industry was becoming prosperous and this made the practical meaning of the Company's claims obvious in that the mining companies began to pay royalties on a handsome scale.[51] In 1937 Stephenson, one of the earliest Company administrators, published his autobiography.[52] In it he vehemently challenged the Company's claims and was particularly scatching about the concessions obtained by Thomson in 1890 in an area where he had

personally run up the Union Jack less than a decade later. In 1938 Sir Alan Pim was invited to Northern Rhodesia to examine the financial situation in the territory. In his report he complained of the fact that at a time when the country lacked money, a private company was reaping thousands of pounds on the basis of what he termed questionable concessions.[53] During this period attacks on the Company and demands for a judicial inquiry continued unabated in the legislative council.[54]

Governor Young and the claims

These events, and the convictions of the Governor of the territory in the thirties, Sir Hubert Young, led to the biggest threat to the Company's claims and to a reference of the problem to the Law Officers for an opinion. Sir Hubert became convinced that it could not be right for a private company to retain in perpetuity the entire mineral rights over the territory, and that if the claims were not right in law, he as governor would be failing in his duty be acquiescing in the existing position.[55] He first made approaches to the Company but was not successful. Then he initiated in Lusaka a research exercise, after which he came to the conclusion that the Company had no legal title to the minerals of Northern Rhodesia. Thus by August 1937 he sent a dispatch to the Colonial Secretary, Ormsby-Gore.[56] In it he argued that the concessions did not

51 In 1936 [hey paid £13,000 and in 1937 £31,000 to the Company in royalties, See Colonial Office Report for 1936 and 1937.

52. Stephenson, Chimpula's Tale, 1937, p.30.

53. The Pirn Report, supra, p.135.

54. On 14 October, 1936, Mr Moor complained that it was unjustifiable that the countryishould lack money simply because the British South Africa Company was exporting the money to shareholders. See Northern Rhodesia Legislative Council Debates, October, 1936, p.97.

55. Governor Young's letter to Colonial Secretary Ormsby-Gore, 19 March, 1938, C.o. 795-95, File No. 45105.

56. Governor Young's letter to Ormsby-Gore, the Colonial Secretary, 21 April, 1937, C.O. 795-95. File No. 45105.

cover the whole country; that prior to 1923 it was not the intention of the British government to recognise the mineral rights of the Company in any area covered either by the Lewanika concessions or the certificates of claim and that in consequence the British government was not bound by the 1923 agreement to recognise the mineral rights of the Company in any area of Northern Rhodesia which was not covered either by the Lewanika concessions or the certificates of claim. He also argued that in ratifying the Lewanika concessions of 1900 it was the intention of the British government that this concession should extend

only over the area of Lewanika's dominion, whatever that area might be, and not over areas in which Lewanika did not then exercise and had never in the past exercised suzerainty. Further that the boundary drawn in the Order in Council of 1899 was not the boundary of Lewanika's dominions and that Barotseland, North-Western Rhodesia, as so defined, included considerable areas in which Lewanika did not exercise and had never in the past exercised suzerainty; and further argued that in approving the extension of Barotseland, North-Western Rhodesia in 1905 the British government did not intend Lewanika's suzerainty over areas in which he did not then exercise and had never previously exercised suzerainty. Also that in approving the additional concessions of 1906 and 1909, the British government did not intend to do more than acquiesce in the renunciation by Lewanika to the Company in its administrative capacity of any claim to ownership of land in areas other than the Barotse reserve in which he had at one time exercised suzerainty. On the question of the 1912 Mining Proclamation and 1923 agreements, Young argued that they only confirmed the Company's mineral rights in the areas covered by the concessions; and further alleged that during the 20 years from 1890 to 1910 the Company had pursued a deliberate policy of building its title to the mineral rights over areas not in reality covered by the concessions. He also suggested that the true facts were not known by the Colonial Office and that the 1923 negotiations were not therefore fully informed of the position.

The Colonial Office's reaction

In reply to Sir Hubert Young, the Colonial Secretary[57] stated that he was not prepared to re-open the question of the title of the British South

57. Ormsby-Gore to Young, 28 January, 1938, C.O. 795-95, File No. 4$ 105.

Africa Company to the ownership of the mineral rights throughout Northern Rhodesia. Its ownership, he argued, had in practice been recognised ever since the Company first administered the country by the general public and by all persons and companies engaged in mining enterprises by previous Governors of the country, and by successive Secretaries of State for the Colonies. It had, he continued, been embodied in the statute law of the territory at least since 1912, in the preamble to the Mining Proclamation of that year, which received the approval of the Secretary of State and that it was finally recognised in the 1923 agreement. He further argued that at the 1923 conference, the Colonial Office did not question that the Lewanika concessions extended as far east as the Kafue river. And as the rest ot the territory was covered by the concessions approved in

the certificate of claims issued by Sir Harry Johnson, this the Colonial Secretary argued was tantamount to an acceptance of the view that the Company had acquired under the concessions mineral rights extending over the whole of Northern Rhodesia, with certain exceptions previously referred to in the agreement, as finally signed. The Crown recognised the Company as the owner of the mineral rights acquired by virtue of the concessions. The Colon.al Secretary further argued that the words 'Mineral rights acquired' in clause (g) of the 1923 agreement meant rights which the Company had de facto acquired and which it claimed to have acquired and not rights which it could show to have properly acquired.

On the Colonial Secretary's arguments concerning the 1923 agreement, one could still submit that it is unlikely that it was the intention ot the British government to recognise the Company's rights despite· the actual legal position. Further, if the intention was otherwise, it is difficult to justify why different words were used for a similar situation in the case of Southern Rhodesia, where no reference, whatsoever was made to the concessions and the 1923 agreement simply read:

Subject to the laws in force for the time being in Southern Rhodesia the Crown recognises the Company as the owner of the mineral rights throughout that territory save so far as the Company has by its own acts parted with such rights.[58]

58. See the Devonshire agreement, supra, clause (h)

In any case the 1923 agreement and the subsequent legislation passed to enforce it, in no way deal with the question of the areas not covered by the Lewanika and Johnson treaties. The Colonial Secretary's view of the issue does not appear to have been the consistent Colonial Office's view. Its representative at the negotiations in 1933 for the new mining law stated:

If doubt existed as to whether the ownership of all minerals had in fact, passed under the concessions then mere confirmation by the Secretary of State of these concessions could not in anyway clear up that doubt or enlarge the terms of the concessions themselves.

In his arguments concerning recognition, the Colonial Secretary seems to have made one fundamental mistake in interpreting the purpose of the recognition of the concessions in 1901 and 1894. The letters of the Company applying for recognition of the concessions entered into in Barotseland in 1900 were for recognition of the Lewanika concessions,[59] and the approval letter of 23 November, 1901[60] was directed at the concession. The same situation prevailed in the North-Eastern part of the country, in the letter from the Company, dated 11 April, 1894, applying for the recognition of its North-Eastern concessions.

Although in the Company's letter of 9 June, 1910, and that of 30 November, 1920, to the Colonial Office, the Company treats the certificates of claims issued by Sir Harry Johnson and not the original treaties as the governing documents,[61] in the agreement of 24 November, 1924 it is the concessions which were confirmed.[62] With regard to his argument concerning the Johnson certificates, it is also unlikely that these certificates in themselves could be regarded as the source of title since even on their face value there are many contradictions inherent in them. Some of the treaties referred to in certificate of claim A made no reference to mineral rights but granted 'all commercial privileges of whatever kind,[63] but certificate of claim A itself, under which these treaties were confirmed,

59 Letter from British South Africa Company to Colonial Office, 11 April, 1894, African South No. 948

60 Letter from Colonial Office to British South Africa Company, 30 November, 1901, African South No. 948.

61 See letters in African South No. 948.

62 Devonshire agreement, supra. Clause (g)

63 E.g, concession granted by Chief Ntara.

described the Company as claiming to have obtained inter alia the exclusive mineral rights under these and the remaining treaties and recognised by it.[64] The certificates of claim covering the Company's freehold areas in the extreme north of North-Eastern Rhodesia, certificates E,F, and K, made no mention of mineral rights, but merely recognised the claim of the African Lakes Company to have acquired the three estates in fee simple. But each of the three deeds of sale confirmed by the certificates granted mineral rights to the Company.[65] In some certificates only tribes are mentioned with no reference to areas.[66] It seems unlikely that such certificates can be a source of what is not granted in the documents they purport to approve. To assume this is the case is to accept that in the construction of the true nature of the rights acquired by the Company, the meaning of the document by which the Company claimed the rights is irrelevant, a legally unacceptable proposition.

The Colonial Secretary's argument that areas not covered by the Lewanika concessions were covered by the Johnson treaties, without specifying which particular certificate of claim,

suggested that Lewanika and the23 chiefs cited as having granted mineral rights in the certificates of claim A and B were the only chiefs who could claim the whole body of minerals within the limits of Zambia, a country with 73 tribes, each with its own chief. How one becomes a chief of a particular area is a legal question and who is chief at a given time is a question of fact. The first of these questions is one strictly controlled by the customary law of the area.[67]

A chief could only act as an agent of his tribe. At common law in case of agent-principal situations, it is necessary that such authority be lawful. Where, however, authority though not legally conferred is held to bind another, it is only when the other has so acted as from his words or conduct to lead another to believe that he has appointed the person exercising the authority to act as his agent or that he has authority from him, and not where the purchaser has clothed the agent with such authority.[68] And the principal has to act in such a way that

64. See certificate of claim A
63. See ZA/9 File No. 35 (National Archives), Lusaka.
66. Concession granted by Katara, Ibid.
67. See Goldin and Gelfand, African Law and Custom in Rhodesia, 1975. Chapter 3 and 5 discuss chiefs and traditional government.
68. Fuller v. Giyn Mills and Company [1914] 2 K.B. 211. See also Spiro v Lintern [1973] 3 All E.R. 319.

reasonable man would take the representation to be true and believe that he was intended to act on it.[69] Where no such authority could be implied the contract is not binding on the principal.[70] Some of the conditions imposed by the concessions and the certificates of claim were altered without any reference at all to the chiefs involved in the transactions. Certificates A and B imposed the payment of 1 % royalties to chiefs as a condition in 1893 for the recognition by the Crown of the then existing treaties with the native chiefs in that area and several of the concessions obtained provided for the payment of varying sums of royalty. In 1911 it was agreed between the Crown and the Company that the royalty should be treated as administrative revenue and that half these fees should be paid for the benefit of the natives on commutation of the 1% payable under the certificates of claim and concessions.[71]

At common law, a contract in writing cannot be altered by one party without the conscnt of the other. It can only be modified with the consent of both parties.[72] Where a variation which is inconsistent with the terms of the contracts is made by consent, this amounts to a new agreement which supersedes the original contract.[73] Any contracts subsequently carried against these

rules remains unaltered.[74] Thus, the changes seem to have violated the original concessions.

Sir Hurbert Young, even after the Colonial Secretary's reply, insisted on a reference to the Privy Council. He stated that whether the matter might have been raised at the Devonshire Conference in 1923, it was not relevant to the issue.[75] He pointed out that knowledge that the Company had been recognised as owner of the right did not prevent the Buxton Committee from recommending a judicial inquiry or the Colonial Secretary of the time from approving the Committee's recommendation. As regards the argument of the Colonial Secretary that the Company was in any case the de facto owner of the rights, Sir Hubert argued that although the words in the 1923 agreement meant that the Company had de facto rights acquired by virtue of concessions or treaties while

69. Per Lord Cransworth in Pole v. Leask (1863), 33 L.J. Ch. 155 at pp. 161—162.

70. Llyods Bank v. Chartered Bank of India, Australia and China (1929) 1 K.B.40

71. C.O. 795-99.

72. Ruotor v. Bowels [1912] 2 Ch. 60.

73. Williams Brothers v. Ed. T. Agux Ltd [1914] A.C. 510 at p. 527.

74. Moore v. Campbell (.USA), 10 Exch. 323.

75. Letter from Governor Young to Ormsby-Gore, Colonial Secretary 29 March, 1938. C O. 795-90.

they can be de facto exercised, cannot be de facto acquired unless they have been acquired de jure.[16] Sir Hubert Young then suggested that the rights should in the event that the Colonial Office was unwilling to have a judicial determination of the matter, be purchased.[77] This was rejected by the Colonial Office which argued that:

from the government's standpoint, the purchase of the ownership of undiscovered minerals would mean (a) a gamble as there is no basis for fixing the price to be paid, (b) a heavy loan burden for a long period, as there would be no return at all in earlier years.[7®]

Other evidence, however, suggests that there would have been a substantial economic advantage to the country. The Pim Commission's Report referred to earlier summed up the condition of the country without the mineral rights in these words:

Government has no real policy on any of the big issues, and though they have money for the moment the prospects are uncertain and, of course the greater part of what would normally be government income goes to the British South Africa Company; altogether it is a depressing place.[79]

But perhaps the Colonial Secretary's insistence that nothing, should uc done can be explained in some notes appearing in the Colonial Office files which were primarily internal memorandum. In one, he stated:

As I was one of those responsible for the 1923 agreement I should regard it as personal breach of faith on my part to authorise such action.[80]

During all this time the British South Africa Company's attitude was simply that there was nothing in the questions raised by Sir Hilbert

76. Ibid.
77. C.O. 795-99.
78. C.O. 795-95*. File No. 45105.
79. Letter from Sir Alan Pim to Mr. Boyd at Colonial Office, II September, 1937, C O. 795-99
80. Note by Colonial Secretary dated 28 January, 1938, C.O. 793-90.

Young which was not considered and disposed of before the 1923 agreement was concluded. The Company was nevertheless worried by Sir Hubert's requests for a reference of its claims to the Privy Council. Behind the scenes it suggested to the Colonial Office that the questions at issue should be settled by discussion with Sir Hubert while he was in London on leave,[81] and began insisting on a new mining bill in what seemed to be an attempt to reinforce its claims to mining rights. In the draft, for instance, clause 5 was designed to give the Company statutory title to mineral rights. But agreement on the bill could not be reached because of opposition from settlers and as a result the effort was abandoned.[82]

The real problem it seems was that any attempts to have the matter settled by a judicial inquiry were opposed by both the Company and the Colonial Office. Th»t the Colonial Office was inclined to the Company's view can easily be gathered from the preceding discussion, and the Colonial office notes suggest that there was always a consideration of the Company's reaction before any action was taken and the Company was usually consulted and informed of the Colonial Office's view on any niatter concerning mineral rights before even the government of the territory was advised of it. One of the Colonial Officials wrote the following note in an internal memorandum file:

Whatever the misdeeds of the Company in the past when building up its title to the Northern Rhodesian minerals we have worked amicably with them since the Colonial Office took over the country and that it would seem to be a great .mistake to antagonise the Company.[83]

Governor Young was transferred in the same capacity to Trinidad

before the reference to the Law Officers was completed. A Colonial Office official showed obvious relief at his transfer when he wrote:

81. Letter from Sir Dougal Malcolm President of the Company to Sir Malcom MacDonald, Colonial Secretary, 19 October, 1928, C.O. 795-99.

82. Summary of Proceedings of Conference on the Mining Law in relation to Forestry, 18 March, 1937 C.O. 795-88, File 45040.

83. Note signed by Mr Otmsby-Gore in C.O. 795-95, File No. 45105

It is clear that most of the arguments so tenaciously put forward by Sir Hubert Young would have little chance of being successfully sustained in a court of law. He has in fact wasted a good deal of everybody's time and it is perhaps as well that he is no longer in Northern Rhodesia to receive the news which we shall have to send.[84]

The 1938 Reference to the Law Officers

Factors which influenced the reference

Three factors seemed to have influenced the Colonial Office to agree to a reference to the Law Officers. Firstly, Governor Young's persistence as already shown,[85] secondly, that of the Legislative Council which was in 1938 preparing another resolution, and thirdly, in 1938 the appointment of a Royal Commission to inquire into the question of amalgamating the two Rhodesias.[86] Settlers threatened to raise the mineral rights question at the public hearings of the Commission. Would-be witnesses publicly challenged the Company's claims.[87] The Company retorted rather surprisingly by asking those opposed to its claims to go to court,[88] while in private continuing to oppose any suggestion that the matter be referred to the Privy Council.

Thus on 9 July, 1938, the Colonial Office referred the matter to the Law Officers.[89] The questions put before the Law Officers were phrased on the basis of some of Sir Hubert Young's arguments. The Colonial Office, however, also expressed opinion on the merits of each and every argument. It appears that by this tactic they hoped to influence the outcome of the proceedings. A note by one of the Colonial Officials handling the matter suggests this even more when he wrote that:

84. Note by Sir Andrew Cohen, dated 26 October, 1938, in one of the files in C.O. 795-95. File No. 45105.

85. As Gann has observed 'Young was the type of man who would bristle and bang the table when he thought banging the table would do any good.' See Gann supra, p.270.

86. Rhodesia-Nyasaland Royal Commission, Cmd, 5949; 1939.

87. For instance Mr Knight, a member of the legislative

Council declared: 'If I had my way, I would contest the claims before the Privy Council; they had never recognised the British South Africa claims.' See Rhodesia Herald 19 July, 1938, pi

88. Ibid.

89. Reference to Law Officers, 9 July, 1938, C.O. 795-99, File No. 45105.

57

The legal adviser and the department are agreed that this is desireable, since we should hardly be justified in putting Sir Hubert Young's contentions without letting the Law Officers know what we think of them.[90]

Moreover, the Colonial Office renders itself open to the suspicion that some of the evidence on the matter was not given to the Law Officers. Although this cannot be proved conclusively, in the absence of evidence of what was given, suspicion can be justified by the surprise expressed at this note in one of the Colonial Office files:

The Governor also expects us to refer to and include a copy of another rather damaging letter which has been unearthed from record.[91]

At the same time it must be pointed out that there was caution not to cause Sir Hubert Young to resign as it was thought it would be difficult to justify publicly why the matter was not being taken up when the Colonial Office was asked to do so.[92] The Law Officers were requested to give their advice from both the strictly legal aspect and from the point of view of good faith. The main question put to them was to advise the Crown whether it could challenge the Company's title to mineral rights in the territory of Northern Rhodesia in areas not covered by the certificate of claims issued by Johnson and the Lewanika concessions.[93]

Opinion of Law Officers

The opinion of the Law Officers was delivered on 5 October, 1938.[94] They expressed the view that the Barotseland-North Western Rhodesia

90. Note in C.O. 795-99 File No. 45105.

91. Note signed by Mr Fox, C.O. 795-99, File No. 45105.

92. Notes by Sir O. Bushe and Sir C. Parkinson, C.O. 795-99, File No. 45105.

93. Reference to Law Officers, C.O. 795-99, File No. 45105.

94. Opinion of Law Officers, C.O. 795-99, File No. 45105.

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Order in Council of 1899 was the decisive document in the matter. They took the position that when in 1899 Lewanika sought Queen Victoria's protection and the terms of the 1900 concession were being negotiated by the Company, the boundaries of

Lewanika's jurisdiction were not known for certain. The Law Officers' view was that the Secretary of State's dispatch of August 1904 made it clear that it was intended that the area covered by the 1899 Order should be coterminous with lands over which Lewanika's suzerainty ran, that the King of Italy's Award determined by the western limit of the Barotse Kingdom, and that when the area embraced by the 1899 Order was extended in 1905 to cover the area of the river the transferred area in the west was confirmed as being part of the Barotse Kingdom. They further added that whatever might have since been discovered as to the real limits of Lewanika's dominion in the olden days, the Crown could not go behind the 1899 Order in Council which from a legal point of view was as final in defining the limits of the Barotse Kingdom as the treaty of Versailles was final as to the boundaries it altered.

The Law Officers dismissed summarily the suggestion that the Crown was in a position to prove fraud against the Company in that certain documents indicated that the Company subordinated their administrative duty to their commercial interests, e.g. in recommending the 1905 extension of the area covered by the 1899 Order in Council, stating that even if Lewanika's jurisdiction was assumed never to have extended over some parts of the country, the Crown and the Company had agreed to treat it as so doing in 1900; and subsequently they added that legislation in the territory had been based on the Company's possession of the rights. Apart from the legal aspects of the question, the Law Officers felt that from the point of view of good faith, the Crown could not be justified in challenging the Company's title, on the grounds that the Company was a pioneer in the area in question and that but for it and its activities there might well have been no Northern Rhodesia.[95]

Criticism of the Law Officers' opinion

The question before the Law Officers was 'whether or not the British government could challenge the Company position', as such the point in the opinion was that the recognition in practice of the Company's rights by the Colonial Office over a period of years coupled with

95. Ibid.

specific recognition of these rights in the preamble to the 1912 Mining Proclamation, debarred the British government from challenging the Company's rights. This did not touch on the question whether others, such as the natives of the country, could challenge the claims. Similarly, their view of the effect of the 1899 Order in Council and the 1905 extension of the area it covered treats successive statutes as fully superseding the true situation and thereby disposing of any doubts which might

have existed. It is a fundamental rule of law that all statutes other those which are merely declaratory of which relate only to matters of procedure or of evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature.[96] Transactions are neither invalidated by reason of their failure to comply with formal requirments subsequently imposed[97] nor on the other hand, can they be rendered valid by subsequent relaxation of the law, whether relating to form or substance. Similarly legislation does not appear to have been held to impose new liabilities or alter the facts existing before its commencement.[98]

The dominant purpose in construing a statute is therefore to ascertain the intention of the legislature. But this is only as so expressed in the statute to be construed.[99] This intention is primarily to be sought in the words used in the statute itself, which must be read according to their ordinary grammatical sense. A statute should not be interpreted in such a way as to extend its operation beyond what was the plain intention of the legislature.[100] This is so even where there is strong suspicion that the result of the interpretation of a statute according to its primary meaning is not what the legislature intended.[101] For upon a finding that the words are precise the words speak the intention of the legislature.[102] It is for the

96. Re Norman, Ex parte Board of Trade, [1893] 2 Q.B. 369 at p.420.

97. Hikson v. Darlow (1883), 23 Ch. 690; See also Smith v. üaflader [I901] A.C. at p. 305.

98. Croxford v. Universal Insurance Company [1936] 2 K.B. 253.

99. Pye v. Minister of Lands for New South Wales [1954] 3 All E.R. 514 at p.254; See also R. v. Kuntawala 2N.R.L.R. 79.

100. Solmon and Company v. Solmon 1956 R & N 364.

101. Solmon and Company v. Solmon [1897] A.C.22

102. R.v. Cowley 1956 R. & N. 523 at p.352.

legislature to amend the statute construed if it finds its meaning contrary to its intention a Court can only substitute the clear meaning of the words of a statute for its own where the legislature has used language of the widest kind, so wide that, if its full grammatical meaning is given to it, the provision will produce injustice of a kind that would revolt a reasonable man.[103] In this case the court acts upon the view that the legislature could not have intended to produce a result which would revolt the mind of any reasonable man, unless they have manifested that intention by express words.[104] The natural interpretation of the 1899 Order in Council would not result in

palpable injustice. Besides, only contracts which have been entered into upon terms which are not in accordance with statutory provisions are automatically modified by the relevant statutes so as to accord with those provisions and take effect as if those provisions were incorporated in them,e.g. an employment contract affected by minimum wages regulations. In all other cases a statute does not automatically modify the particular class of contracts to which it relates, but only confers power under which contracts of that class may be modified individually. The Law Officers' interpretation of the effect of the 1899 Order in Council and their assertion that it was the intention of the legislature to alter the boundary covered by the concessions seems to be a violation of rules referred to here. It is also a self-defeating argument in that it amounts to saying that it was the intention of the British government, prior to 1923, to recognise the rights of the Company as having been acquired in virtue of the Lewanika concessions in any area in which the mineral rights had been previously acquired in virtue of the certificate of claim A since the area there overlaps the area covered by the 1899 Order in Council.

The 1899 Order in Council was made at the suggestion of the Company. It was made solely for administrative and political convenience and did not state that it intended to revive the Barotse boundary. The Order's provisions are all concerned with administrative matters, such as the appointment of administrators, judges, and empowering the High

103. R. v. Kuntawala 2 N.R.L.R. 79, at p.80

104. In re Brockel Bank* Export Dunn and Raeburn (1889), 23 Q.B.461, at p.462-463; see also Wilkes v. Goodman [1927] 2 K.B. 86

Commissioner to make proclamations for the administration of justice, the raising of revenue and the imposition of taxes and customs dues, while in fixing the boundary between the two territories the British government was under the impression that it was roughly describing the eastern boundary of Lewanika's dominion on the information before them, provision was made in both the Orders for the boundary to be changed at any time, and in any case it could not have been the intention of the British government, in describing this line in the Order in Council, to include in Barotseland North-Western Rhodesia any areas in which Lewanika did not then exercise and had never in the past exercised suzerainty. The boundary drawn in the Order in Council of 1899 was not the boundary of Lewanika's dominion, as is shown elsewhere in this book. But Barotseland as defined in the Order included considerable areas in which Lewanika did not exercise and had never exercised suzerainty. The delimitation of the

boundary clearly had no effect on the actual boundaries of Barotseland and thus no effect whatsoever on the geographical limits of the Lewanika concessions.

In addition to the above objections to the interpretations of the 1899 Order in Council by the Law Officers, their interpretation offends a fundamental rule of evidence. While a document stands and provided it is intelligible, it is both exclusive and conclusive as to evidence of what its terms are. Extrinsic facts are generally inadmissible to add to, vary or contradicts its terms. 105 To admit the evidence of the 1899 Order in Council as being available to contradict the terms of the concessions, would be to violate the above principle of the law of evidence and defeat the very evils the rules guard against,[106] as it would be to substitute for the terms of the concessions those of a subsequent enactment on a matter already dealt with by the concessions. Since the terms of the 1899 Order in Council and those of the 1905 Order in Council and terms of the concessions cannot co-exist, the subsequent alteration of the Barotse boundary would have the effect of wiping out the provisions in the concessions dealing with the same subject matter. Also to be kept in view the fact that the 1899 Order in Council and the 1905 Order in Council were drawn up without the participation of any of the chiefs alleged

105. Henderson v. Aurlher 11907] 1 K.B. 10; Angell v. Duke (1875), L.R. 10 Q.B. 174

106. T/iomson (Pvt) Ltd, v. Bennet (1962) KSN 689.

to have granted the mining rights to the Company. The concessions were not documents handed by one party to the other as a record of what the Company was undertaking to do or granted. They purport to be 'documents of both parties, and therefore no question of what the other party thought they meant is relevant. The opinion contradicts other legal advice in the Colonial records on the question of boundaries. The Colonial Office at a meeting to consider the country's mining legislation stated that:

Our reasons for suggesting this amendment is that we should not like it to be put on record, even in your mouth, that we are aware that the extent of the concessions of 1900 and 1909 has never been definitely settled.[107]

As regards the Law Officers' argument that the Company opened up Northern Rhodesia and as mandatories on behalf of the Crown continued to bear the burden of administration on the basis that they had, in the area acquired the mineral rights granted in the concessions this could be said of Southern Rhodesia as well. However, in the latter case the matter relating to land was referred to the Privy Council with little difficulty and the

Privy Council found against the Company. What this amounts to is the fact that the Law Officers in fact did not examine the basis of the claims to mineral rights by deciding that the 1899 legislation put the Company in a position that it was not by the instruments by which it claimed those rights.

The Law Officers' opinion compared with other opinions in other British Colonies

The Law Officer's opinion on mineral rights in Zambia seems to be contrary to other Law Officers' opinions in some of the countries in Africa where Britain had jurisdiction and similar situations arose notably in Botswana, South Africa and Ghana. To take the case of the then Bechuanaland Protectorate (Botswana), the British government appointed a Commission[108] to inquire into a report upon alleged land and

107. Letter from Colonial Office to the British South Africa Company C.O. 795-90. See also Summary of Proceedings of Conference on the Mining Law in Relation to Foresty 18 March, 1937, C.O. 795-88, File No. 4500.

108. Commission was appointed by the Bechuanaland Protectorate Proclamation, 10 January, 1893.

mineral grants claimed by several Europeans. The Law Officers recommended to the Commission that: (a) grants of any kind made or purporting to be made by the chief alone, without the express consent of the tribe or council, were not valid; (b) titles granted by one chief to land in the occupation of another chief were not as a general rule valid without the express concurrence of the later, and (c) no grant was valid which had been obtained by fraudulent or otherwise improper means or for which Valuable considerations had not been given, or of which the condition had not been fulfilled.[109] In this way several claims were invalidated by the commission set up to examine the concessions.[110] In one case a concession was invalidated on the grounds that the consideration was inadequate,[111] while in another on the ground that the extent of the ground claimed was far in excess of what the chief intended to lease and included several tribes ruled by different chiefs,[112] both grounds were advanced by Sir Hubert Young and other opponents of the Company's claims.[113] The Commission also invalidated mineral rights claims on the sole ground that they were in the nature of monopolies, and likely to interfere with the practical workings, of the general or financial administration of any future government,[114] a fact alleged in the Zambian case by several independent commissions referred to earlier.[115]

A similar policy was invoked in South Africa after the British government annexed the territories and obliterated the

sovereignty of the South Africa Republic. Then it asked the Law Officers to determine in what relation it stood to the concessions granted by the previous government of the state[116] who advised that for the mineral and land claims to be valid the concessions on which they were based must have been duly acquired in the first instance, and also the condition of their acquisition must have subsequently been duly performed. Pursuant to this opinion,

109. See Correspondence Relating to Concession in Bechuanaland Protectorate 1893-1901, Colonial, March 1903, African South No. 537.
110. The Concession between Chief of the Bangwa Ketsi and the Gesertsire Concessions Syndicate was invalidated on the grounds that the Chief was ignorant of the true intent and purpose of the document signed by him, See Report of the Commission, African South No. 537.
111. The Sebele Chief of the Baken and Allway concession, the Report of the Commission, ibid.
112. The claims by Riele and J Nicholas, Report, ibid.
113. See p.53.
114. See concession, granted by Chief Lamber of the Koia to Duncan, see Report, ibid.
115. E.g. The Pim Commission, supra.
116. The Transvaal Concession Commission, 19 April, 1901, Cmd., 623, 1901.

the Transvaal Concession Commission invalidated several mining rights claims.[117]

In the Gold Coast (Ghana) prospectors and concession hunters obtained concession from local chiefs in the second half of the 19th century. The Colonial Office in 1889 decided to intervene in order to protect through legislation, the interests of ordinary citizens and to regulate the mining industry of the future. It consistently pursued, from the establishment of its authority over the territory, the policy of according full recognition to the peoples' rights of ownership of land and minerals. It established a concessions' court to which future as well as past grants by local chiefs were to be notified, and the court had power to certify the concessions valid or invalid. The conditions which were required in order that a certificate of validity might be issued included such matters as proof of express consent, or concurrence of every person whose consent was necessary by customary law and of adequate consideration.[118]

It seems the 1938 Law Officers' opinion was enthusiastically received by both the Colonial Office and the British South Africa Company.[119] With it they both sought to silence the Company's critics and took the unusual step of publishing in

March 1939, in the Official Gazette of the Northern Rhodesia government a dispatch, conveying the opinion, to the Government of the territory from the Colonial Secretary.[120] The dispatch explained that the Company's claims to mineral rights were valid and could not be challenged, but did not reveal the substance of the legal opinion. It simply stated that both the Attorney-General and the Solicitor-General of the United Kingdom are agreed that the claims to the rights were valid.[121]

The Period Between 1938 and 1960

The Legislative Council

Just before the publication of the referred to dispatch there were renewed demands for the matter to be referred to the Judicial Committee of the

117. The Dvnamite Concession, Ibid.

118. See Concession Ordinace No. 14 of 1900. For.a fuller discussion of the British Concession policy and legislation in Ghana, see Ilegbune, British Concessions Policy and legislation in Southern Ghana, Ph.D thesis, London University, 1975.

119. Note by Sir Andrew Cohen in C.O. 795-99, File No.45105.

120. General Notice 118 of 1939 in the Government Gazette, Lusaka, 10 March, 1939. The opinion itself was not communicated.

121. The Solicitor-General was named as Sir Terence O'Connor, ibid.

Privy Council. On 13 December the same year, a motion was moved in the Legislative Council, to that effect. It read:

This Council requests government to refer the question of the rights of the British South Africa Company to precious and base minerals in Northern Rhodesia, founded on the concessions obtained from Lewanika and on the certificates of claim issued by Sir Harry Johnson to the Judicial Committee of His Majesty's Privy Council for investigation, in order that a decision as to their legality may be obtained.[122]

In support of this motion many of the reasons discussed before were cited. The motion was withdrawn when members of the Council were informed that the matter was before the British government. However, the publication of the dispatch in 1938 was not the end of the matter as on May 17, 1941 the purchasing of the rights was again suggested.[123] The government rejected the suggestion on the ground that the time was not opportune for any such venture. Southern Rhodesia, which had been in a similar situation, had purchased the Company's mineral rights in 1933.[124]

Four years of little or no significant activity passed before the mattei was again raised by Sir Roy Welensky. On 11 December, 1945, he intro duced a motion concerning the 1939 dispatch which

read:
This Council does not accept as final the conclusions reached by the Secretary of State in his Dispatch No. 374 of 31 December, 1938, regarding the validity of the British South Africa Company's claims to mineral royalties in respect of that part of the territory known as the Copperbelt.[125]
In support of his motion Sir Roy advanced more or less the same reasons as previously advanced by Sir Hubert Young. He suggested that the

122. Northern Rhodesia Legislative Council Debates, December, 1938, P.116. The motion was introduced by Captain Smith.
123. Northern Rhodesia Legislative Council Debates, May, 1941. p. 113. This was suggested by Captain Smith.
124. The rights were purchased in Southern Rhodesia for £2 million. See Sklar, Corporate Power in an African State: 1975, p.35.
125. Northern Rhodesia Legislative Council Debates, December, 1945. p. 160.

rights should be expropriated or alternatively be purchased by the government. His view, however, was that in the event of the latter then it was the British government's duty to pay because in his own words they had made more than the cost incurred out of the share of taxation they have gathered.[126] The motion was carried on 12 December, 1945. The following year the dispute was referred to the Law Officers once again. This reference was not published and the Legislative Council was not informed and the result was not communicated to them. However, it seems the Company's claims to the mineral rights again received support from the Law Officers who apparently could not be persuaded to depart from the opinion of their predecessors in 1938 that the validity of the rights could not be challenged.[127] Also as a result of the 1945 resolution, an inquiry was set up but nothing materialised from it. This led to complaints in the Legislative Council and by 22 March, 1948, another resolution was passed and phrased in similar language to its predecessor. [128]Besides, general attacks and denunciations of the British government by members of the Legislative Council were made such as when Sir Roy stated:
1 find it difficult to express in decent English my views of the action of a government of that nature that they should sell, give, batter — or whatever you are to call it — the mineral wealth of a country for which they were the trustees.[129]
He was referring to the 1923 agreement. Up to this time the Company had made no attempts to answer its critics in the Legislative Council; but when, in 1949, on March 24, Sir Roy introduced a motion in the Council proposing the imposition of a

special tax on mineral royalties,[130] the motion provoked violent exchanges between the chairman of the Company and Sir Roy. The Company eventually made overtures to Sir Roy

126. Ibid.

127. The opinion is not yet available to the public.

128. It read 'that the Secretary of State for the Colonies be asked to reconsider the decision contained in General Notice No. 118 of 1939 to the effect that the British South Africa Company's claim to the mineral rights are vested in the people of Northern Rhodesia', See Northern Rhodesia Legislative Council Debates,
January, 1948, p.690.

129. Ibid., p.690.

130. The motion read, 'in the opinion of this house the time is opportune for the introduction of legislation providing for the imposition of a special tax on mineral royalties recovered from minerals in this country' See Northern Rhodesia Legislative Council Debates, March, 1949, p.670.

and persuaded the Colonial Office to call a conference to discuss the matter. As a result, the Secretary of State invited the Governor of the territory, Sir Roy Welensky, and one other member of the Legislative Council to a meeting in London with representatives of the Company.[131]

The 1950 Agreement

This led to an agreement between the Secretary of State for the Colonies on behalf of the British government and the Governor of Northern Rhodesia and the British South Africa Company. The agreement was formalised in 1950.[132] It provided that the British South Africa Company should continue to enjoy its mineral rights in Northern Rhodesia for a period of thirty-seven years from 1948. The British government undertook to secure that any government which became responsible during the period for the administration of Northern Rhodesia should become bound to the arrangement. This was designed to enable the British government to bind a successor government. By doing this, in a way, the British government could be said to have given away part of its protecting responsibility. There was, however, no question of the settlement of the legal nature of the dispute, although this is one of the agreements the Company claimed confirmed the title to its claims.[133]

THE SETTLEMENT OF THE DISPUTE

The Nationalist Government and the claims

By the middle of the 1950s it became clear that should independence come to Northern Rhodesia the mineral rights issue would achieve prominence. Some time in 1956 the nationalists movement of the African National Congress consulted lawyers in

London but owing to lack of funds it did not proceed. Later in 1960 the other nationalist movement,

131. Colonial Report, Northern Rhodesia, Sir Roy was accompanied by Mr. Becket.

132. Agreement with the British South Africa Company on the Mineral Rights owned by the Company in Northern Rhodesia and for the Eventual Transfer of the Rights to the Northern Rhodesia Government, 1951 colonial No. 272.

133. As a result of the agreement the revenue of Northern Rhodesia rose by £700,000 in 1950 alone. See Northern Rhodesia Legislative Council Debates, September, 1950, p.362.

the United National Independence Party, made it clear that when it gained power the mineral rights would be taken over.[134]

The question of the rights was given much publicity when in 1961 a local paper the Central African Mail, complained that despite exchange control regulations the Company, because it was registered in London, was still allowed to remove its royalties from the country.'[35]This provoked the Company into publishing a rejoinder in the form of a circular and as an advertisement in the local press. It gave an account of the Company's record. It claimed to be largely responsible for developing the Copperbelt mines. It claimed this without disclosing the amount of money it had put in the mining companies and the amount of money it had received from the mineral royalties. The Company accused its opponents of being communists and described the paper's attitudes as part of the softening-up process in a campaign to deprive it of its legal rights.

The reaction of the Company was however, a tactical error for its defensive tone greatly encouraged its critics. Up to tha^ moment there had been nothing like a campaign, but one quickly followed in the knowledge that the Company felt vulnerable and this intensified when in 1963 an African government was elected to power for the first time in Northern Rhodesia. The then Minister of Finance, who was still a Colonial Official, approached the Company and suggested that the government should: (a) buy out all the Company's future royalties for a consideration comprising 50% cash and shares, and 50<7o government bonds payable in equal instalments over the 23 years that the 1950 agreement had to run, and (b) would remit until 1986 the 80% royalty that it would be purchasing from the Company in exchange for an allotment of cash and shares by the mining companies. This offer was rejected by the Company.[136] But towards the end of 1963 the Company became worried about the fate of the rights for it became obvious that the country would become independent the following year. In September 1963 its president made approaches to the government. The Company was

also under pressure to settle from Anglo-American Corporation Ltd., partly because of its twenty per cent holding in the Company and the realisation that to win maximum compensation for the rights it was vital to secure

134. It stated in one of its policy pamphlets that 'the mineral riches of the country remain... the inalienable possession of the people' — IVhen the United National Independence Party becomes Government, 1962, p.7.

135. See the Author's Account, Halil High Price of Principles, 1969, p.78.

136. Faber and Potter, Towards Economic Independence, 1971 p.12.

an agreement before the country obtained independence.

From the government's point of view its efforts to recover the rights were encouraged by a United Nations report.[137] In 1963 a United Nations mission had been asked to make a study of the country's economy. In its report it was very critical of the Country's continued ownership of the mineral rights. It went on to state that:

The issue of the rights of the British South Africa Company is essentially distinct from the question of its royalties, Zambians will not need in the future to obtain the permission of a foreign company to prospect on their own soil. The responsibility for shaping the exploratory work in the nation's territory, and for ensuing adequate development of its mineral resources, should pass to the government after independence.[138]

In October 1963, negotiations were conducted between the government and the Company. A proposal that it transfers the mineral rights to the government for twenty-two years and a half annual payments amounting to £35 million was rejected by the Company on the grounds that it could not rely on an African government to honour the payments particularly as the British government refused to guarantee the annual payments. Surprisingly the Company even turned down a scheme proposed by Anglo-American Corporation Ltd., and Roan Selection Trust Ltd., which the two Companies were willing to guarantee.[139]

At the 1964 Constitutional Conference convened to draw the independence constitution, nationalist representative realised that under the constitutional instruments whereby Northern Rhodesia was to become independent, the British government proposed to fulfil a pledge made to the Company in the 1950 agreement to ensure that the new Zambian government was bound to observe thfe provisions of the 1950 agreement.[140] At this point also the Central African Mail published a

137. U.N./E.C.A./F.A.O. Economic Survey Mission on the Economic Development of Zambia, 1964.

138. Ibid., p.48.
139. For a fuller discussion of the scheme, see Faber and Potter, supra. Both authors worked in the Ministry of Finance in Zambia and were closely involved in the dispute.
140. The first clause eventually became section 18 concerned with the protection from deprivation of property in the 1964 constitution. The second became clause 17 of the Independence Order in Council jpy means of which ‘all rights, liabilities, and obligations' of Her Majesty in respect of the territory became those of the President of Zaipbia.

series of articles in which revelations were made about the frail foundations upon which the mineral rights were founded and these had a significant effect in that they led the government to commission an investigation into the validity of the Company’s claims and hence to jettison the idea of paying compensation. The Company, however, insisted that if the rights were to be taken over, proper compensation should be paid. The government issued a whitepaper after its research referred to above was finished.[141] In it the government argued that the claims were invalid as having been obtained by fraud in that the chiefs were acting under false representations made by the concession hunters to the effect that they represented the Queen, and also that, even if they were valid, on their true interpretation the concessions did not cover the Copperbelt.

The main thrust of the white paper was, however, that after independence the government would not ratify nor assume the obligations created by the agreement. Rather it believed that it was the duty of the British government to extinguish before independence and without further liability to the Zambian government any claims which the Company might have under the 1950 agreement or any earlier agreement. The government attitude was reinforced by its discovery, in one of the colonial records accidentally left behind, a loose note which was a memorandum prepared for the attention of the Colonial Secretary in 1948 which went a long way to conceding its position. It stated:

...if action had been taken at the right time there is little doubt that the Company would not have established mineral rights in these areas...[142]

The note went on to suggest that the responsibility for the situation as it existed rested entirely on the British government and that thus it should bear part of the purchase price when the rights were purchased. At about the same time as the production of the white paper, the government sought legal opinion from a British firm in London which advised

141. Northern Rhodesia Government, The British South Africa Company claims to Mineral Rights in Northern Rhodesia, supra,

1964.

142. Ibid., p.11. The note was written by Sir Andrew Cohen for the attention of the British Colonial Secretary.

them that the Company's mineral rights claims were invalid in that it never possessed and did not at that moment possess a legally established claim to the ownership of mineral rights on the Copperbelt. The opinion did not go into the question of the legality of the claims, but it considered the legality of the Company's boundary claims, and concluded that both the 1923 and 1950 agreements alike only recognised the Company's rights to the extent they already existed, that it was not the intention of the agreement to add to those rights, and that the Company's claim to title had to be founded upon the original concessions and treaties and those did not cover the Copperbelt.

In September 1964, the Colonial Office called a conference in London to discuss the matter. At this conference the Northern Rhodesia government position hardened further and its delegation refused to talk to the Company on the grounds that it should talk to the British government as it was they that had confirmed its rights, agreeing only to talk to the British government. They also stated that, for their part, they would not pay any compensation to the Company but indicated a willingness to pay a gesture of goodwill amounting to £2 million. This was a very significant drop from the original offer of £50 million. Nevertheless, the willingness of the government to pay any amount at all was inconsistent with its stand that the rights were a responsibility of the British government. Such a stand logically led to the need to demand a refund of money illegally obtained by the Company in the form of royalties. But it can be explained on the ground that, although the government appeared tough, it was worried about the image of the country and its ability to attract foreign investment thereafter, particularly since merchant bankers had advised to pay compensation as did some of its own advisers and consultants. At this conference the Company lowered the amount of compensation it was demanding to £15 million. Although the Lord Chancellor of England, who chaired the meeting, met both parties separately the talks ended in deadlock. As a result both the British government and the Company suggested that the question of the legality of the mineral rights should be referred to the Privy Council, a reference they had both schemed to prevent in the past. The Zambian government rejected the suggestion for the same reasons as the Company had done so in 1920 — that such a reference would take a long time to bring to a conclusion.

The Threat to Expropriate the Rights

After the deadlock, the Zambian government announced that in the

absence of a settlement on its terms, it would proceed to amend the constitution and expropriate the mineral rights without compensation immediately after independence and published a bill to that effect.[143] In this respect it seems the government would have been within its legal rights had it gone ahead with this action. Although the generally consistent practice of states is that acquired rights must be respected by a successor state,[144] ordinarily both international[145] and domestic[146] law recognise the right of a sovereign state to terminate concessions or contracts unilaterally. A state cannot be compelled to carry on with arrangements made by its predecessors which are either contrary to its public interests or obstructive to the realisation of its ideas of social development. This applies to the ones in issue here, particularly in that they were a monopoly and the injury was aggravated by the fact that the monopoly was foreign. This principle is supported by the majority of leading writers on the subject and of world governments, and is not questioned by judicial decisions.[147] In fact several countries ranging from the relatively conservative industrial states of Europe to underdeveloped countries of Africa have themselves used one form of nationalisation of concessions or another as an instrument for reconstructing in a substantial degree their national economies.[148]

Internationally, expropriation of property rights and, domestically, repudiation of contracts are, however, only justified when they are

143. Zambian Government Gazette, Vol. 1. No. 1

144. Transvaal Commission Report, supra.

145. England cancelled concessionary interests in Tanganyika and Palestine after the first world war, see O'Connell, 'Critique of the Iranian Oil Litigation' (1955) 4 InternationaI and comparative Law Quarterly p.267.

146. At common law a party is entitled to repudiate a contract, sucii repudiation gives the injured party only a right of action for damages, see Heynes v. Dixon (1900) 2 Ch. 561.

147. E.g. Company General of Orinoco v. Venezuela Opinion of Umpire Piumley, 31st Julv 1905, Raltons Report. French-Venezuela Mixed Claims Commission, 1902. d.224. Delagoa Bay Case. 11 More Int. Arbitrations, p.1191 and also Nissan v. Attorney-General [1970] A.C. 179.

148. Katzarov, Theory of Nationalisations, 1964, discusses incidents of nationalisation throughout the wona, p.425. See also United Nations Resolutions, 14 December, 1962, G.A. res. 1803, 17 U.N.9 A/R. supp. 17A/J0/7.

accompanied by a recognition of the equities involved.[149] What is

protected is the value of the property right which Is assessable in the uiOial improvement valuation manner. But it is an obvious corollary of the rule that the rights in question must be valid not only by reason of the acquisition in the first instance, but by reason of their conditions having subsequently been duly performed.[150] In a case where the rights are invalid, cancellation without compensation appears in the absence of special circumstances to be legally justifiable. Special circumstances would arise where the rights' holder has for instance expended the money, as in such a case non-payment of compensation would amount to the unjust enrichment of the state.

The Company in this case, it would appear, would not be owed any compensation. Apart from the fact that the Company did not directly invest in mining and that it had been reimbursed for its administrative deficit, it gained a sum of £135 million before tax in the period up to 1964 in royalty payments.[151] It took much of this money out of the country. In 1964 its value of investments in Zambia showed that the value of local investments held by the Company amounted to only 10 per cent of its gross royalty receipts, and to less than one-fifth of its investments portfolio.[152] The Company was unwilling to give the money to the country as it thought this would weaken its title, as it indicated when in 1936 it was asked by the Colonial Office to consider making an annual payment on equitable grounds for the benefits of the local people on the grounds that in return for its vast mineral resources, it was making purely nominal payments.[153] The Company's reply rejected the request, stating that if it were to make ex-gratia annual payments, many people would conclude that its title to mineral rights was not secure and that consequently the gesture proposed would have the opposite result from that intended.[154]

149 Norwegian Shipowners Claim. 1 Rep Int. Arbitration Awards 309, (1948); Lena Gold Fields Lid., v. U.S.S.R. Award 3 September, 1930; and also Heyman v Darwins [19421 A.C. 356.

150. Transvaal Commission Report, supra, p.l 17.

151. Northern Rhodesia Government, British South Africa Company claims to Mineral Rights in Northern Rhodesia, (White paper) 1964. Anglo-American Corporation which held some shares in the British South Africa Company made similar distinction, its chairman in a speech distinguished productive capital from non-productive capital, Chairman's Remarks, Annual stock holders meeting,
7 May, 1964.

152. Northern Rhodesia Government, British South Africa Company claims to Mineral Rights in Northern Rhodesia, (White paper), supra, p. 15.

153. C.O. 795-99.

154. Ibid.
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The failure by the Company to reinvest its royalty earnings within the country was particularly unfortunate because ordinarily they are imposed as compensation for the exploitation of a wasting asset,.and therefore should be utilised for the building up of other sources of revenue, to replace the mining industry when it is eventually worked out. Therefore the only persons it seems who could merit any compensation were those who had bought shares in the Company in the genuine belief that the royalty payments were validly founded but even these would have had their due return from the excessive royalties the Company drew and their subsequent reinvestment. It may be argued that this is not strictly correct since someone who had bought the shares in, say 1962, would not have got much in the way of royalty payments. But then he would still benefit from the subsequent reinvestment of the royalty payments and in any case it can be argued that along with shares one buys all the associated risks.

The 1964 Agreement

The matter was settled finally a few hours before the independence of Zambia.[155] The Commonweath Secretary offered the Company £4 million contributed in equal shares by the British government and the Zambian government which it accepted. And on 14 December of the same year a formal agreement was signed under which the Company transferred the mineral rights to the Zambian government with retrospective effect from 24 October, 1964.

The Company has however maintained that the agreement was forced on it and that it was deprived of its legally held mining rights without adequate compensation.[156] The nature of the interest the Company acquired through its concessions is a legal question that can be resolved by a consideration of the legal rules that applied to the transactions at the time of their making. Where subsequent legislation affected them, then the true legal effect of such legislation can be interpreted by generally accepted rules of construction, a task we shall concentrate on in the following chapter.

155. For an account of the final stage, see Hall, High Price of Principles, pp.69-92.

156. Its President stated, ‘1 was told that a decision had to be reached within the next eleven minutes because the Zambian ministers and the Secretary of State were about to leave for other engagements which would occupy them until the independence ceremony at midnight. Your President faced with the alternative of expropriation without compensation felt there was no course open to him but to acquiesce,’ British South Africa Company Circular to Shareholders, December, 1964.

AN ANALYSIS OF THE BRITISH SOUTH AFRICA COMPANY CLAIMS

The basis of the British South Africa Company's claims, it has been established was the concessions obtained from various African chiefs. In this respect first to be settled therefore is whether in fact the chiefs had power to grant the rights claimed by the Company. If not, it must be asked then whether legislation vested the rights in it. A further question we need to settle is what, if anything, was the joint effect of the Devonshire agreement and the 1950 agreement both made between the Crown and the Company and in both of which it was later claimed the Crown recognised the Company as the owner of the mineral rights throughout the country. The final question to be answered is whether or not on their true interpretation the concessions indeed covered all the minerals and in the whole country. The substantial questions, then, though complicated in detail, are in fact simple and can be summarized as: to what mineral rights or royalties had the Company any title in view of the concessions, legislation, and recognition by the Crown, all of which have already been discussed in detail in the previous chapters?

Customary Land Tenure Concepts and the Grant of the Rights

The main question here is whether the concessions on which the Company's claims were based could convey the sort of title claimed by it especially that the chiefs from whom they were acquired had no authority under customary land law to give away the mineral rights of their kingdoms and the transactions themselves were contrary to customary law. The land laws of the tribes contain no provision for the granting by the chief of tracts of land or mineral rights as were promised by these concessions. Thus, the proper law to be applied in determining the validity of these transactions being private contracts is that of the conceding kingdom, being also their place of conclusion.[1] It is this law which should characterise the interest the Company acquired. Two

1. Massey Harris Co. (SA) Lid., v. Ohio Stores 2 N.R.L.R. 37; See also O'Connell, State Succession and International Law, 1967, P.303; and Leroux v. Brown (1882), 12, Q.B.D. 801 Taylor v. Great Eastern Railway [1901) 1 K.B. 774 seems to hold otherwise but can be distinguished on the grounds that in this case the contract was only wrong procedurally. The chapter ignores the fact that it is doubtful whether the concessions are contracts at all. It can be argued that the concessions were of no binding effect on the chief, as no court existed (P.T.O.)

principal rules of customary land tenure seem to suggest that an

African chief in Zambia had no right to grant mineral concessions of the nature claimed by the Company. These principles relate to the ownership of land and its inalienability.

Ownership of Land

Ordinarily under customary law when people speak of land they refer to the surface of the earth, but the legal conception of land goes further than this and includes the things that go with it such as the vegetation, the animal creatures and mineral rights.[2] In this respect the fundamental answer to the question, who is the owner of the land among all tribes in Zambia is that the land in effect belongs to the whole community. The interests of individual and constituent members of the tribe or community are not interests of allodial ownership. In each case the title, whatever it may be, is vested in the group as a community and not in any of its members. The individual member's rights may be broadly stated as rights of possession. The community stated here represents both its dead and liv ing members so that title is never vested in an individual but remains a continual flow of people from generation to generation. The notion of individual ownership of land by an individual member of the community is thus quite foreign to all tribes in Zambia.[3] This is supported by practice among the tribes and has been acknowledged in several colonial reports concerning Zambia. An Arusha Conference which was called to consider land use in Zambia, after recommending the encouragement of individual land ownership as a means of encouraging the development of agriculture in the territory, commented that 'the roots of traditional concepts and customs in land ownership would not easily be dislodged' and 'the changes proposed would confront the African with difficulties of

to which the chief could be nude «menable. See In re South«m Rhodesia, supra

p.215: and also Cook v. Spring [1899] A C. 752 at p.575

2. White, Northern Rhodesia Land Tenure Report, No. 1. Tonga, Southern Province, 1956, p.2.
3. This is not restricted to Zambia, Viscount Haldane, quoting Chief Justice Rayner in the Report on Land Tenure in West Africa of 1898 observed: The next fact which is important to bear in mind, in order to understand the native land law is that the notion of individual ownership is quite foreign to native ¡deas'. See

Tijani v. The Secretary, Southern Nigeria 119211 2 A.C.399.at pp.404-405

understanding'.[4] The Conference clearly thereby acknowledged the nonindividual nature of the customary land tenure system and implied that the European conception of individual ownership of

land has no part in the traditional system.

Position of the chiefs

The chief is everywhere in Zambia regarded as the symbol of residuary and ultimate ownership of all land held by the tribal community, and in a loose mode of speech is sometimes called its 'owner'. He holds it on behalf of the whole community in the capacity of a caretaker or trustee only. His position is not comparable to the Crown's position in England, whereby the ownership of all land in England is in the Crown alone and everybody else holds his land only as tenant of the Crown. Thus the significance given to the term 'owner of land' is different from the ordinary use of the word and it is important to distinguish the two senses to avoid confusion. For instance among the Bemba when they say 'mwine mpanga'xn reference to the chief they do not mean by this statement that he is absolutely entitled to do as he likes with every piece of land within the boundaries of the Kingdom. His rights are clearly defined and the expression 'owner of land' primarily refers to political control exercised by the chief over his territorial area and where appropriate includes also the idea of supernatural control expressed through economic rituals. As White, for a long time a Local Court adviser in Zambia, observed on the use of the word in anthropological studies about the tribal communities in Zambia:

'owner of the land' is of course an attempt to translate various vernacular expressions, it contains no legal actuality. Nor can it be regarded as denoting an authority who controls the allocation of land since no such system of controlled allocation exists.[5]

The people in each community clearly understand the political ownership of the chief, for instance, the Lunda summarise it in the phrase 'chalo chamfumu Katongo Kamulanda' which means the whole realm belongs

4. ...Report on African Land Tenure Developments in Kenya and Uganda and their Application to Northern Rhodesia, 1960, pp.6 and 8
5. White, 'A Survey of African land tenure in Northern Rhodesia' (19J9) 4 Journal of African Administration, pp.6-7

to the chief but each commoner has his place of settlement. They insist, however, that in no sense do they imply that the chief owns the land in the western sense of having power to do anything with it. He is but a trustee who is as much controlled in his employment of the public lands by his people as they are by him. The description of the chief's position by analogy to the idea of trusteeship is not wholly accurate. There is fundamental difference between him and a trustee strictly so

called in that whereas a trustee of land had the legal title vested in him and is therefore the legal owner of it, the title to communal land is vested in the tribe and not in the chief individually.

Power of chiefs

The chiefs' rights vary from tribe to tribe, but in none of the tribes has a chief any right that would entitle him to dispose of the land. In some tribes, such as the Lozi, the chief has the right to distribute previously unallocated land to subjects who are short of land and to newcomers.[6] Every subject has the right to ask for land for building and for cultivation from the chief and he may be given certain arable land as he may need it for himself and his family, and so long as he is making use of his land he enjoys absolute legal security of tenure. Once land is thus allocated by the chief to a man, that man acquires the right to be protected against all encroachment on this land by any one, including the chief and he passes this right to his heir and anyone to whom he may give or lend the land. No one, can, however, settle on the land within the kingdom unless he becomes a subject to the chief and accepts the obligations this entails, failure to carry out which was and is punished.[7]

The power of the chief with respect to land in other tribes such as the Bemba, Ngoni, or Lunda is much less than that of the Lozi chief. The emphasis is essentially on the political control which the chief exercises over his territory. The chief may 'give' land but in fact it is acknowledged that all he does is give a man permission to live on land.[8] In such a case he is exercising control over the movement of his people and not allocat

6. Gluckman 'Essay on Lozi land and Royal Property' (1943) 10 The Rhodes Livingstone Papers, p. 14.
7. Ibid.
8. This led Cunnisson to refer to Kazembe as having power of allocating land. See Cunnisson, 'Kingship and local organisation on the Luapula River' (1950) S Rhodes Livingstone Institute Communication, p. 12.

ing land as such. In every case whether a village or an individual is concerned, they pick their own site and merely obtain permission to move on to it. They must take care to avoid trespassing on land already being used by another. As with the Lozi, however, all people who live in a given chief's territory must accept his political control.

In societies such as the Tonga, who traditionally had no chiefs, the headman of a village did not allocate land to his village, and his only participation in the acquisition of land was to provide information as to whether or not existing rights

were already enjoyed by an individual on a piece of land which another wishes to acquire. The situation could be said to be the same as among the other tribes discussed above except for the Lozi who had a strong central political authority.

Anyhow the main consequence of the distinction between societies with a strong centralised political structure and those without it is that the former have a conception of a tribal area and unit occupying a territory.[9] Hence the rule that a person seeking to live in such an area must be accepted by the political authority controlling the area, and must himself accept its political control in order to live there. This right to live in the area included by implication the right to use land, but the land to be used is not allocated to him by the chief in the sense that the chief cannot deny an individual empty land where it exists.

Inalienability of Land

The second main feature of customary land tenure in Zambia is that land is inalienable and always belongs to the tribe or community. There is perhaps no other principle more fundamental to the indigenous land tenure systems throughout Zambia than this theory of the inalienability of land. The idea of land purchase as understood in Europe is entirely foreign to African thought and custom. Chiefs and councillors are on record as being emphatic that land sales did not occur and would not be tolerated.[10] Not one sale of empty land can be found in traditional Zambian society.

9. White, 'Terminological confusion in African Land Tenure' (1958) 3 Journal of African Administration, p. 125.

10. Conroy, 'The General Principles of Land Tenure' (1946) 14 Rhodes Livingstone Papers, p.95.

There is abundant evidence of the observance of this principle. The 1964 Report on the Economy of Barotseland observed that the idea of a market in land was absolutely foreign to the Barotse people.[11] Land among the Lozi people cannot be bought or sold, the report emphasises, and it is not even possible to leise or rent it. Yet this is in the very kingdom in which the British South Africa Company obtained their most important concessions. .Richards, in a sociological· study of the Bemba, observed that in the course of ordinary conversation no Bemba lists among his assets his possession^ occupation of a given tract of land. In answer to a direct question as to the ownership of his country any chief will reply quite simply that the whole territory belongs to him.[12] Richards further states in reference to the sale of land that:

as elsewhere, the concept of land as a saleable commodity will revolutionise native society. In the case of the chief, land

ownership will be servered from political responsibility, and the commoner will acquire the right to exploit land to his individual advantage, and such phenomena as absentee landlordism, mortgaging, and excessive fractionation, that have been so pronounced among the Indian peasantry, may appear.[13]
There are no known sales of land in the Eastern Province among the Ngoni nor are there any among the Tonga in the Southern Province. This is confirmed by Helen in her anthropological study of the Ngoni. She observed that:
Land tenure is a simple recognition of individual usage. This usufructuary right obtains throughout the Ngoni country and all la^d is vested to Ngoni minds in the hands of their Paramount Chief (Mpezeni) — although in fact the Secretary of State for the Colonies is legally invested with their control. Land therefore has no

11. Selwyn, Report on the Economy of Barotseland, 1964, p.30; See also Gluckman, supra, at p.33.
12. Richards, Land Labour and Diet in Northern Rhodesia, 1939, p.42.
13. Ibid., at pp. 274-75.

monetary value and inheritance is essentially the retention of usufructuary rights by kinship groups.[14]
The economic situation in traditional society supports the view that land could not be sold and as long as a subsistence economy existed, people obtained the goods they needed by work on their lands. Societies under such conditions are characterised by a low level of economic production with little or no wealth or capital accumulation and land cannot therefore have an exchange value. The only instances which have been recorded of the transfer of land when money has changed hands indicate that the money relates to improvements made on the land as distinguished from the land itself.[15]

It has been argued in reference to West Africa that the tribe, as the owner, has the competence of an individual owner of property to deal with its property in any way it wishes including to dispose of it.[16] However, that may be in West Africa, this argument is not supported by the practice of any of the tribes of Zambia and is emphatically denied by them. Moreover, the communal land tenure prevalent in West Africa can be distinguished from that in Zambia in that in Zambia land belongs to the tribe whereas in West Africa it belongs to the family, which is a much smaller unit than the tribe. Even if it were, it is contended that the procedure for a valid transfer of group-owned property were not observed. The tribe, being a group, can act as such only through recognised procedures. The title to group-owned property can be transferred only by the owning group as a whole through its regular management agency

acting on its behalf. There is no rigid rule, of course, as to what procedures should be observed in the case of group dispositions but the bare minimum seems to be that the group should be properly consulted and represented, that is that the consent of the people must in one way or another be given. At the very least the unanimous consent of the tribal council, and possibly that the transaction after being sanctioned by the

14. Helen, Some Aspects of land use and over population in the Ngoni Reserves of Northern Rhodesia, 1962, p. 196. In Hermansburg Mission Society v. Commissioner of Native Affairs a South African Court when dealing with a grant of concessions by African chiefs to European companies observed 'when they were governed by their own customs and laws the notion of separate ownership in land or of alienation of land by a chief or any one else was foreign to their ideas,' [1906] T.S. 135 al p.142.

15. Government of Zambia, Land Tenure Report 1963, (Unpublished).

16. Ibid.

council and the chief should be submitted to a public meeting duly convened which should approve the transaction. In the case of the British South Africa Company's concessions, they could not allege group consent with much success as it is unlikely that they could even be credited with having obtained the consent of the chiefs. As observed in an earlier chapter very often there was no consultation. In other cases non-existent chiefs were alleged to be party to the concessions, and in many others the Company officials wrote the concessions and asked chiefs to sign with no consultation with their people, and in some instances deception was used. In conclusion, therefore, it can be asserted that in view of the preceding discussion, the grant of the concessions was not within the legal powers of the chiefs and consequently without authority.

Legal Result when Tribal Property is Transferred Without Authority

What then is the legal result where there is purported alienation of tribal property without authority? Is the transaction void, as not being an act with authority or is it merely avoidable? Did title not pass to the British South Africa Company, or did it pass subject to divestment upon action taken by the tribe to have the purported alienation set aside?

It is possible to submit here that the sounder view is that title does not pass, i.e. that a purported alienation is void or invalid where the transfer is without authority or is contrary to law. Thus, where this happens there is a strong implication of an intention on the part of the chief to treat the property as his own absolutely or representation that the land belongs to

him individually and as such is an attempt by the chief to give away what he has not got. This in fact appears to have been the view the British government adopted in other parts of Southern Africa. In the case of the Dynamite Concession,[17] where the Transvaal Dynamite Company had been granted a concession by the South Africa government in December, 1888, through Mr Lippert, on proof that the concession was obtained on the corruption of government officers responsible for the granting of the concession the Transvaal Commission held that the concession could not be valid and was void because it was without authority and also it had been obtained by fraud.

17. Report of lhe Transvaal Concessions Commission, 19 April, 1901.

In the case of the concession between Chief of the Bangwaketsi and the Gase-Tsire Concession syndicate,[18] where the Company had acquired from the chief a grant of the right to prospect for precious stones and the minerals throughout his territory, the Bechuanaland Commission held that the concession was invalid on the grounds that the chief in question did not understand the true intent and purpose of the documents signed by him, since the documents were not properly explained to, nor fully understood by him before signing them. In the issue of the Secheland concession,[19] the Commission commented that it is an invariable rule that 'no grant made by a native chief is valid without the authority of the tribe'. Here an analogy can be drawn with the situation in West Africa where family land has been alienated without authority. In Owiredu v. Morshie[20] where the headman of the family and some of the principal members of the family leased family property ignoring other principal members of the family in the transaction, the lease was held invalid and of no effect as a lease. The court holding that the family being a corporate body, can be bound only by corporate acts, i.e. acts of its properly constituted managing agency, and insisted that the head of a family cannot make a testamentary gift of family property which is effective.

There are, however, some West African cases[21] on the same issue, in which the courts have held that such a transaction is voidable and not void.These cases can be distinguished in that it was because the family or members of it had in effect acquiesced in the development of their land by an outsider over a period of time and as such they are all circumstances where it would be inequitable for the court to support the claim of the family for recovery of possession. A voidable transaction is a transaction which is valid when made. Now if the families in these cases had acted timeously, the ground for restoring possession to them would have been that there had been no sale,

the vendor having no title. Accordingly,

18. Report of the Bechuanaland Concessions Commission, 1901

19. Ibid.

20. (1952), 14 W.A.C. All. See also Honger v. Bassil (1954), 14 W.A.C. A 569.

21. E.g. A bey v. Oilennu (1954), 14 W.A.C. 567.

the real justification for rejecting the family's claims in these cases would appear to lie in the inequity of allowing a negligent family to be unjustly enriched as against an innocent purchase who developed the land over a period of time, believing it to be unquestionably his own.[22] So that the claim here is defeated by the rule of estoppel and still leaves intact the rule that title does not pass where communal property is irregularly transferred.[23]

The fundamental issue of justice presented in the cases that hold that such a transaction is voidable, is one way of deciding as to which of the two innocent parties, the purchaser or the unconsulted members of the family, is to bear the loss in the case of a purported sale of family property not made by the proper persons. Such an issue of justice does not arise here. The Company knew all the time or ought reasonbly to have known that its rights were precarious and its ownership of the rights did not involve expenditure. In fact as observed earlier it was the reverse. It involved gaining royalties without any expenditure at all. In Naested v. Kia Ora Syndicate,[24] the court, while acknowledging that a plaintiff is entitled to damages for the loss of rights being the subject-matter of a contract, decided that where the tenant was at the time of entering into the contract aware that the right of the landlord to let him the property for the full period of the lease was defective, and that therefore, he, the tenant was liable to be deprived of his rights, he is not thereafter on being deprived of these entitled to claim damages from the landlord. Decisions in cases where natives lacking authority have entered into legal relationships support this submission. In Massey Harris Co. (SA) Ltd. v. Ohio Stores[25] the plaintiff, a white man from Zimbabwe entered into a contract with an African in Zambia which at the time was not allowed by the Credit Sales to Native Ordinance of 1936. When the white man sued to enforce the contract, the court held that the contract was unen

22. It can be said that here the doctrine of estoppel is applicable, whose effect is that a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not through Having made it appear otherwise through his own deed. See Willmont v. Berber (1850) 15 Ch.D. 105 Anglo-American Telegraph Co. v. Spurting (1879), Q.B.D.

188 and also Re Sugden's Trusts, Sugden v. Walker {1917] I Ch. 510.

23. Bentsi—Enchill, Ghana Land Law. 1964, p.44 and also OUenu, Principles of Customary Law in Ghana, 1962, p. 126. Both authors take the stand that the head of the family acting alone cannot make a valid alienation of land.

24. 1935 S.R. 117.

25. 2 N.R.L.R. 37.

forceable even though legally binding in Zimbabwe. And in Komo and Leboho v. Holmes,[26] where a will had been made and customary law of the area did not recognise the right of testamentary disposition, the court stated that where natives deliberately entered into legal relationships inconsistent with customary law, or made contracts or dispositions unknown to customary law, such legal relationships would be invalid. Here an analogy can also be drawn with the common law. Contracts at common law are void if against established law[27] and a contract made by a company though not unlawful is void if ultra vires the legal restrictions imposed on the capacity of the parties.[28]

The Interests Claimed by the Company and Customary Law

Apart from the position advanced in the preceding section, the concessions could not grant, severe, exclusive mineral rights in perpetuity Customary law, differing from English common law, would not recognise such a grant as such interests are unknown to it, and since the rights of parties under a contract must be determined by the law of the land where the resultant conditions and rights are to be enforced,[29] it would at most operate as a licence to mine and remove minerals — a right recognised by customary law.

Under customary land tenure concepts, every member of a tribe is entitled to enter upon tribal land at any time and to take and make use of, either for his domestic or commercial purposes, anything which is the natural product of the land including minerals, excepting any products of the land resulting from human effort. This is an inherent fundamental right of a subject of a tribe, which does not depend upon the pleasure of the chief and which he can enforce against the chief or any other members who are unlawfully depriving him thereof. He can excercise it on any portion of the tribal land, cultivated or uncultivated, but it does not extend over land which has lawfully been enclosed bv another subject. In the exercise of that right a person could go on any portion of the land to hunt, or collect salt or minerals. This right did not entitle him to such natural produce if another subject had already reduced it into his

26. 1935 S.R. 86

27. Re Trepca Mines Lid.. [1963] Ch. 199, al p.221. See also Wild

v. Simpson (1919)
2 K.B. 544.
28. Sinclair v. Brou^han [19141 A.C. 398.
29. Massey Harris Co. (SA) Ltd. v. Ohio Stores, supra.
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possession. Thus, he could not take minerals dug by another or wood gathered by another, or take minerals or wood enclosed by another.

This type of use of land by the subject takes out of the land. It does not improve the land. In the eyes of customary law, it is a use by the community at large, not an appropriation of any portion of land into the subject's exclusive possession and occupation. Therefore the exercise of that right does not confer upon the individual who uses the land any right, title or interest in the portion of the land over which the right is exercised. It is. an incident of the community's absolute ownership of the land.

The contention advanced here was upheld in rather similar circumstances in South Africa in Le Roux and Others v. Loewenthal.[30] There, owners of two farms declared that the owners of the two farms 'do hereby sell, cede, assign and make over unto the party of the second part all the coal rights of and under and appertaining to the said farm together with all rights of mining and removing the said coal in or under 'the said farms'.[31] ... Such a transfer was in fact unknown to the Roman- Dutch Law, under which ownership of minerals goes with that of the soil and is inseparable. The court held that under such circumstances no one can transfer minerals and mining rights not severed from the soil unless he transferred the soil which contained them as well. It resolved that since the owner of the land could grant permission to win and remove coal, a cession of coal and rights without the transfer of the land which the coal is situated at most operated to confer upon the concessionary the right to mine and remove the coal.

If the concession had operated as licences they would not in general be valid after 1905, unless registered. According to legislation, introduced in that year every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any
30. f 19031 T.S. See also L.E.D.B. v. Federal Admmislralor-General. 1960 L.L.R. 276
31. Ibid.
87
charge upon land, was required to be registered in the deeds registry in order to be binding otherwise unlike as between parties.[32] The same principles seem to have been adopted by the

Privy Council in land cases. In Oyekan and others v. Adele,[33] the Privy Council had to construe the interests granted by a British Crown grant which granted the residence of the Oba to King Docemo, his heirs, executors, administrators and assignees forever at a time no man in Lagos was entitled to own it absolutely as it belonged to the family. The decision turned on an act of state, but during the course of this judgement, Lord Denning, however, made some comments on the Crown grants, which because of their similarity to the British South Africa Company concessions are very pertinent to the argument here. Commenting on the nature of the interest the documents purported to convey, he said:

Those words are familiar in English law, they would fit well into a society which had the same legal structure as England; but they do not fit at all well into the structure of Lagos. The grant is drawn up according to the English conception where by one man is able to have the entire ownership of land himself, with power to sell it to another absolutely, power to transfer it by will to anyone he likes on his death, or, if he leaves it undisposed on his death, it passed by law to his heir and now to personal representatives.'·*

After acknowledging this, Lord Denning went on to observe that the inhabitants of Lagos in 1870 approached land in a very different fashion, and stated:

Many of these Crown grants were made in the English form; and much misunderstanding has arisen on that account. People have claimed rights under the grants in English fashions as though thereby they gained a title superior to the rights of the rest of the family under the

32. Lands and Deeds Registry Act, Chapter 287 of the Laws of Zambia, ss. 4 and 6. This Act replaced the North-Western Land and Deeds Registry Proclamation, 1910 and also the North-Eastern Rhodesia Lands and Deeds Regulations, 1905

33. (1957] 2 All. E.R. 785. See also Sakanvawo Oshodi v. Moriamo Dakota [1930] A.C. 667, and Sunmonu v. Disu Raphael [1927] A.C. 881.

34. Oj'ekdna v. Adele supra p.789.

local law, several of these cases have reached their l ordships, and it has been uniformly held that these government grants do not convey English titles or English rights of ownership. The words “his heirs, executors, administrators, and assignees forever” are to be rejected as meaningless and inapplicable in their African setting.

... It leaves the interests of the family or occupiers intact, to be determined, as therefore, by the local law.[35]

The Privy Council in re Southern Rhodesia,[36] rejected the

contention advanced by the British South Africa Company that the concession in question could be construed to give the Company absolute land rights thereby implicitly accepting the contention advanced here. More important, this was in reference to the Lippert concession which was obtained by the Company in Southern Rhodesia in similar circumstances to the ones the Company obtained in Zambia and at more or less the same time. The Privy Council stated:

Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged.

It would be idle to impute to such people some shadow of rights known to our own law and then to transmute it into the substance of transferable rights of property as we know them.·[17]

It further alluded to the dangers of construeing the concession as giving the Company perpetual and exclusive rights:

The consequences of the constructions which the Company puts on the documents would indeed be extreme. It would follow that Herr Lippert was, or could become at pleasure, owner of the entire kingdom for nothing is reserved in favour of the inhabitants — from the kraals of the King's wives to the scene of assembly

3J. Ibid.. p.790.

36. supra.

37. In re Southern Rhodesia, supra, at p.233. In fact the court went further and , declared that 'the Lippert concaskn may have some value as helping to explain how and why the Crown came to confer the administration of Southern Rhodesia upon the Company but as a title deed to the unalienated lands it is vahideu.'

of his indunas and his pitso — Thenceforward the entire tribe were sojourners on sufferance where they had ranged in arms, dependent on the good nature of this stranger from Johannesburg even for gardens in which to grow their mealies and pastures on which to graze their cattle.[38]

In this particular case the British South Africa Company argued that the ignorance of Lobengula as to the nature of the rights he was transferring ought not to derogate from the amplitude of a grant, which was as wide as he knew how to make. The argument seems at one time to have been implicitly accepted by the Privy Council in an earlier case[39] but was specifically rejected by the Privy Council in this case. It categorically stated:

Their Lordships can not accept this argument. As well it might be said that a savage who sold ten bullocks, being the highest numbers up to which he knew how to count, had thereby sold his whole herd numbering in fact many hundreds.[40]

Some of the Concessions were Obtained by Fraud

At common law fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false.[41] A principal is vicariously liable for the fraud of an agent,[42] so that if an agent in the scope of his authority is himself fraudulent, the fraud is transmitted to the principal.

Incidence of Fraud

The facts suggest that the Company officials fraudulently misrepresented the nature of the documents. They made statements which were untrue and which they knew to be untrue and whatever were their motives were liable. For instance, there is the question of the copy of the Lochner con

38. Ibid., p.237
39. Cook v. Spring, supra, at p.512
40. In re Southern Rhodesia, supra, at p.236
41 Derry \^Peek (.1889) 14 App. Cas 337
42. Lloyd v. Grace, smith and Company [1912] A.C. 716

cession left behind in Barotseland containing clauses which were not present in the copy retained by the Company. Lewanika himself, denied that he had given rights to the Company which were exclusive and in perpetuity in nature. He alleged that he and his councillors did not write the agreements, but that the Company wrote them and then asked for their signatures, that the Company wrote agreements and concessions, whose words he and his councillors did not know the meaning of, because as he further alleged the verbal explanations did not give the Company the right to sell land or own the minerals.[43]

Several other incidents indicate the use of fraud in obtaining the concessions. There is the case of Khama's messenger Mokoatsa referred to earlier, whose appearance seems to have been plain deception and was admitted to be such by the Company. There is also the fact that in each case the Company officials alleged that they were acting for the Queen and that they were offering British protection which they knew they were not and had no right to do so. There is too evidence of gifts showered on some of the chiefs. Besides some of the concessions refer to chiefs who do not exist and lastly there is the evidence of one Dr Swan and one Mwebela referred to earlier and both of whom were present at the conclusion of some of the concessions. Thus the probability of the widespread use of fraud in obtaining the concessions is significantly increased when it is realised that the concessions were not only written by the Company but were composed in difficult technical terms in the English language and yet were addressed as being from the chiefs and their national councils, people who could not even write or read their

own names in their own language.[44]

43. Letter from Lewanika to the Queen. 1 November, 1890. No. 119*F.O. Con. 6178

44. For instance they contained such phrases as '1 further declare that I hereby also transfer, assign and make over to the said Company all minerals, mining rights, game reserves and all taxes and tolls and duties and privileges of what ever sort and kind which at present appertain to the territory hereby transferred' — See concession obtained by Sharpe from Chief Fuji File No. 35, ZA/1/90, (National Archives), (Lusaka). In re Southern Rhodesia, when referring to the need to examine concessions obtained from African chiefs closely, the Privy Council sarcastically state... 'but their Lordships are relieved from the duty of inquiring into the (P.T.O.)

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Legal result where concessions were obtained by fraud

A representation is only material if it is one of the causes that induces a contract.[45] These statements made by the Company officials were likely to be very effective. Most African chiefs were eager to get British protection because of the tribal wars that were prevalent during the period. The Company statements were intended to exploit this and cause, and in fact they appear to have caused, the chiefs to make the contracts.

It could, however, be argued that in some cases the chiefs were motivated by monetary gains. But at common law once it is shown that a representation was calculated to influence the judgement of a reasonable man, the presumption is that the representee was so influenced, and a rebuttal of this is not proved by suggesting that there were other contributory causes which played a substantial part.[46] Generally fraud renders a contract voidable at the instance of the party deceived. It remains binding until set aside.[47] In any action brought to enforce it the party deceived can assert his right to have it stated as void.[48] If he elects to disaffirm, there are several courses open to him. He may repudiate it without resort to legal proceedings in which case repudiation becomes effective as soon as he does all he can in the circumstances to make it known that the underlying principle should be that a purchaser should be allowed to keep what he has fraudulently.obtained.[49] Lewanika before he died repudiated his concessions with the Company several times as shown in the previous chapter, a matter which was ignored by both the crown and the Company.

In the preceding pages we have suggested that the Company did not acquire any mineral rights as a result of the concessions. It remains

circumstances under which this grant was made by the fact that competent officials reported to the High Commissioner, after

making full inquiry under his direction, that the concession had been properly obtained and that its terms correctly expressed Lobengula's intentions and exactly reflected his understanding of the matter. This is a testimony to his enlightenment and acumen, which perhaps goes beyond what might have been supposed'. Supra, p.236.

45. See Smith v. Chadwick (1884), 9 App. Cas. 187 and Paxman v. Union Assurance Society Ltd. (1923), 29 L.T.R. 424.

46. Edgington v. Fitzmaurice (1885) 29 Ch. D. 459

47. Ansom v. Smith (1881), 41 Ch. D. 348 at p.371

48. Derry v. Peek (1889), 14 App. Cas 337 Newbigging v. Adam (1886), 34 Ch. D. 582; and also Carand Universal Finance Company Ltd., v. Cadwell| [1963], 2 All E.R. 547.

49. Harper v.' Webster 1956 R. & N. 10.

to be determined whether the Company did acquire them subsequently through a grant legislation at the instance of the British government or by some other competent authority.

Effect of Legislation on the Company's Position

In considering this question, we need first to determine when the mineral rights became the property of the Crown and secondly an examination of the true construction of the legislation concerned.

Land was vested in the Crown

At common law, communal title to land by the native inhabitants of a territory which was acquired by the Crown is recognised as a legally enforceable right. This is probably an instance of common law applying existing international rules, in this case, the already well established and unquestionable proposition that a change of sovereignty does not affect existing private rights. As early as the sixteenth century this principle had been considered to apply to the Indian tribes in America.[50] Indian land tenure systems were seen as constituting distinct patterns of rights not derived from the common law but recognised by it. Several judicial decisions give support to this principle.[51] Blackstone's Commentaries state that there was a distinction between settled colonies where the land, being a desert and uncultivated, was claimed by right of occupancy, and the conquered or ceded colonies. The difference between the laws of the two kinds of colonies was that in those claimed by right of occupancy all the English laws which were applicable to the Colony are immediately in force on its foundation, but in the conquered or ceded kind the colony may have a law of its own and that law remains in force until altered. Blackstone's statement of the law has been followed by many judicial decisions[52] although this distinction was somewhat blurred by the Foreign Jurisdiction Act of 1890. In this Act it was provided that the

jurisdiction held by the Crown shall be enjoyed in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the

50. See Tee-Tit-Ton Case 348 U.S. 278

51. Tijani v. The Secretary Southern Nigeria where Viscount Halden stated 'a mere change in Sovereignty is not to be presumed as meant to disturb rights of private owners', supra, p.12. See also Oyekan v. Adele supra, at p.789, for a similar statement of the law.

52. Campbell v. Hill 98 E.R. 1045 at p. 1047.

cession or conquest of the territory. However, the meaning of this Act has been a subject of judicial interpretation which has left Blackstone¯ rule intact.

It has been stated that:

The language does not assimilate the jurisdiction exercised in a foreign country either in nature or degree, to that which belongs to the Crown in a conquered territory. Its object is simply to provide that such jurisdiction as may have been acquired by express consent or sufferance of the foreign state shall be exercised by the Crown precisely as if it were exercised by sole virtue of the prerogative.[53]

Several other cases support this opinion.[54]

Applying to Zambia the law as stated by Blackstone which as we observed in an earlier chapter was never a conquered territory places the country into the category of countries where local law of the people continued to apply until it was altered. In fact at various times this recognition of customary law was buttressed by statutes in Zambia.[55] Thus for legislation to extinguish customary rights it must be explicit.[56] A point which means that legislation must reveal a unit of intention to extinguish the rights in question. This can be done if the legislation in question clearly states its intention to achieve the desired results. In this respect we can therefore observe that although the British government did grant the British South Africa Company the right to own land in 1889,[57] and in 1911 granted[58] the right to alienate such land, a right which the Crown later revoked (as it transferred in 1924 to the Governor the right to alienate land in the name of the Crown and on its behalf which could

53. Hall, a treatise on the Foreign Powers and Jurisdiction of the British Crown, 1894, pp 11-12; See also Sobhuza v. Miller [1926], A.C. 518.

54. E.g. Nyali Ltd. v. Attorney-General, per Lord Denning [1956], 1 Q-E).]. at p.9

1. at p.9.

55. E.g. Royal Charter of Incorporation of the British South

Africa Company, 29 October, 1889, Clause 14; Barotseland North-Western Rhodesia Order in Council, 1899 Article 9; North-Eastern Rhodesia Order in Council 1900, and Northern Rhodesia Order in Council, 1911.

56. Colder v. Attorney-General of British Columbia (1969), 7 D.L.R. 59.

57. Royal Charter incorporating the British South Africa Company, 29 October, 1889, s.3.

58. Northern Rhodesia Order in Council, 1911, s.40.

lawfully be granted or disposed of by the Crown,[59]) it was not until 1928 that it extinguished African land rights.[60] In that year machinery was needed by which African land rights over land granted or available for grant to non-Africans for economic development could be extinguished. This led to the passing of the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council. By this Order in Council, land (other than land in Barotseland, the freehold areas vested in the British South Africa Company, and land alienated by that Company before 1 April, 1924, or in perpetuity by the government of Northern Rhodesia between April, 1924 and 22 March, 1928) was divided into Crown lands and Native Reserves. All rights of the British Sovereign in or in relation to the Crown lands were vested in and made exercisable by the Governor who was empowered, subject to the provisions of any law and of any directions given to him by the Secretary of State, to make grents and disposition of Crown lands. In the same legislation the rest of the land was vested in the Secretary of State and set aside in perpetuity for the sole and exclusive use and occupation of the Natives of Northern Rhodesia.

Here it could be submitted that after customary land rights were extinguished by this Order in Council, the minerals were vested in persons and entities in whom the Order vested the land and as detailed by it, i.e. in the three freehold areas in the British South Africa Company, in unalienated Crown land in the Crown, in alienated lands to the various persons to whom such land had been alienated, and in the Native Reserves in the Secretary of State. As at common law minerals are part and parcel of the land,[61] and consequently the owner of land is entitled prima facie to everything beneath or within it down to the centre of the earth. If land is acquired, the estate thus acquired includes minerals which at the time of acquiring the interests had not been severed in right or in fact. The ownership in the minerals under the land, however, may

59. Northern Rhodesia Order in Council, 1924, s2; for Governors powers see s. 14.

60. Northern Rhodesia (Crown Lands and Native Reserve) Order

in Council, 192S. In its preamble the Order clearly states that its purpose is to declare land within Northern Rhodesia Crown and uses explicit sections, e.g. s.6 reads 'the lands described in the
schedule here to and known as Native Reserves, as also the appendant rights setforth in the said scheme, are hereby vested in the Secretary of State...' See also ss3 and 4 dealing with Crown land granted to the Company and land alienated by the Company.

61. Seddon v. Smith (1877), 36 L.T. 168.

be severed from the ownership of the surface. And minerals so severed become a separate tenement, capable of being held for the same estates as other hereditaments and with the like incidental rights of ownership.[62] Where this has happened, it has been done by conveyance of minerals excepting the surface[63] or by an Act of Parliament as in the Zambian Mines and Minerals Act. The Company claimed title to mineral rights which until severence remained in the owner of the land, yet there is nothing in any of the concessions or Orders in Council which could possibly be interpreted as severing title to minerals from land ownership. The government had no power, apart from any provision in the statutes (and there appears to have been none), to deal with minerals except in so far as they passed under the common law by a grant of the law. The passing of the 1928 Order in Council itself is further support for the argument advanced above, since the situation was otherwise it would not have been necessary to execute the Order. The admission in the various legislation prior to this order that all minerals belonged to the British South Africa Company with no separate ownership of unserved minerals legally possible and customary land rights still in force, were merely mistaken admissions that the Company had rights which in fact could not actually belong to it. Thus the legislation was entirely nugatory and without any operative effect at all.

Legislation and the rights in the Company

The main argument here is that most of the legislation passed in relation to mining rights did not suffice to rebut the presumption of the ownership of minerals arising from surface ownership.[64] Thus since the concessions did not operate to vest the mineral rights in the Company, for the reasons discussed earlier, it was necessary to have a vesting statute. There is no doubt that none of the statutes could be said to have vested such mineral rights in the Company.[65] Partly this is because most of the legislatures that passed the enactments in question were all of limited authority and partly because the laws in question have general laws which would not be expected to deal with

private rights whose terms
62. Cox v. Clue (1884), 5 C.B. 533.
63. Ibid.
64. Humphries v. Broaden (1850), 12 O.B. 739.
65. Howley Park Coal and Cannel Co. v. London and North Western Rail Co [1913], A.C. 11.

required to be examined with some strictness.[66] The same contention applies to any of their clauses that claimed to be for the private advantage of the Company.[67] This consideration is particularly important here where, for part of the time the legislature was itself controlled by the party in whose favour the enactments were being passed, and where throughout the period, all legislation relating to minerals had to be approved by the same party, without doubt a person with power to, legislate could do so for his own benefit,[68] but the courts today might not follow this reasoning as what is here being dealt with is essentially a privilege and not anything else.[69]

The 1912 Mining Proclamation

Before dealing with this legislation, it is important to refer briefly to two Orders in Council which made references to mineral rights, namely the Company's Charter and the 1911 Order in Council.

T he Company's Charter of 1889 gave no rights of property or power of administration, but only capacity to acquire them. It recited certain concessions or agreements which had been obtained from native chiefs, and one of its clauses empowered the Company to hold their full benefit so far as valid for the purposes of the Company.[70] The 1911 Order in Council on the other hand granted powers to the Company as a government to grant land and mineral rights.[71] These powers were revoked in 1924 when the Company ceased to be government.[72]

Having mentioned the two orders in Council in this respect, the 1912 Mining Proclamation was the first formal mining legislation and in its preamble it stated that:

Whereas the right of searching and mining for and disposing of all minerals and mineral oils in Northern Rhodesia notwithstanding the dominion or right which any person, company syndicate or partnership may

66. Attorney-General for Ontario v. Reciprocal Insurers (1924), A.C. 337.
67 Union of South Africa (Minister of Railway) v. simmer and Jack Proprietary (1918) A.C. 603; See also Commissioner of Public Works (Cape Colony) v. Logan [1903] A.C. 335
68. Philip v. Eyre (1869), 5 Q-B. 225.
69. R.v. Lord Crewe [1910] 2 K.3. 628.
70. Royal Charter of Incorporation of the British South Africa

Company,
29 October, 1889, clause 2.
71. Northern Rhodesia Order in Council, 1911, S.40.
72. Northern Rhodesia Order in Council, 1924, S.2.

possess in and to the soil on or under which such minerals and mineral oils are found or situated is vested in the British South Africa Company[73]

However this recital was not conclusive evidence as to the ownership of mineral rights in Northern Rhodesia nor did it vest them in the Company. A mere recital in a statute, though admissible in evidence as proof of the facts recited[74] is not conclusive, and a court is at liberty to consider the facts or the law to be different from the statement in the recital.[75] Thus the recital in the 1912 Mining Proclamation can well be read as meaning that the rights mentioned belong to the British South Africa Company as a government, and not to it beneficially, or alternatively, it may well be that the recital is not conclusive as to the truth of its allegation,[76] or it may be disregarded as a mis-recital.[77] Such mis-recitals have been held not to be absolutely unknown even in acts which have been framed by skilled and careful draftsmen.[78] However that may be, this is also a case where the variation between the recital and the earlier documents make its accuracy suspect. At most it amounts to nothing more than a statement that the Company has certain rights which are certainly not exclusive or vested as every claim taken out under the later provisions of the Ordinance limited the area over which these rights could be exercised. But the claim of the right of interference with private land, advanced for the first time here, makes it fair to suppose that at this date the Company had already realised that any rights they might have acquired depended solely on their land ownership and did not extend to land in other ownership and as such they sought to enlarge their rights if possible by this recital.

The 1958 Mining Ordinance

The 1958 Mining Ordinance in its section 3 did, after vesting the minerals throughout Zambia in the Crown, state that:

73 Mining Proclamation No. 1 of 1912.
74 Sturla v. Freccia (1879), 12 Ch.D. 411.
75 Kent Coast Rail Co. v. London, Chatham and Dover Rail Co. (1868), 3Ch. 556; and also Houghton v. Fear Brothers Ltd., and

Willsher, [1913), 2 K.B. 342.
76 Merttens v. Hill [1901] 1 Ch.
. 842 at p.852.
77 Headland v. Caster [1905] 1
. K.B. 231.
78 Ibid., p.231.
.
98
Nothing in this section (a) shall operate to vest in Her Majesty any right of ownership in, of searching or mining for minerals, mineral oils or natural gases which is now vested in the Company.[79]
Again this provision did not suffice as being able to grant mineral rights to the British South Africa Company. It merely makes a statement that certain mining rights are vested in the Company but does not purport actually to vest them, or to give any foundation for the statement thus made. In fact it offers a sharp contrast in construction to section 3 vesting the minerals in the Crown which declares that:
All rights of ownership in, of searching and mining for and of disposing of all mineral oils and natural gases are hereby vested in Her Majesty notwithstanding any right of ownership or to any minerals, mineral oils or natural gases or in or to the soil on the or under which such minerals, mineral oils, or natural gases are found or situated.[80]
Until this legislation was passed the legal title to the minerals between 1928 and 1958 remained in the owners of the land where they had been vested by the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council of 1928 and which as shown earlier was valid under common law principles of land tenure and also by reason of the absence of any legal severance of the title to minerals from that of the land before them. The statement in the legislation that certain rights belonged to the Company was erroneous as there were none since the Company never owned the land as unsevered minerals cannot be the subject of separate ownership from land ownership. Thus, the vesting of mineral rights in the Crown in 1958 constitutes in itself a positive and practical recognition of i he contention discussed here in that it implicitly recognised that until that lime mining rights were not vested in the Crown alone but in all land owners. Consequently the Crown could not have been the source of the Company's title to minerals, since if the righ s were not owned by surface owners there would not have been any need for vesting the minerals in
79. Mining Ordinance, 1958, s.3 (2).
80. Ibid.
99

the Crown and the severing of ownership of minerals from the ownership of land which this Ordinance actually effected. Taking the position of ihis contention in respect of the Company, if the company already owned these rights, what was the neeed of its making the statement contained in the 1958 Ordinance? It would seem that the Company knowing it had not secured these rights attempted here to strengthen its position by transferring its claims from a mere recital where it was placed in the 1912 Proclamation to a substantive section in the 1958 Ordinance.

By implication this suggests that there was a reason for this difference as no change would be made in dealing with the same subject unless the object was either to limit, or at least vary, the exercise of the claim made, or alternatively to provide an additional mode of attaining the subject previously aimed at. And by the same contention if a statute records existing powers, nothing would be gained by its enactment as nothing would be added to the existing law.[81] Hence, it could be submitted that this provision did not alter the Company's position at all and that the reason for making it was that this was not a true vesting section it requires a very clear and unmistakeable language in a subsequent statute to revive or recreate a void right.[82] In the case of a corresponding section under construction in an Australian case Colonial Sugar Refinery Co. v. Melbourne Harbour Trust Commissioners,[83] the section was held not to vest any rights in the Company involved for the first time or as it was put by the court:

It is not a vesting section in the sense that it operates to transfer any lead at all. It refers to the vesting as a state of things already accomplished.[84]

or later in the same judgement:

The circumstances existing are to continue to have the same operation and effect as they would have had without the section.[85]

81. Attorney-General v. De Keyser's Royal Hotel, (1920], A.C. 561.
82. Lauri v. Read [1892] 3 Ch. 402 at p.420.
83. Colonial Sugar Reßnery Co. v. Melbourne Harbour Trust Commissioners [1927] A.C. 359.
84. Ibid., p.360
85. Ibid., p.361 See also Nireaha Tamaki v. Baker [1901] A.C. 567.

Section 3 cannot be construed as having been intended to be an interpretation of the preamble in the 1912 Mining Proclamation either. For although Parliament can by statute declare the meaning of previous Acts, and it is competent for parliament to do so even though its declaration offended the plain language of

the earlier Act,[86] it would be an unnecessary step to take unless it were intended and this contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. As has been suggested,[87] great unfairness may ensue if an interpretation which an act of parliament would fairly bear unaided by subsequent statutes was inferentially changed by other words in a subsequent act. In any case had this section been intended to be used as an intepretation section, it would have been easy and necessary to have used words to the effect that these rights always were, and should be taken to be vested, as had been done in some cases[88] instead of making the bare statement that they were vested as was done in this ordinance.

It could be submitted in this respect that if a statement was erroneous it can be disregarded, as was held in some cases[89] which apparently overruled earlier decisions and that if a legislature had made a mistake only the legislature could correct it.[90] Thus this section in the 1958 Ordinance could alternatively, be regarded not as a mis-statement of fact, but as merely a legal opinion which was not to be looked upon as part of the law. For although the legislature can declare what the law is going to be, it cannot say what the law was.[91] It was held in Ormond Investment Company v. Betts[92] that a subsequent legislation, if it proceeded upon an erroneous construction of previous legislation, cannot alter that legislation. Later in the same case the House of Lords stated that the interpretation of an Act cannot be inferentially changed by other words in a subsequent Act.[93]

86. Ormond Investment Company v. Betts, [19281, A.C. 143.
87. Armond Investment Company v. Betts [1927], 2 K.B. 346.
88. Ibid. _ ”
89. Colonial Sugar Refinery Company v. Melbourne Harbour Trust Commissioner,
supra, p. 123.
90. Labrador Company v. R. [18921, A.C. 104.
91. Princess Estate Cor. v. Registrar of Titles, [1911], T.P.D. 1076.
92. [1927] i K.B. 334
93. Ormond Investment Company v. Betts, [1928], A.C. 143, at p. 155

Therefore, the importance of any change of wording has been shown by several cases[94] because any change in the words of a statute imports vagueness as to what is really meant.[95] Besides the interpretation of such statutes which were urged upon the legislature by the Company were contrary to principles relating

to the construction of statutes. A statute is not to be construed so as to deprive a man of his property without his having an opportunity of being heard, unless it clearly appears that, that was intended. Thus, there seems to be nothing in the 1958 legislation indicative of the legislature having intended such a breach of natural justice.

The Matter of Levying Royalties

If the British South Africa Company owned exclusive mineral rights, there is no doubt that it could then levy royalties by agreement without any statutory authority,[96] but the miner received his rights from public officers and the officials were exempt from public liability. If the miner got his rights from the Company as owners of exclusive mining rights then the royalties would come to them as monies derived directly from the right to minerals,[97] but if the correct view be that he got his title from the state, and not at all from the Company, then the royalties were due to the state which gave the title. Hence such royalties were not a source of revenue connected with the mineral rights of the Company[98] and in the same way one can no more say that these were sources of revenue connected with the mineral rights, than that the purchase money for a thing is connected with the thing that is sold. They are a consideration for the rights obtained by the person exercising mining rights. The British South Africa Company could only be entitled to sources of revenue connected with mineral rights, i.e; which go with mineral rights, which are attached to them, and which the owner of the mineral rights can get by virtue of mineral rights, and not monies paid for the right to use such rights. The fact then that these royalties were levied under statutory authority raises a strong presumption that they were the property of the state, and not of

94. Esqumault Water Works Company v. City of Victoria Corporation, [1907], A.C. 507.
95. Labrador Company v. R., supra p.120
96. R. v. Visagie, 1963-1964 Z and N.R.L.R. 140
97. Commissioner for Inland Revenue v. L.P. Syndicate Ltd., [1928] T.P.D. 199, at p.206.
98. Rocher v. Registrar of Deeds. [1911] T.P.D. 996, at p.998.

the Company. Thus, when they were expressed to be paid to the Company, it was the Company as government that the payment had to be made to, a presumption reinforced by the provisions giving officials powers in connection with them. Moreover, although in one sense these are a tax, royalties are really a reservation out of the grant of the right to mine by the owner of minerals"

and so are presumably due to the government. If this contention is not correct, the legislation which granted the royalty to the Company might as well be held to be obnoxious on the ground that the one thing that a subordinate legislature, cannot do is to levy a charge for the benefit of a private individual as that would not be a taxing measure and hence would be illegal.[100] In practice such a case would not arise although it seems however, that such a case did indeed arise in the legislative grant of royalties to the British South Africa Company, and that no doubt such legislation was therefore illegal.[101]

Also as the Company claimed mineral rights on the basis of grants it was necessary for it to prove the legal basis of its claim to the right to charge royalties. A royalty interest could perhaps have been created in favour of the Company by grant or by reservation or exception just like a mineral interest. This could have been done by the landowner conveying a royalty interest in the land. But a graver doubt exists still as to whether the minerals were due to the Company and this arose from the fact that no instrument existed granting the Company these rights.

This discussion leads us to the conclusion that with no separate ownership of minerals and royalty, all this legislation gave, whether in connection with vesting or royalties was nothing beneficial and was therefore entirely nugatory and legally unenforceable.

Recognition by the Crown as a basis for the Company's Claims

Here, the issue is whether the Crown did anything that gave the Company a title to any mineral rights. It has been shown that the Crown had made no grant since recognition by the Crown as a source of title means

99. Chappelle v. R. [1904], A.C. 135.

100. Union of South Africa (Minister of Railways) v. Simmer and Jack Proprietary, [1918], A.C. 603.

101. Mchlary v. R. [1912], A.D. 199.

nothing unless it means that a grant of exclusive rights by the Crown is to be implied. There can be no such implications as there are known foundations for the Company's claims namely, the concessions. In re Southern Rhodesia[102] it was stated that 'erroneous acquiescence by the first party in the view of his own rights and asserted by the second neither extinguished title in the one nor created it in the other.'[103] Later it was again stated that 'the Crown recognised the concession for what it might be worth on its true construction, recognition could give no title where none existed already.'[104] Similar statements in substance had been said in Labrador Company v. R.[105] where it was expressed that for a recognition to be effectual for the purpose

of curing a defective title. It must be made with the knowledge of the defects to be cured, and no such knowledge on the part of the Crown can in this case be inferred from its officers,' mistaken view of the position of the Company. Thus, there is no hint anywhere either in the legislation or anywhere else of any intention by the Crown to remedy a defective title held by the Company or to create a new one. The ordinances were all passed for the purposes of regulating mining, not with any object of dealing with the Company title. This recognition is according to the Company supposed to proceed from the recognition of the concessions, the Devonshire agreement, the 1950 agreement, and legislation.

The Concessions

Here, it should be stated that if the Company's title rested on the concessions, no new recognition by the Crown could carry the matter further. The concessions had been recognised for what they were worth as stated in In re Southern Rhodesia, thereby leaving the value of the concessions to be decided, when necessary, by the proper tribunal. As the Privy Council in In re Southern Rhodesia stated, only public acts by which one independent sovereign, however humble, enters into political relations with the agents of another can derive their judicial characters from their recognition and adoption by the Crown[106] and went to hold that:

102. supra.
103. Ibid., p.228.
104. Ibid., p.238.
105. Supra, p.122. Also the same principle prevails in mistakes in the law of contract, See Blay v. Pollard and Morris, [1930], 1 K.B. 628.
106. Supra p.228. See also Cook v. Spring, supra p.572 and Nissan v. Attorney-General, [1970], A.C. 179.

the concession is not of this character, like the Rudd Concession, it received the approval of the High Commissioner on behalf of the Crown, but is essentially a private contract though entered into by the concessionaire with the paramount chief, and like other legal documents its effect must depend upon the construction of its terms according to ordinary legal rules. It is indeed, of importance to the Company's case largely because it confers private rights and is not in any sense a mere public act of state[107]

All the concessions obtained in Zambia by the Company are identical with the Rudd and Lippert concessions referred to already obtained in similar circumstances and by the same Company, and consequently seem indeed to be covered by the Privy Council decision.

Legislation

This as a ground of recognition can hardly be seriously maintained. Thus it cannot be said that by approving the Company's ordinances and other mining legislation the Crown gave them any effect beyond their true construction: and certainly the Crown is not bound where its prerogative would be affected as it is shown later that it would be, where this legislation held to touch precious minerals or precious stones in cases where these v/ere not expressly provided for. No better example of this could be had than is af[f]orded by the decision in In re Southern Rhodesia. In that case it appears that the Company had passed regulations, which had been duly approved by the Colonial Office, claiming land as their own, but these the Privy Council disregarded.[108] Given such a precedent there would seem to be no reason why the claims made by the Company in its mining regulations to own or control all the minerals and to own the royalties could not be equally questioned, and if need arose, be disregarded also.

107. Ibid., p.229

108. Supra, p.226.

The Devonshire agreement and the 1950 agreement

This ground was unlikely to succeed given the Privy Council's decision in a similar case. It was held by the Privy Council that a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waintangi could not of itself be sufficient to create a right in anybody cognisable in a court of law.[109]

The Devonshire Agreement of 1923

This document stated that:

Subject to the Provisions contained herein the Company shall retain and the Crown shall recognise the Company as the owner of the mineral rights acquired by the Company in virtue of the concessions obtained from Lewanika in North-Western Rhodesia covered by the aforesaid certificates of claim issued by Sir H.H. Johnson and by the two further certificates of claim issued by Sir H.H. Johnson and dated 25th September, 1893[110]

Here again it appears that only any existing rights the Company might have had under the concessions were recognised. The agreement did not pretend to be a new grant by the Crown, or to give any rights. The limitations of the word 'recognise' were well known when the clause was drafted and therefore the word must have been used advisedly. Furthermore, in 1923, African land rights had not yet been extinguished and the common law presumption that the owner of the surface land owned the mineral rights had not been rebutted as mineral rights had not as yet been severed from land rights.[111]

109. Nireaha Tamaki v. Baker, supra, p.567
110. The Devonshire agreement, supra, clause (3) (g)
111. This as observed earlier happened only in 1928.

The 1950 Agreement
This agreement in clause (a) provided that:
The Company shall subject to terms of this agreement, continue in undisturbed enjoyment, as now of the mineral rights owned by the Company in Northern Rhodesia until the 1st day of October, 1986.[112]
Here once more only mineral rights owned by the Company as of that date were guaranteed 'undisturbed enjoyment' to the extent that they already existed. The ordinance did not pretend to make a new grant nor add to those rights. And also applicable here are the other arguments advanced in connection with the Devonshire agreement so that even after this new agreement the Company's claim to title had to be founded upon the original concessions and treaties and those as we have already shown did not convey any title.

It has been demonstrated that recognition cannot in any way be the basis of the Company's claims as it still left unanswered the question of what rights were being recognised. It would be surprising indeed if the Crown had purported to deprive its protectorate of one of its principal assets by granting it to a Company especially one largely composed of foreign shareholders. Such a position would be difficult to reconcile with the position of the Crown as 'champion and guardian of public rights', and if indeed any such grant had been made it could well be said of it on the authority of Simpson v. Attorney-General[113] that 'no similar patent has ever been upheld in the worst days of the Stuarts.[114]
Concessions and Their Validity Regarding Mineral Rights Ownership
If the concessions are to be treated as valid by such a contention, there is a need to examine the nature of the rights and the areas they covered. First, the concessions have to be construed strictly against the grantees,
112. Agreement with the British South Africa Company on the Mineral Rights Owned by the Company in Northen Rhodesia and for the Eventual Transfer of those Rights to the Government of Northern Rhodesia, Cmd. 1950 113 11904] A.C. 487. if4. Ibid. p.487.

both because they were drafted by them as observed earlier and because these concessions alienated public assets to private persons.[115] Second, it should be submitted that the Company could never have acquired all the minerals and as such the concessions

did not cover the whole country.

Precious stones

The concessions did not expressly give any rights of precious minerals and precious stones. But more than this, the concessions did not mention either of them and that being so, it might well be that they were not included in the rights granted and especially so as the distinction between them and base metals was well known in Kimberley where the company originated. Even if it were to be held that the company's rights were founded on a grant from the Crown, they could not all the same include precious stones and precious minerals. For it was held in Attorney- General of British Columbia v. The A ttorney-General of Canada.[116]1 hat a conveyance by the Crown does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown and that the precious metals in, upon, and under such lands are not incidents of the land, but belong to the Crown and an intention to transfer them must be expressly or necessarily implied, and that cannot be until they have been severed from the title of the Crown.[117] Any document purporting to do that is as was stated in Hudson's Bay Company v. Attorney-General for Canada[1] J[8] to be construed strictly against the Company. In that case the Crown had granted by Charter to the Hudson's Bay Company territory together with the silver and gold therein. Later by deed the Company surrendered to the Crown all the rights and privileges it has been granted except and subject to a right to retain the posts and stations which it then occupied, a right to blocks of land adjoining to be selected by the Company, and a right to certain other lands to be claimed within the fifty years following. Pursuant to the deed the Company received Crown grants of selected blocks which grants included the posts and station adjoining thereto, and Crown grants of land subsequently claimed by the

113. Union of South Africa (minister of Railways) v. Simmer and Jack Proprietary,
[1918), A.C. 603.

116. [1889], 14 App. Cas. 295.

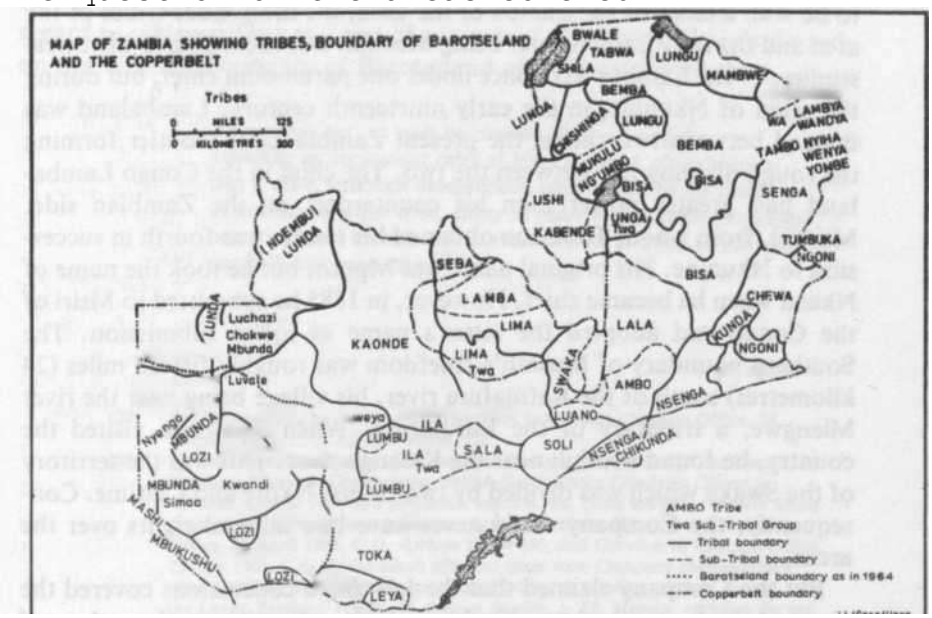
117. Wolley v. Attorney-General fur Victoria, [1876), A.C. 163. 'as the iwo tides are
distinct' p.202.

118. [1929), A.C. 285

Company. The Company claimed rights to gold and silver in those ateas. However the court held that the precious metals in all the lands so vested in the Company belonged to the Crown and that the grants to which the Company was entitled under the deed were crown grants of lands with those incidents which ordinarily attached thereto, and that it was settled law that those

incidents did not included the precious metals and that the right to retain the postsand stations was an exception to the general surrender, and was to be construed strictly against the Company; the use of the word ‘retain’ being held insufficient for this purpose.

The question of the areas covered



IN*)<WANOA
jLUVALE \
j Lyuwa>*' j Makoma^
CHEWA
KAONDE-\LENJE
NKOYA \ Mb MBUNDA Kwangwa '·
I \Mashdsha
TOTElA\
TONGA
SHANJO
[SUBIYA

There is abundant evidence from Colonial Office reports and historical studies which conclusively supports the submission that all the concessions obtained by the Company taken together did not cover the whole Country and in particular the Copperbelt, shown in Fig. 1 where the country’s mineral wealth that had been discovered was and from which the Company collected its loyalty payment.

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In considering the-question of territory among the Africans it is important to remember that there was seldom if ever a need to define a boundary with the precision with which it is normally defined in any system of law of European origin.· A boundary need be only as precise as the users of the land require it to

be for the uses to which they put the land. It was not the habit of the Africans to mark, either notionally or actually, by any line on the ground a boundary between the land of one tribe and that of another. This necessarily means that all the attempts by the Company officials in the concessions purporting to indicate tribal areas by references to watersheds, rivers and, points of latitude and longitude must be rejected as meaningless.

With reference to the Copperbelt only, one of the concessions purports to be with a chief of the Lamba or the Lala, the indigenous tribes of the area and the only Lamba chief being Mushili. But according to historical studies,[119] the Lambas were once under one paramount chief, but during the reign of Nkunine, in the early nineteenth century, Lambaland was divided between two chiefs, the present Zambia-Zaire frontier forming the rough dividing line between the two. The chief in the Congo Lambaland had greater power than his counterpart on the Zambian side. Mushili, from whom Thomson obtained his treaty, was fourth in succession to Nkunine. His original name was Mputo, but he took the name of Nkana when he became chief. However, in 1885 he submitted to Msiri of the Congo and adopted the latter's name as token submission. The Southern boundary of Mushili's chiefdom was roughly fifteen miles (24 kilometres) south of the Kafulafuta river, his village being near the river Miengwe, a tributary of the Kafulafuta. When Thomson visited the country, he found Mushili near the Katanga river. This was the territory pf the Swaka which was divided by two chiefs, Nkote and Chitime. Consequently, the Company could never have had mineral rights over the areas.

But the Company claimed that the Lewanika concessions covered the Copperbelt. Lewanika himself when asked to describe the boundary of

119. Dolce, The Lambas of Nothern Rhodesia. 1931, pp. 33-42.

his kingdom, gave a list of seventeen tribes, none of which was Lamba or Lala.[120] Their absence from the tribes under Lewanika's suzerainty is confirmed by Coillard in his own list of tribes under Lewanika[121] and by the Barotseland Boundary Arbitration proceedings.[122] In Doke's history of the Lamba tribe, the Lozi and Lewanika are not even mentioned, and it is important to remember that when Doke collected his material many Lambas were still alive who had been alive during the period of the making of the Concessions.[123] A Colonial memorandum by the Assistant Chief Secretary for Native Affairs on the extent of Lewanika's dominions[124] stated that it regarded Lewanika's dominions as that area in which there were indications that the people regularly paid tributes to him about the beginning of the century or regarded him as an overlord. The Lambas and the Lalas are not

listed anywhere as any of the tribes that paid tribute to Lewanika at any time in history. In any case with regard to taking tribute as a test of suzerainty, the King of Italy's Award on the Western Boundary of Barotseland of 1905 cautioned that:

Tribute can not, as such be considered as proving the authority as paramount ruler of him, in fact it often happens that a tribe, although independent, pays tribute to the chief of another stronger tribe, either in order by this means to escape being harassed by him and to avoid war or in order to gain his goodwill and protection[125]

120. See list compiled by Major Adams in letter from him to Foreign Office, 24 August, 1897. C.O. African South, 552.

121. Coillard listed twenty one tribes but again there is no mention of the Lamba. See Northern Rhodesia Government, British South Africa Company Claims to Mineral rights in Northern Rhodesia, supra p. 15. There are other reports which argue that it covered large areas e.g. Report by Major Harding to Colonial Office, 30 April 1902, C.O. African South 695, and Corydon to Colonial Office, 25 July 1901, C.O Africa South 659. But these were Company commissioned reports. Whitt has criticised reports by Gibbons & Harding, 'Ethno History of the Upper Zambezi' (1962), 11 African Studies, p. 23. Mainga, criticises the use of evidence of foreigners on the grounds that they did not know the country well but ironically goes on to rely on selected evidence, of the same worse still of those who were interested parties, that is favourable to her case that the boundary was wider than suggested in this study without convincing reasons as to why it is more acceptable than that which limits Lozi influence and treats raiding as proof of owne ship of territory. Buiozi under the Luyana Kings, supra, p. 165.

122. Ibid. This is from a list taken from the papers of the Barotseland Boundary Arbitration, 1963. The Lambas once again fail to appear.

123. Doke, supra.

124. Letter from Native Affairs Comm, to Chief Secretary, 15 Oct. 1S27, ZA1/9 File No. 35 (National Archives), Lusaka.

125. C.O. 795-99, File No. 45015.

Ill

None of the concessions also purported to be with a Tonga ruler. The Lozi rule did not extend over the area covered by the present day Southern Province, although there is evidence that Lewanika raided them as did the Matebele. Chief Monze, a senior Tonga Chief claimed by the Company to be included in Lewanika's concessions, laughed, it is reported, when it was suggested to him that Lewanika was his Paramount Chief.[126] With regard to the

Gwembe district, an area within Southern Province. The Native commissioner for the district during the Company administration wrote in the following terms:

There is no recognised paramount chief of the natives inhabiting this district. They are all Batonga, with the exception of a few by the Kafue — Zambezi confluence but subdivided into lesser tribes. There are the Bana Mweemba, the Bawe, the Balumbila and the Nanainga; the last include a number of Bagoba, who are totally distinct from the Batonga, speaking a different tongue.[127]

Most of Central Province does not appear to have been covered either. Stephenson, who opened the Ndpla station in 1905 as a Company official and who was very familiar with the area, in a letter to the governor

stated:

possibly the Lenje Chiefs Chipepo (or Mwashi) and Chinamamighi occasionally have paid Lewanika tribute though they never told me they had or were doing so but even with these doubtful exceptions there is not the least doubt the Natives of Ndola, Broken Hill, Chilanga, Feira and Mkushi sub-districts of the territory, never had anything to do with Lewanika and whose taxes ten percentum have been paid to the Barotse fund, have suffered a great wrong to the extent of some thousands of pounds sterling, which I have no doubt your excellency will see righted.[12]®

126. Ibid.

127. Letter from Griffin to the Company, March 1914, Ibid.

128. Letter from Stephenson to Sir Hubert Young, 10 September, 1925, Ibid.

Early in 1905 when Colonel Harding, an official of the Company with Barotse native police and some indunas entered the Lenje country west of what is now Kabwe, he is reported to have caused protests from the Administrator of North-Eastern Rhodesia, on the ground that this was not Lozi country.[129] In 1900 one Gielgud and one Anderson were sent by the Company to establish a station in the Hook of the Kafue; in their report they stated that:

(a) the whole of the Hook of the Kafue is inhabited by Mbaluba, Amalamba, Amankuni and Mbayila. (b) None of these people were of Barotse blood, nor with one exception, do we know of any Barotse living east of the Kafue. I do not however go so far as to state that there are none.[130]

Another area not covered is the Kaonde and Lunda country. In 1905 the then District Commissioner, a Company official wrote to the Secretary for Native Affairs disclaiming any Lozi influence in the area.[131] Mellard, a Company official in Kasempa[132] wrote that the Lozi had no influence in his area and later in his book

on the Kaonde country there is no mention of the Lozi ever ruling this part of Zambia.[133] There is on the contrary a statement by one Mutendi, a Lunda headman on the Kabompo river who swore before the District Commissioner that the Lunda: never recognised Lewanika. The Lunda have never recognised him and have no wish to do so. We do not want to pay tribute to Lewanika, we pay our tribute to the Boma every year.[134]
Thus none of the North-Eastern concessions covered the Copperbelt nor were any of the chiefs alleged to have entered into them of any importance.[135] They could not cover the whole country unless they were granted by all the native chiefs of the country. But only 24 chiefs were

129. Ibid
130. C.O. 795-90
131. Letter, Copeman to Secretary Native Affairs, 25 May, 1905, C.O. 795-99, File No. 45015; also in 1N/1/9, (National Archives), Lusaka.
132. Ibid.
133. Mellard, In Witch Bound Africa, 1923.
134. C.O. 795—99, File No. 45015. The Lunda elder swore before Bruce Miller, Native Commissioner on 20 January, 1916.
135. E.g. Chitimukulu of the Bemba is missed out.

parties to them, whilst there are seventy three tribes in Zambia, as shown in Figure 1. Lewanika and the other chiefs named by the Company were never in fact, in territorial possession of the land over which the Company claimed they granted it mineral rights.
The Company's knowledge Regarding concessions and areas covered
The British South Africa Company knew that its concessions did not cover the whole country and particularly the Copperbelt. In 1817 the Foreign Office sent to the Colonial Office a report by Major Adams on the extent of the Barotse Kingdom.[136] This was accompanied by a map on which the boundaries of the Barotse Kindgom were marked by a line, which in certain respects fell short of the boundary subsequently defined in the Order in Council of 1899. This was pointed out by the Company to the Colonial Office but it made no claim that the line was inaccurate[137] And earlier in 1902, its own officials had reported to it that Barotse influence was non-existent in the entire Hook of the Kafue.[138] The awareness of the Company is confirmed by the events leading up to the change of the boundary in 1905. Then the Company had suggested that the boundary between North-Eastern and· North-Western Rhodesia be altered. The proposed new boundary involved adding to North-Western Rhodesia, considerable country from North-Eastern Rhodesia. It was recognised at the Colonial Office that if North-Western Rhodesia was so extended

it would no longer be coterminous with the country over which Lewanika ruled. The Company stated however that the change was necessary for administrative reasons.[139] The proposal was subsequently approved by the Colonial Office.[140] But Company correspondence reveals that its claims that it wanted to change for administrative reasons was fiilse. In 1902 the Secretary of the Company wrote to the Administrator of North-Eastern Rhodesia, to explain why some of his territory was being removed. He stated that:

136. Letter, Foreign Office to Colonial Office, 14 October, 1917, C.O. 795-99

137. Letter, British South Africa Company to the Colonial office, 8 December, 1917 Ibid.

138. Report of Val Gelgud, 30 October, 1902 to Mr. Mullon, Company Administrator in Salisbury, C.O. 795-99, File No. 45015.

139. See letter by Jones, Secretary to the Company's London Board to Codrington 13 February, 1904 and in Company's London Board to Codrington 13 February, 1904 and in Company letter to the C.O 24 June, 1904 African South; 746. Also Company letter to C.O.il October, 1903 Africa South No. 717.

140. Gazette Notice 29 September, 1905, of both North-East Rhodesia (P.T.O)

Under the Johnson concessions our rights are founded upon the very large number of contracts made with personages whose existence to say the least are some what mythical. Had we ever to prove our title to any of these rights we should not be in quite so favourable a position in your territory as Barotseland[141]

In reply the Administrator for North-Eastern Rhodesia wrote:

But as regards the proposed boundary with North-Western Rhodesia I cannot quite understand your views, your rights to minerals may be very clear under the Lewanika concession but to contend that any such concession or any agreement whatever with Lewanika has any connection with territory or natives further east than sitanda is beyond all reason, if you are going to hold your rights on such a fiction they will rest on a less secure basis than at present. The contracts on which you hold your rights to minerals in North-Eastern Rhodesia are all made regular by Johnson, there is a lot of humbug about the original agreements but nothing so fictitious as the suggestion that Lewanika had at any time any influence there. 1 think there must be some other reason for your desire to add territory to North-Western Rhodesia.[142]

In another letter, after agreeing that the change should go on since it was in the interests of the Company, the administrator

discussed and dismissed each and every reason advanced for the change.[143] Further he stated that the Mashukulumbwe country was not covered by the Barotse concessions. Even after the change of the boundary in a letter to the Colonial Office the administrator stated that:

and Norih-West Rhodesia, Notice No. 88. C.O. 795-88 the letter approving boundary change is 28 October, 1904 Africa South No. 164

141. Letter by Fox, Secretary of the British South Africa Company, March 1901, cited in Northern Rhodesia Government, British South Africa Company Claims to Mineral Rights to Northern Rhodesia, supra, p.23

142 Ibid.

143 Ibid.

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I think that Lewanika and his Council have made up their minds for sometime that the Eastern part of North- Western Rhodesia is nothing to them. They exercise no control, almost no influence outside the Barotse valley.[144]

Oddly, there was never any acceptance by the British government that the concessions covered the whole country. That is revealed by Colonial Office correspondence. For example, at the time of the Yeta agreement the Colonial Office wrote to the Company that:

unfortunately the question of the area covered by the Lewanika concession is still under consideration, and this, of course, affects the Map, and through it, the agreement. We are now awaiting a letter from Young on the subject[145]

In fact when it was suggested to the British government by the company that they approve the 1905 boundary changes as confirmation of what amounted to the Barotse boundary, the Colonial Office insisted that:

There has never betn any specific declaration on behalf of the Colonial Office that the Lewanika concessions covered the whole of North-Western Rhodesia as extended in 1905 in approving the extension of Barotse-North- Western Rhodesia in 1905, H.M.G. did not intend to extend Lewanika’s suzerainty over areas in which he did not then exercise and had never previously exercised it.[146]

The object of the British government in approving the extension is indicated in a letter written to approve the transfer which stated:

The adoption of the boundary now proposed would involve the transfer of a large area from North-Eastern to North-Western Rhodesia. If it is in the interest of both

144. Letter by Codrington to Colonial Office, 12 November, 1909, Africa South No 932.

145. Letter by Malcom President of the Company, 23 June, 1937, C.O. 795-88 Filj No. 45050.
146 Ibid.
116
territories that this area should be administered as part of North-Western Rhodesia, Mr. Lyttleton will not object to the transfer, but before taking the necessary action for effecting such a transfer he proposes to consult the High Commissioner and Consul-General for the British Central African Protectorate.[147]
Later in the 1930s it was more insistent in its explanation and stated in a letter to the Company:
your deduction from this that His Majesty's government had accepted the view of the Company is erroneous.[14]*
It has to be remembered that the suggestion for the division emanated from the British South Africa Company and was put forward ostensibly on administrative grounds, and in fact the Company appreciated that the transfer was made for administrative convenience as shown by a strictly private and confidential memorandum by the Company's secretary referred to earlier. The Lewanika concession was not mentioned in the whole course of the correspondence as providing any basis for the new boundary. In fact there was support within the Colonial Office for the submission advanced here that some areas within the country were not covered by the concessions. In an internal note one Colonial Official stated:
It is impossible not to have great sympathy with the Northern Rhodesia point of view. There are certainly areas of Northen Rhodesia where the authority of the Paramount Chief of Barotseland on which the mineral rights in the Western part of the territory are based never ran.[149]
147. Letter from Colonial Office to the Company, 20 October. 1904, C.O. 79MS. PBe No. 45050.
148. Letter from Colonial Office to the Company, June, 1937, C.O. 795-M
149. Note by Cohen, See Northern Rhodesia Government, British South Africa Company Claims to Mineral fUfhts in Northern Rhodesia, supra, pp. 29-30
117
The Crown rejected any suggestion that their recognition of the 1905 boundary implied a change in the area in which the Company owned minerals and categorically stated:
It is simply inconceivable that the Colonial Office should have accepted the argument that the Company acquired rights in a specified area, based upon the renunciation by Lewanika of any such rights within that area, involved the simultaneous recognition by His Majesty's government not only that Lewanika owned mineral rights throughout the area (even in those parts of

it where the mineral had already been granted to the Company and where he had himself never claimed or exercised suzerainty), but also that the basis of the Company's rights was in consequence automatically converted.[150]

From the available evidence, therefore, there can be no doubt that the concessions did not cover the whole country. Further the considerations advanced in the preceding sections lead us to conclude that there was no legal basis for the British South Africa Company's claims to own mineral rights in Zambia. Also our analysis has shown that the practice whereby the Company was allowed to regulate mining and collect royalties was mistaken and that the royalties from the minerals were payable to the government and not the Company.

1*0. I cltci from C olonial Office to British South Africa Company, 1938. C.O. 795-88.

MINING RIGHTS BEFORE THE 1969 MINING LEGISLATION

All legislation dealing with Mining during this period was introduced by the British South Africa Company. Such legislation created problems which were inherent in the nature of the legislation's origins. These led to its repeal and replacement by the 1969 legislation.

Origins of the Legislation

The Company, as owners ot the mineral rights of Zambia, could by reason of the common law and without the aid of any legislation grant rights to prospect, mine and take away minerals. At common law, just as the owner of the land can dispose of his whole estate or interest in the land, including all that is beneath the surface, or a specifically defined portion only of that interest in the same way the owner of minerals can grant and dispose of his minerals.[1] The Company did not, however, adopt the common law system of mineral tenure. The country was largely unexplored and under-developed. With few mineral discoveries the common law conception of tenure was built around known mineral deposits as the Company could not hope to lease mineral land as it did not know which parts of the country were mineralised. Besides the country had not even been surveyed. It was in its interests, therefore, to promote a system which as far as possible opened the country to prospecting and mining. It was also imperative to the Company's scheme to create mining rights exercisable under a system of licence and control, which were not dependent on the possession of full rights of ownership in the ground worked since although the Company claimed to own all the mineral rights in the country in reality it did not own all the land.

Essentially the Company sought a system which would best enable it to enjoy its ownership of mineral rights. The actual

choice of the South African system was influenced as much by the factors already described and by the fact that most of the early miners were people and companies with a South African background — a country where the state had already devised legislation by which mining rights were granted over

1. The owner of minerals can grant a mineral lease of a mine to another for a term of years (See Can v. Benson, (1868), 3 Ch. 524) or he may give a licence (See Sutherland v. Henthcote, [1892), 1 Ch. 475).

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private land. The real property law of South Africa, based as it did upon Roman-Dutch law, differed fundamentally from the common law. Under it the owner of the surface of the land was the owner of the whole of the land and of all minerals in it.[2] But though this was so, the Roman- Dutch lawyers had not yet developed the theory of dominium in such a manner as to permit the severance of holdings horizontally. It follows that it was not possible, under the South African system, for one person to have ownership of the surface and another to have ownership of the subject minerals.[3] No one could therefore transfer the dominium in unsevered minerals unless he transferred ownership in the land containing minerals.[4]

Gold and diamonds were discovered on the surface in the Transvaal in 1881. Thus, at first mining consisted of surface workings which was something that could be undertaken by the landowner himself. But when the gold reef was not near the surface, prospecting and mining necessitated heavy expenditure. Then the landowner wanted to sell the prospecting and mining rights, and the intending mine owner, who had the available capital, was anxious to acquire them. Landowners began to give mining rights in the form of leases. To cope with this the Transvaal government modified the Roman-Dutch law in the 1885 Gold Mining Law,[3] which was later consolidated into the 1908 Transvaal Precious and Base Minerals Act. In Section 67 of this legislation, the state, while leaving dominium in the minerals in the owner of the land regardless of Whether the owner was the state or a private individual reserved to itself: (a) the right of mining for and disposing of all precious metals and precious stones and (b) the right to proclaim land a public digging or mine.[6] The significance of this was that the owner of the land remained the owner of all precious metals, but could not mine them although he could still exercise his Roman-Dutch rights of mining the base minerals on his land.

Further, the Act provided for the granting of mining leases which, m the first instance, were offered to the owner of the land and mineral rights on better terms than when granted to other persons but when these rights were not offered other

compensation was provided in addition to

2. Rich and Bhyat v. Union Government, [1912], A.D. 719 at p.734.
3. Neebe v. Registrar of Mining Rights. [1902], T.S. 65 at p.85 per Wessels, J. Rocher v. Registrar of Deeds, [1911], T.P.D. at p.315 per Masson, J.
4. Le Roux and others v. Loewenthal, [1905], T.S. 742 at p.745
5. By this law, minipg rights could be granted by the state. See Gold Mining Law No. 8 of 1885.
6. See Precious Stones and Base Minerals Act. 1908, s.67.

the mining lease. In addition to the mining lease it also adopted the claim system and the practice of proclaiming gold fields or public diggings whereby claims could be pegged by members of the public holding a prospecting licence. The claim licence which was subsequently granted depended upon the fulfilment of its terms, and in particular, upon the punctual payment of the claim licences or where ore was being produced, of the digger's licence fee. As a result the state gained effective control over the miner who had to fortify himself with the necessary state permits, licences or leases and had to conform to the regulations, give the necessary notices, and carry out the various duties imposed upon him by the gold and diamond laws, in order to protect his holdings and escape the penalties imposed by these laws. Effectively, therefore, the South African system achieved over South African minerals what the Company wanted to achieve over Zambian minerals.

The South African influence in Zambian mining legislation came through Southern Rhodesia, where the claim system was introduced by the Pioneer Column. It was part of the contract with each member of the column that he was allowed to peg a certain number of claims. Though there were regulations governing the terms on which prospectors could acquire rights as early as 1890 in Southern Rhodesia[7] and later in 1891, the Company applied to the territory the Proclamation by Her Majesty's High Commissioner for South Africa on 10 June, 1891,[8] which brought into being rules designed to be the temporary framework within which mining operated. The first regular system of mining in Southern Rhodesia, however, was not established until the Mines and Minerals Ordinance of 1895, drafted by the British South Africa Company and based substantially on the mining legislation of the Transvaal. The law was amended in 1898 and in 1903 the amendments and the 1895 Ordinance were incorporated into the 1905 Mining Ordinance of Southern Rhodesia. When diamonds were discovered at Gwelo in 1906, a Mining Ordinance for precious stones was enacted on very similar lines to the 1903 Mining

Ordinance.[9]

7. See Mashonaland Mining Legislation No. 1 of 1890.

8. See Hone, Southern Rhodesia, 1909, at p.239 for a reprint of the regulations.

9. It was different in one respect. The Ordinance introduced for precious stones system whereby the prospecting licence formed a contract between the Company and the holder, and was not of statutory force as was the case in the 1903 Mining Ordinance. This was of later significance in Zambia.

Fari;' Mining Law

Prior to the existence of any mining code in Zambia, the British South Africa Company granted mineral rights to individuals by means of an exchange of letters.[10] The terms of the grants specified the number of claims to be pegged within a stipulated area and in some cases granted the right to acquire farms of stipulated sizes. The Company always included in its exchange of letters the obligations of the grantee to allot to the Company a certain percentage of the equity share capital of any Company established to work a discovery (ranging from 30% to 50%) and the Company charged a royalty on all the companies so granted the right.[11] In some cases the grants were absolute and without any right of reversion to the Company, e.g. the grant of mineral rights in respect of all but 'reserved minerals' to the North Charterland and Exploration Company (1937) in respect of an area of land known as the North Charterland Concession, the grant to Rhodesia Railways of mineral rights in farms adjacent to the railway system and the grant to De Beers Consolidated Mines Ltd., of all mining rights throughout the country with respect to diamonds. In such cases, particularly that of the North Charterland Company, the British South Africa Company placed the grantees on the same footing as itself in regard to its exercise of mineral rights. The grantee, for instance, was not liable to pay royalty to the Company, but could trade in mineral rights in his area on his own account. These grants were recognised and continued under the post 1912 Mining Legislation.

The 1912 — 1969 Legislation

The Company did formulate regulations for the North-Eastern part of the country,[13] as well. However it was not until 1911 that it applied to the

10. See e.g. concessions to F.R. Burnharm, Pearl Ingram, the Bechuanaland Exploration Company Ltd., and the Chartered Goldfields Ltd., dated 13 February, 1895 and to J.W. Dore, 9 April, 1895, in Company Register of Titles, Geological Survey Dept., Lusaka.

11. See e.g. letter from British South Africa Company to Northern Territories British South Africa Exploration Company

in Register of Titles, Geological Survey Dept., Lusaka. See note 8(a) on the file, page 55.

12. See s.5 of the Mining Proclamation, supra. Also see s.6 of the Mining Ordinance, Chapter 91 of the Laws of Zambia, 1965 ed.

13. See C.O. 417-506, they are contained in a letter from the British South Africa Company to the Colonial Office, 5 November, 1906.

British High Commissioner's Office of Southern Africa for a mining code for Northern Rhodesia. The first draft of the mining law was ready in the same year, drawn up by the Company and submitted to the Colonial Office on 9 January, 1911, for approval.[14] The idea it seems was that the law should come into force as soon as the Order in Council amalgamating the administrations of North-East and North-West Rhodesia came into force. The draft corresponded closely to the North- East regulations referred to already and the 1906 Precious Stones Mining and Trade Ordinance and the 1903 Mining Ordinance of Southern Rhodesia. In discussing the drafts, the Company rejected all attempts by the colonial office to secure benefits from mining activities to the chiefs from whom they claimed to have obtained the concessions. For instance, at one stage of the drafting of the legislation, the Colonial Office suggested that the legislation should include a provision for the commutation of 1% royalty to the native chiefs. The Company's reply was that such a provision was not one which could properly be included in a mining law.[15] Meanwhile, it inserted clauses entrenching its ownership of the mineral rights,[16] and categorically stated that it had no intention of applying for a mining law which would limit in any way the full exercise by it of its mineral rights.[17] The draft was accepted by the British government and was promulgated as the Mining Proclamation of 1912 which took effect on 1, July, I912.[18] In 1934 it was renamed the Mining Ordinance of 1934 and it survived with little substantive amendments in the 1958 Mining Ordinance.

Prospecting Rights

The law as established by both the 1912 Mining Proclamation and the 1958 Mining Ordinance was that with the exception of the North

14. See C.O. 417-506

15. See C.O. 417-424, letter of High Commissioner reporting on his visit to Southern Rhodesia to the Colonial Office, 5 November, 1906.

16. Se· British South Africa Company letter to Colonial Office, 15 February, 1911, in C.O. 417-506.

17. The company stated this very explicitly in a letter to

the Colonial Office, 15 February, 1911, in C.O. 417-506

18. See Mining Proclamation No. 1 of 1912.

Charterland concession,[19] the Western Province[20] and special rights in respect of diamonds which had been acquired by De Beers, the right to prospect could only be acquired from the British South Africa Company. Such right to prospect was ordinarily conferred by a prospecting licence given by the Company. In its application there was no restriction as to who could obtain mining rights nor was there any machinery to investigate the financial and technical competence of applicants for mining rights.[21] This left the field open for people with little money and possibly no mining experience to take out prospecting licences and eventually mining rights, with the inevitable result that they could withold mining ground from those who could develop it.

In general, a prospecting licence was no more than a contract which was made between the British South Africa Company and the prospector. It set out the terms on which the prospector could prospect and which, when he had made a discovery, conferred on him mining rights on certain terms and conditions. The Company, at the time of the drafting of the legislation, took care that many of the more important provisions regulating the activities of the holder were not stated in the mining legislation but were left to be written into the licence by the Company. In this way the Company thus acquired machinery by which it could control mining without further recourse to legislation. This approach was probably inspired directly by the Company's experience in Southern Rhodesia. In that country the Company had included the terms of prospecting licences in the 1903 Mining Ordinance, and mining rights had therefore to be held on the terms laid down in the legislation. The only way in which different terms could be included in a grant would have been by amendment of that legislation, which was in fact opposed by the pioneer settlers. Consequently, when the Company came to framing the mining legislation in 1912, and found there was no opposition by settlers, care was taken to avoid this dependence on the statute. In consequence, however, mining right holders often carried on business under varying conditions, and since the terms of the licences were subject to negotia

19. See s.6 of Mining Ordinance, 1958

20. It was covered by the Northen Rhodesia Order in Council, 1924, which in article 41 provided that 'it shall not be lawful for any purpose whatsoever to alienate from the Chief and people of the Barotse, the territory reserved from prospecting by virtue of the concessions from Lewanika to the

British South Africa Company, dated the 17th day of October, 1900 and the 11th day of August, 1909.'

21. The only restriction related to age. The applicant had to be at least 21 years old. See Mining Ordinance. 1958 s. 17(2)

tion, they could not be predicted with any degree of certainty. This was not particularly welcome in mining circles, which preferred to have ample advance notice of their obligations so as to be able to predict their expense before committing large amounts of capital.

As the prospecting licence conferred on the holder the right to search for minerals, prospecting could not be done by a person other than the holder. To do so without a licence was prohibited and a criminal c. fence.[22] The licence entitled the holder to post one or more prospecting noticcs on any ground,[23] which was usually done after the discovery of a vein or lode. There was no fixed rule as to the amount of mineral to be discovered in order to make a posting although such a notice had to be in a prescribed form, and had to be displayed in a prescribed manner.[24] A subsequent prospecting notice could not be posted until the earlier discovery notice had been removed and notice of abandonment posted.[25] Having posted a prospecting notice, the holder of the prospecting licence had exclusive rights to prospect over an area within a circle having a radius of 1,000 feet (30.5m) from the point where such notice was posted in the case of precious metals or precious stones or 3,000 feet (91.5m) form such a point in the case of base minerals. This exclusive right lasted for 30 days.

A prospector was allowed to do this on any land throughout the country unless it was declared to be reserved against prospecting, or where prospecting upon such land was permitted only after certain statutory consents were obtained. In other words it was not necessary for land to be declared or Gazetted to be open for prospecting. It was only necessary for it not to be closed against prospecting.

The relationship between the prospector and the owner or occupier of private land was regulated by law. Prospecting could not take place without the consent of the private owner or occupier upon land which

22. Ibid., s.9 provided that 'any person who prospects for minerals or exercises any righl under a prospecting licence in contravention of the provisions of the section shall be liable to a fine not exceeding 200 pounds.'

23. Ibid., s.22 (1).

24. Ibid.. s.25 (I).

25. Ibid., see s.22 (4) which provided that 'No person shall

post a second or subsequent prospecting notice within an area specified in subseciion (5) of this section until such lime as every such notice previously/posted by him|in|such area and the peg upon which it was carried have been removed.'

was within 200 yards (182m) of any occupied or temporarily unoccupied house or building, or within 50 yards (45.5m) of land cleared, ploughed or bona fide prepared for the growing of farm crops on which farm crops were growing, or on land where during the twelve months immediately next preceding, farm crops had been reaped, or on land which was in the vicinity of any cattle dip-tank or any private water supply.[26]

Besides the above the prospecting licence included other conditions with which the holder had to comply when he acquired a mining location. These concerned, for example, the amount of work that had to be performed within stated periods in order to develop the location with a view to establishing that it was a workable proposition as a mine, and of course, with a view to the profitable working of such a location by the extraction and removal of minerals.

A prospecting licence carried the right to peg one mining location. In 1936 a review form of the licence was introduced and it was valid for one year only, but in 1948 a further revision permitted the pegging of more than one mining location on the same licence.

Exploitation Rights

A right to exploit mineral deposits could be acquired in either of the two ways: by pegging the claims or mining locations on discovery of minerals as a result of a prospecting licence; or by obtaining a direct grant of mining rights or special grant.[27] The first step in the acquisition of a mining right through the first method was the posting of a prospecting notice. Once the holder of a prospecting licence had posted a registration notice he could then apply for the registration of the area concerned as a mining location.[28] The law enabled the holder of a mining location to apply for and obtain a certificate of special registration. This was conclusive evidence that all formalities required for the acquisition of a location had been observed. It means that the holder was entitled to the location free from any adverse claim and that nothing done or omitted to be done before the date of the certificate of special registration rendered the location defeasible.[29] This was welcome in that the special registration

26. Ibid., s.20 (1)
27. Ibid., ss.38, 46
28. Ibid., s.25 (I)
29. Ibid., ss.44 (1) and 47.

ensured a guaranteed title and one which justified the expenditure of large sums of money. But there remained the problem that no proof was required of the discovery of a mineral within the area covered by the prospecting notice, prior to the act of locating, and marking the area, on the surface.[30] Thus before a registration took place the applicant did not have to certify that a mineral vein or lode was found on the location. This omission in requiring proof meant that the original locator could hold the ground even when he made the location before any mineral was discovered on such a location.

The special grants were rights to mine and were acquired on application from the Company and not by pegging a mining location.[31] They were intended to be granted to companies with the financial resources to undertake prospecting. They mostly ended up in the hands of powerful mining companies and these areas became closed to holders of ordinary prospecting licences. The special grants, like the prospecting licences, took the form of private contracts and again differed in their detailed provisions. The special grant areas were regarded as consisting of blocks equivalent in size to a mining location. As with all other mining rights, the special grants had to be registered within a prescribed period or they became null and void. The grants had no fixed term, but continued in force until abandoned or forfeited pursuant to the provisions of the grants and the law until surrendered by the holder.

Obligations of Miners

Provisions in the prospecting licence tended to require the holder to execute at least thirty feet (9m) of obligatory development work within four months of the registration of the mining location and to obtain an inspection in respect of work that had been carried on. For each succeeding year after the expiry of the first period of four months, he was required to execute at least sixty feet (18m)of development work and at or before the expiry of four years obtain an inspection certificate. The holder could, however, obtain what were called inspection certificates by payment, on a sliding scale, of cash in lieu of work.[32] Failure to obtain an in-

30. Infact the same requirement prevailed as in ordinary registration. See ss.44 (3) and (1), Ibid.

31. Ibid.. s.38 (a) 38 (1)

32. Ibid., s.80, provided that 'there shall be paid to the Engineer a fee of one pound in respect of every inspection certificate and of every certificate of extra work issued by the Engineer under the terms of the prospecting licence in respect of any mining location.'

an inspection certificate rendered the mining location liable to forfeiture to the Company. This measure was designed to cause holders of mining locations to exploit them and not merely sit back and hold them for speculative purposes, but, as is shown later, these measures failed to achieve this desired objective.

Similarly, a holder of a special grant was required within the period of four months from the date of registration, to execute upon one of the subdivisions a footage of development work amounting in total to not less than thirty multiplied by the total number of subdivisions, and to obtain an inspection certificate confirming that the work had been carried out. For each succeeding year from the close of the period of four months, he had to execute a footage of development work amounting in total to not less than sixty multiplied by the number of subdivisions, excluding those being worked for profit, and to obtain an inspection certificate. He too was entitled to obtain an inspection certificate by paying the sum of money specified in the grant in respect of the particular inspection certificate required, in lieu of doing the development work. Failure to observe the development provisions constituted failure to comply with the provisions of the special grant, and made it liable to forfeiture.[33]

There were several defects in these requirements which militated against their effectiveness. Although development work had to be undertaken or inspection fees paid in lieu to protect a mining right, the work did not have to be done until the end of the year in which it was due. If begun just before the end of the year and continued until the required amount of work was done, the location or grant could not be forfeited even though such work was not completed within the year for which the requirement work was done. Consequently, in practice the act of locating alone could hold a mining location for practically two years. For example, if a location were made in January 1976, this would hold the claim until 1977 after the holder had done the required work for the first four months, and annual labour for 1977 need not be done until the end of 1977, so that nearly two years could elapse before development work

33. This was authorised by s.64 (1) of the Mining Ordinance, supra, which provided that 'any special grant or prospecting licence may contain provisions for the forfeiture thereof or of any rights granted thereby and, in the case of a prospecting licence of any mining location or other rights acquired there under in toy circumstances specified there in and at any time however remote.'

became necessary. This was also because the mining-rights holders were not required to follow a specific programme in

their operations. Moreover, with respect to inspection fees as a result of carry-overs and transfer provisions it was possible to protect a right over a long period by work done in previous years on contiguous claims. The fees themselves were also too low to have much effect,[34] and indeed no inspection fees were payable at all once a claim had been worked for profit. Hence many claims surrounding small, old mines could continue to exist virtually in perpetuity. In any case, with respect to a location where after forfeiture work was resumed and continued before anyone else located the area, this could preserve the original locator's rights. Besides the person who forfeited the location did not lose his prospecting licence nor was he debarred from locating in the same area.

Additional Problems Created by this System of Mining Rights

Despite the shortcomings of the legislation, it must be acknowledged that mining activity under it was very successful and it led to the discovery and development of most of the present-day mines in the country.[35] However, the legislation and particularly the special grants created problems that could not have been foreseen when they were created. This was particularly so for the independent government which wanted to implement its own mineral policy after it had acquired the mineral rights from the British South Africa Company.

In 1964 the mineral rights formely held by the Company and the Crown became vested in the President on behalf of the Republic of Zambia and this was implemented by the 1965 Mining Ordinance (Amendment) Act.[36] 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. The relevant provisions read:

34. 1st certificate — £5, 2nd certificate — £10, 3rd certificate — £20, 4th certificate — £20 and 5th certificate — £30. See Prospecting Licence Condition, 20.

35. Special grants are recommended widely as perhaps the most important single step which led to the opening up of the Copperbelt. See Coleman, The Northern Rhodesia Copperbelt 1899-1962, 1971; Bancroft, Mining in Northern Rhodesia, 1963; and Davis, Modern Industry and the African, 1965.

36. This was also a tidying up Act which removed reference to the Company from the Mining Ordinance. See Mining Ordinance (Amendment Act) No. 5 of 1965.

Notwithstanding the provisions of subsection (1), it is hereby confirmed that any prospecting licence, mining location, special grant, mining right or title granted by the Company prior to the twenty fourth day of October,

1964, shall continue to be held, subject to the provisions of

¿his Ordinance, under the same conditions as are contained in such prospecting licence, mining location, special grant, mining right or title.[37]
The privileges and rights secured for the Company by virtue of the conditions in such rights were, however, vested in the President on behalf of the Republic of Zambia, and included royalty payments. The power of granting new prospecting licences was vested in a government officer, the Mining Engineer.[38] Prospecting Licences continued as under the Company to[1] be granted outside the Mining Ordinance but their conditions were th,is time to be determined by the Minister of Mines. However, the recognition of existing grants meant that the North Charterland Exploration Company and the Chief of the Lozi tribe continued to have the exclusive right to grant mining rights in the North Charterland concessions area[39] and the Western Province[40] respectively.

The existence of the Litunga's special powers undoubtedly caused legal difficulties which inhibited prospecting and in fact after sixty years the areas remained virtually unexplored. Also these powers of the Litunga were enormous by comparison with those of the other paramount chiefs. The recognition of existing rights also meant that over areas which 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. The Zambia government thus inherited a system which it operated within a legal framework built by the Company. It could make grants of prospecting rights only in areas

37. Ibid., s.3 (2)
38. Ibid., s.7 (1).
39. Ibid., s.3 (3) provided that 'Nothing in this section shall operate to vest in the President on behalf of the Republic any right of ownership in searching or mining for, or of disposing of minerals, mineral oils or natural gases which was on the twenty-fourth day of October 1964 vested in persons deriving title from the Company' see Mining Ordinance, supra.
40. Ibid, See s.4, which read 'Nothing in this Ordinance contained in shall in any way effect the rights and privileges secured to the Litunga of Barotseland and the people of the Barotse by virtue of article 41 of the Northern Rhodesia Order in Council, 1924.'

open to prospecting as this excluded areas already covered by valid and operative grants made by the Company. 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.[41] 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.[42]

Thus, the fact that the areas were not being adequately developed was defeating the government's main mineral policy which was mainly to obtain a rising supply of foreign exchange for development purposes. Since the mining-right holders were not using some of the areas they held, the government wanted to bring in completely different companies with fresh sources of capital to develop those areas. There was also some dissatisfaction with the rate at which companies were increasing their capacity in the then existing mines. In 1968 the government, in an attempt to put pressure on the grant holders to work their holdings, increased the rates for the inspection certificates,[43] though it was realised that for this to have any real effect the government would have to wait for quite some time.

These practical realities meant that the government's acquisition of mineral rights from the Company in 1964 was of little practical significance. 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. If nothing was mined, however, there was nothing it could do. The inequity of the situation was not just that it denied the government power to do anything to galvanise the holders of rights into prospecting in and developing their

41. The area covered by special grants totalled 75,000 square miles (195,000 square kilometres). See Research Bulletin, Economic Financial and Technical Series, 7 February, 1970 p.1, and also Copper Services Bureau, Copperbell of Zambia Mining Year Book, 1966, p.6. Almost all the companies that held the special grants were owned either by Roan Selection Trust Ltd. or Anglo-American Corporation Ltd.

42. See s. 18, Constitution of Zambia, Laws of Zambia, Appendix 3, 1965 ed.

43. S.2, Mining (Amendment) Act, No.52 of 1968, amended s.80 of the Mining Ordinance, supra and provided that '...there shall be paid to the Engineer in respect of such inspection certificate, a fee equal to three times the fee payable therefore in accordance with second schedule, and such fee shall be in addition to, and not in substitution for, any specified sum of money required to be paid in respect of such inspection certificate under the terms of such prospecting licence or of such special grant.'

areas, or if this failed to bring in new mining partners who might show greater interest in the development of mineral resources but because it also prevented the state from exercising any control over such vital aspects of mining methods as the size of any mining operations and the recovery rate. Most of these have an enormous influence on the longterm benefits to be derived from a nation's mineral resources. The state's role in the development of mineral resources was reduced by this situation to almost excusively a regulatory one — registering locations, recording production, issuing prospecting licences, ensuring that regulations on questions such as safety were carried out, surveying the mineral resources, and preparing comprehensive geological maps for use in prospecting.[44]

There was also an important geological factor which concerned areas open for prospecting — i.e., areas other than those covered by special grants. In these areas the law had become largely irrelevant to the needs of a miner. The requirement of the discovery of a mineral in establishing location rights without meaningful exclusive prospecting rights made it legally impossible to obtain rights or title to many important types of deposits. Location practices are well suited to identifying mineral deposits with surface outcroppings, but these are no longer present in the country. Most prospecting now is for subsurface and difficult mineral occurrences which require a great amount of drilling and time before they can be discovered. This reason alone was enough to make it necessary to bring in a system of mining rights which granted exclusive rights to the prospector over his prospecting area without the requirement of the discovery of valuable minerals, so that ground without surface exposure or other positive evidence of ore or valuable mineral deposits might be held for sufficient time to complete exploration or to secure evidence indicative of its prospective value. Thus in 1969 it was for these reasons that it was necessary to change the mining law of Zambia to eradicate the anomalies inherited from the past, and to give the country a new approach to prospecting and mining activity.

44. To stimulate development United Nations Report recommended the termination of mining grants. See Report of Economic Survey Mission on the Economic Development of Zambia, UN/ECA/FC, 1964 p.48.

OWNERSHIP OF MINERALS AND THE NATURE OF MINING RIGHTS AFTER THE 1969 LEGISLATION

In 1969 the State introduced a new mining law.[1] The Act introduced in 1969 has since been replaced by one enacted in 1976. The two are more or less the same. The new mining law embodies a whole new approach to mining rights in Zambia.

Ownership of Minerals

Theory of Ownership

As already mentioned the property in all minerals within Zambia is vested in the President on behalf of the people of Zambia,[2] and this notwithstanding any right of ownership or otherwise which any person may possess in and to the soil on or under which minerals are found or situated.[3] This enables the state to grant mining rights over private land and saves mining-rights holders from spending huge sums of money on land purchases which would otherwise be necessary.[4] Further, the state's ownership of mineral resources enables it to have complete power over the property within its boundaries, whether mined by the state, by its citizens, or by foreign countries.[5] There is no doubt that government control in this area of natural resources is important in view of the exhaustible nature of mineral wealth. Any country's minerals, once mined

1. See Chapter 329 of the Laws of Zambia and Mines and Minerals Act, No. 32 of 1976.
2. s. 3(1) reads 'All rights of ownership in, of searching for, mining and disposing of, minerals, are hereby vested in the President of the Republic of Zambia'. In most countries the sovereign's interest in the mineral resources is recognised at least to some degree, and in general it has always been recognised that the sovereign may have an overriding interest in essential and irreplaceable resources. In 1607 all the judges of England resolved that the King could mine the salt-petre necessary for the national defence without regard to private interests: 12 Co. Rep. 12; 77 Eng. Rep. 1294. See also Mines and Minerals Act, Chapter 66:01 of the Laws of Botswana, s.2 and also Mining Act, Chapter 306 of tht Laws of Kenya, s.4.
3. s.3(2) reads: 'the provisions of subsection (1) shall have effect notwithstanding any right of ownership or otherwise which any person possess in and to the soil on or under which minerals are found or situated.'
4. There is also the problem that a mine is never co-extensive with the surface. No two orebodies are alike; one may continue to depth but most tend to go horizontally. This may lead to confusion over the ownership of the mine and its exploitation where the owner of land is the owner of the minerals therein.
3. The position could be said to be similar to the Royal Prerogative in some ways: See Attorney-General for New South Wales v. Williams, [1915), A.C. 580.

can never be replenished and stocks of them are fixed even though their extent is not all known. This view is recognised the world over by governments in different ideological blocs and

having widely differing opinions about the role the state should play in the economy and about the rights and obligations of private property that exhaustible resources require special treatment from the government especially where the objectives of government may differ from those of private companies involved in the exploitation of the resources. The objective function of a government may, for example, include considerations which are only incidental to a private company,such as the preservation of a resource for future generations. Also, their ideas on the rate of development may differ.

Ownership by the state, although not specifically provided for, is regarded by the state as inalienable.[6] There is no provision in the mining laws for the alienation of the mineral interest of the state and all interests the state can grant under the mining laws fall short of the state's interest in minerals. Where a granted interest terminates, it reverts to the state.

Owner of land not owner of minerals

The principle of ownership established by section 3 of the Act, is based upon a fundamental distinction between ownership of the surface and that of the sub-soil. Although private property in land is fully recognised in Zambia, ownership of minerals contained in the sub-soil is always vested in the state by virtue of the Act, that is, the owner of land is not the owner of the minerals in it.[7] It is apparent therefore, that a lease of land by the state per se creates no rights whatsoever to minerals therein, and that where the lease of land is coupled with the grant of a mining right or rights conferring on the grantee the rights to win minerals, it is in virtue of such a grant and not the lease of land that the right to win

6. This view of mineral resources has been encouraged by the work of the United Nations Permanent Commission on Sovereignty over Natural Resources which eventually found expression in the General Assembly Resolution 1803 of 1962. This states that 'all countries have the right to exercise permanent sovereignty over their natural resources in the interest of their national development'. ,
7. The state's mineral rights in land it has parted with can be regarded on this point as analogous to that of the owner of land in commAn law who at a fee parts with the land excepting the minerals. See Ramsay v. Blaier (1876), 1 App. Cas. 70.

minerals arises. This is quite apart from the fact that the two interests will be conferred by two different organs of government pursuant to entirely different statutes.[8] This also means that the state may lease land for agricultural and other purposes to one man at the same time as it is the subject of a

mining right to another. In practice most mining rights holders obtain both surface and mining rights, especially when they have reached the stage when they have to take out a mining licence.[9] This distinction is of practical importance. The holder of a mining right cannot for instance sue in trespass for wrongful acts committed solely upon the surface where he is mining on private land since the easements of necessity relating to mining of minerals springing from mining legislation do not amount to a lease of the land.

Legal implications of theory of ownership

The state as owner of the minerals has the exclusive right to decide as to who can and should work the minerals.[10] The exercise of any mining right without its consent is thus a criminal offence punishable by imprisonment or a fine or both.[11] As holder of the title to minerals, it is however arguable that the state is also entitled to maintain all legal and acquitable actions for actual or threatened injury that are accorded to owners of property at common law in addition to its power to invoke the

8. The lease will be granted pursuant to the land tenure laws where as the mining rights will be granted by virtue of the Mines and Minerals Act, Supra. See also Siamer Jack Proprietory Mines Ltd, (1918) A.C. 591 for a discussion of a similar situation in South Africa. In some countries this is expressly provided for, see Mines and Minerals Act of Botswana, supra, s.3. (4) which provides: 'No state grant of land issued subsequent to 22nd December, 1967 shall confer on the grantee any right to prospect for, mine or dispose of minerals found in or on such land'.
9. For instance, Chingola mine holds a mining licence over approximately 11,763 hectares in the Nchanga mining area and 27,287 hectares leasehold surface rights in the same area; Mines Industrial Development Corporation, Zambia Mining Year Book, 1974, p.3.
10. The granting of mining rights as well as the supervision and controlling of related activities are carried out by five government institutions namely, (a) the Minister of Mines, (b) the Chief Mining Engineer, (c) the Director of Geological Survey,

(d) the Chief Inspector of Mines and (e) the Mining Affairs Tribunal. The Minister decides whether to grant or reject application for mining rights and amendment thereto. Below him is the Chief Engineer whose major responsibility is to supervise and regulate the proper and effectual implementations of the provisions of the Mines and Minerals Act. The Chief Inspector of Mines has general responsibility for the safety of mining activities and the Tribunal is the body of last resort in mining disputes. See s.6. (I).

11. S. 124 (f) A mining official when satisfied that an offence has been committed may summarily demand from such person the payment of a fine not exceeding fifty Kwacha. See also t.127 (I) where defendant objects, the state can thenjpro- secute the matter before the court.

criminal sanction mentioned above.[12] But the state can recover damages for trespassing sustained by reason of an invasion of the mineral stratum by someone without a right, and if the trespasser serves and removes minerals, it may recover possession of the minerals (or their value, where the trespasser has already disposed of them).

Damages for wrongful abstraction

Here the problem which arises is, what are the damages recoverable for the wrongful abstraction of minerals? At common law in ordinary land trespass cases in which injury to land results, damages are measured by the difference between the value of the land before injury and its value after injury.[13] If the trespass is a continuing one, damages for the use and occupancy of the land are measured by the reasonable rental value of the land.[14] The application of these rules in the case of the wrongful abstraction of minerals is somewhat difficult.

Minerals are a highly speculative commodity and their value at any time is extremely difficult to determine. Moreover the wrongful removal of minerals may involve great cost to the trespasser in the form of expenses incurred in actual digging of the minerals and may also actually result in an advantage to the owner of the minerals as such action would save him possible prospecting expenses especially if the trespasser were to find a hitherto unknown mineral deposit. Thus, some other method of the amount of damages recoverable for the wrongful removal of minerals and their appropriation must therefore be used.

At common law, these may be assessed according to the value of the minerals at the pit's mouth, without making any allowance for mining expenses, or they may be assessed according to the value when severed, thus allowing for the expenses incurred in mining them. Which rule is adopted depends on the conduct of the person guilty of wrongfully abstracting the minerals and the circumstances of the invasion. The right of the defendant to an allowance depends on whether he acted bona fide

12. At common law as observed in Trinidad Asphalt Ltd. v. Ambord, [1899], A.C. 594, if a stranger enters on another's land and works or abstracts minerals whether by breaking bounds or otherwise, the injured party is entitled to a remedy.

13. Lavender v. Betts [1942], All E.R. 72

14. Hiller v. I.C.I. (Alkali) Ltd., [1936], A.C.I.

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or mala fide. If he acted without fraud or negligence, fairly and honestly, or under a bona fide belief in his possession of a licence, or under the impression that a licence would be granted in his circumstance, he should be allowed the expenses of extracting the minerals in question. If, on the other hand, the abstraction of the minerals was wilful and fraudulent and without mitigating circumstances, or was continued even after knowledge that a licence would not be granted, any allowance should be forfeited.

In the House of Lords in Livingstone v. The Railway Coal Company, [15] where the owner of coal sued for its value after it had been worked and disposed of by the defendant, the action of the defendant was innocent. It had believed that it had the right to work the coal. Then Lord Hatherly stated:

There is no doubt that if a man furtively and in bad faith robs his neighbour of property, and because it is underground is not for some time detected, the Court of Equity in this country will struggle, or I would rather say will assert its authority, to punish, fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement.[16]

His Lordship went to deal with a situation where the abstraction is innocent. He stated the law in these terms:

These principles are that the owner shall be repossessed as far as possible of that which was his property, and that in respect of that which has been destroyed or removed, or sold, disposed of, and which can not therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the other party the whole of that which was his, and will

15. [1880], App. Cas. 25. See also lay or v. Mostyn, (1886), 33 Ch. D.226.

16 Ibid., at p.34.

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at the same time give to the others, in calculating that value, just allowances for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which had by misfortune and inadvertence on both sides and through no fault been done.[17]

It is conceivable, however, that the wrongful mining could make it more difficult or impossible to mine the remaining minerals. This could happen for instance where the defendant has used bad mining techniques resulting in injury to the mine, such as flooding or subsidence. In Ledgon v. Vivian[18] where the defendant

had mined coal without the authority of the owner, a general inquiry was directed as to the damages which the plaintiff sustained by reason of the defendant's workings. It seems that the defendant was directly liable for all consequential injury which may have been caused, whether by reason of the rest of the minerals being rendered unworkable or useless. The damages then included the value of the minerals that could not be mined or the increased cost required to work them. But the position should be otherwise, if the state could not have got them or could only have got them at ruinous expense. In any case the defendant should be allowed to remove fixtures and should their removal endanger the mineral deposits he should be credited with their value, which would be consistent with the basic principle that the objective should always be to compensate the plaintiff and not to punish the defendants.[19]

17. Ibid. See also for the measure of damages if a miner has acted fairly and honestly Wood v. Morewood, (1841) 3 Q.B. 440, when he has acted inadvertently Ledgon v. Vivian, (1871), 6. Ch. D.742, where he has acted without an express authority but with the knowledge of the rightful owner (Ashton v. Stock, (1877), 6 Ch. D. 719) or under a mistake or expectation that a permit would be granted (Trotter v. Maclean, (1879), 13 Ch. D.574) where abstraction of the minerals has been wilful and fraudulent (Morgan v. Powell, (1842), 11 L.J.Q.B. 263) or having begun in the hope that a permit would be given has been continued after knowledge that such permit would not be granted (Trotter v. Maclean, (1879), 13 Ch. D.574).

18. (1871) 6 Ch. D. 742 See also Livingstone v. Railway Coal Company, supra.

19. This is also in line with the practice where abandonment of a mining area takes place. See s.87 (1) which provides 'subject to the provisions of this section, the holder or former holder of a mining right may, within six months of the date of a certificate of abandonment, remove from any area abandoned by him buildings, fixed machinery or other moveable property, including in the case of an abandoned mining area or part thereof, any mineral product which may have been extracted therefrom.'

Categories of Mining Rights

Types of mining rights created

Because the working of minerals requires large amounts of capital, the state would not be able to mine all the minerals in the country even if it wanted to. In the interest of promoting the use of the mineral resources to the maximum desirable extent, the state has therefore brought about a system in which the development of mineral resources by private individuals and

mining companies characteristically take place under a system of licences, as grants from the state.[20] These licences are designed iO enable the maximum flexibility of arrangements for the exploitation of mineral resources and ensure a sufficient retention of sovereign control and title so that the state is at all times assured that the mineral resources are being adequately developed in the interests of the national economy, and that the state is receiving the maximum return from such exploitation. Thus; three categories of mining rights have been granted under the Act.[21] These are a prospecting licence, an exploitation licence and a mining licence.[22] The lowest form of the right is the prospecting licence and the highest form is the mining licence, and each higher right includes the lower. The holder of a mining licence, for example, may explore or prospect within the area to which the licence relates as though he were the holder of an exploration or prospecting licence. The gradation of rights represents progressive stages from searching through evaluation to mining a mineral deposit. In each of these stages the length of time and the amount of money required in terms of mining expenses increases with respect to that required for the preceding stage of mining developments. Each licence constituies a kind of constitution on which the holder of the mining rights bases his work, in the sense that the rights and obligations of the mining-right holders are contained in the document finally issued to the miner.

20. The minerals for which licences may be issued are divided into four major categories (1) building minerals (sand, clay, gravel, laterite, limestone, etc;) (2) industrial minerals (non-metalic minerals such as graphite, gypsum,/nica and talc and sand and clays when used for industrial purposes;) (3) reserved minerals (mineral oils, gas, diamonds, emeralds, gold, the platinum group and radio active minerals) and (4) all other minerals. The licences for building minerals are called permits, see s.69 ibid.

21. The scheme follows a three stage concept of prospecting, exploration and mining which in one form or another is a feature of the pre-1969 legislation.

22. ss. 16, 27 and 44.

I

Who may obtain the licences?

Unlike the position under the earlier legislation, there are several restrictions on who can obtain these rights, aimed at ensuring that these rights do not fall into the hands of speculators and persons unable to utilise them. For example, mining rights cannot be granted to or be held by persons who are under the age of eighteen and are not citizens of Zambia, or

have not been ordinarily residents in Zambia for a period of two years. It cannot be granted to a person who has been declared bankrupt and is still undischarged. In the case of a company, before it can be allowed to obtain a mining right greater than the prospecting licence, it has to be incorporated under the company law of Zambia.[23] A company in liquidation cannot acquire a mining right except where the liquidation is entered into voluntarily for the purposes of reconstruction or amalgamation. If during the currency of any mining right, the holder is adjudged or otherwise declared bankrupt or goes into liquidation, the mining right terminates. The same is true where the holder of a mining right dies. Any document which purports to grant a mining right to any person not entitled to hold such a right is null and void and thus does not operate to pass any mining right.[24] Also mining rights' holders are not required to pay any fees or rents. Rights are therefore acquired free of charge, thus enabling miners to spend any funds they possess on actual mining activities rather than on paying rents and fees.[25]

Prospecting Rights

A person wishing to obtain prospecting rights over any area not closed to prospecting can apply for any number of prospecting licences. In its application a company is required to give the names and nationality of the directors, and the names of any shareholder who is the beneficial

23. s.5. The advantage of local incorporation is that it can to some extent be controlled locally, e.g. it can be wound up, see Baroness Wenlock v. River Dee Co. (1885), 36 Ch. D. 685.

24. s.5. The restrictions on who may mine are widespread in most mining systems. In some there are even requirements pertaining to literacy e.g. s.13 of the Mining Act of Kenya, supra, provides, 'a prospecting licence shall not be granted (ii) to any person who, in the opinion of the Commissioner is unable to understand the provisions of this ordinance'.

25. This is unusual. On the whole most countries demand the payment of rentals. Compare the situation in Kenya, see Mining Regulations, Chapter 132 of the laws of Kenya. In others e.g. Botswana the licence fees are used to stimulate developments. See s.33 (1) of the Mines and minerals act, supra.

owner of more than five per cent of the issued capital. Every applicant for a prospecting right has to show his financial and technical capability. He has to specify the names of the minerals he intends to prospect and give a detailed description of the area over which a licence is sought.[26]

Prospecting licences are issued for specified minerals. Where there are applications for licences for different minerals in

the same or overlapping areas they are considered in the order in which they are received. It is possible that minerals other than the ones specified in the licence are discovered in the process of prospecting, though this is unlikely as most prospecting licence grants include reference to most common minerals.[27] When, however, a holder of an exploration licence discovers any mineral not included in his licence, he is allowed to apply to the state for prospecting rights in respect of such minerals. If another person is already the holder of a prospecting licence covering the mineral concerned, and the area in which it was discovered, the prospecting rights will not be granted without approval of the holder of such a licence.[28] The need to secure the state's approval is based on the assumption that the state owns any minerals which are discoverable by exploration licence holders and discovery does not give the holders of such licences any rights. Ordinarily, as mining officials point out, however, an application in these circumstances is a mere formality and the person who discovers the mineral is more or less sure to be given the mining rights unless somebody else already holds rights in respect to that mineral. Any other policy would be unjust in view of the licence holder's existing expenditure. It is not desirable to limit a prospecting licence to specific groups of minerals, except possibly to exclude such obvious groups as oils and gas from a licence required primarily to search for base minerals, mainly because the methods used in prospecting are generalists in nature and are apt to reveal most mineral occurrences in existence in any area taken out. The explanation of the present situation given by mining officials seems to indicate that a practical problem had to be faced in drafting the Act, in that overlapping licences for different minerals already existed such as the diamond right of De Beers. But as noted above, many mining right holders have got round this problem by applying for every conceivable mineral in their licences.

26. s.17.

27. See, e.g., the licence to Roan Consolidated Mines Ltd., which names up to 25 minerals. Licence No. P.L. 122 issued to the company on 5 May 1975. Register of Mining Titles, (Lusaka).

28. ss. 34 and 24.

ing for every conceivable mineral in their licences.

There is no limitation as to the size of the area which one can be granted, which is a significant policy decision. Without other safeguards, it could lead to the sort of monopoly of large areas as resulted under the previous legislation. However, the likelihood of this occurring is made somewhat remote in practice

in that the areas a person holding an exploration licence can hold are limited partly by the minimum expenditure obligations, and more effectively by the programme of intended operations. For example, an application for an area of several thousand square kilometres over which it is intended to carry out an airborne geophysical survey would not be unreasonable, but it would probably be considered too large an area if the proposed programme did not include as an initial phase a previously untried or newly modified reconnaissance approach of some sort. It must also be borne in mind that every applicant for a prospecting licence has to prove that he has the financial resources and technical staff available to carry out the proposed programme of operation effectively. This practical requirement effectively limits the area a prospector can take out.

In theory, the prospecting licence does not confer an exclusive right to prospect in the area of which it is granted, i.e., the state has always the power to grant licences over existing areas. This fact that prospecting licences are not exclusive may of course cause worry to an investor who would like to do fairly concentrated prospecting over a given area and can give rise to the problem of simultaneous applications for the same exploration areas later. Nonetheless, the practice of the mining officials makes this very unlikely, since they do not as a matter of policy grant prospecting licences over areas for which licences have already been taken out. Besides the grant of a prospecting licence is discretionary following compliance by an applicant with all the preliminary steps required by the Act. The mere fact of such compliance does not in any way give an inchoate right to a licence.[29] Once a prospecting licence has been issued, however, the state is committed to issuing subsequent exploration

29. Presumably an aggrieved party can challenge the rejection of his licence should it be based on reason» other than those provided for in the mining laws by applying to the High Court for Certioran. See generally Patel v. A.G. Selected judgements of Zambia No. 1 of 1968; and Sotinadis v. Patel, 1960, R. A N. 280.

and mining licences. Both section 30 (1) and section 48 (1) being the provisions relating to the grant of these licences state that the state 'shall’ and not 'may’ grant the licences, providing of course always that the applicant has discharged his obligations, and can show reasonable evidence of mineralisation in the area applied for and proposes an acceptable plan for the next stage.[30]

This concept is regarded as absolutely essential by most

mining investors in order to encourage people to prospect. If it were otherwise, there could be no justification or incentive for a mining right holder to spend large sums of money which prospecting require s if he were not sure of getting the later licences and thereby have an opportunity to recover that expenditure.

A prospecting licence entitles the holder to enter freely upon the land specified in his licence to search for minerals.[31] The activities of a prospector usually involve the mapping of geological formations, mineralisations, and structural conditions as seen or interpreted in the field. The mapping may be generalised or may be very detailed. Surface geological mapping is usually accompanied by the use of topographic aerial maps. After making the geological maps, the geologists prepare geological cross-sections, make structural analyses, and otherwise interpret the information using a variety of techniques. Drilling is employed in field geological prospecting to obtain sub-surface information which is not otherwise available. Laboratory samples are made of various samples collected in the field. Should the holder of a prospecting licence discover mineral occurrences, he would then be ready to obtain the second stage of the mining rights.

Exploration Licence

A holder of a prospecting licence may, not later than two months before the expiration of his licence, apply for and obtain an exploration licence for any area within his prospecting area and in respect of any minerals covered by his licence.[32] He may, if he so wishes, apply directly for a mining licence.[33] The intention is to get the prospecting right holder to

30. In this way the state has limited its discretion in the grant or withholding of exploration and mining licences. When considering applications for prospecting licences or other mining rights, the Minister of Mines is advised by his professional staff, particularly the Director of Geological Survey.

31. s.25

32. s.27

■>3. s.45

the mining stage as soon as possible. Perhaps it is for this reason that an exploration licence is limited to an area of ten square kilometres in size. This also ensures that very large areas cannot be held for long periods with all the work confined to a small area and besides this would lead to the withdrawal from competitive prospecting and exploration of more land than an individual can reasonably explore. If, however, geological evidence indicates that a more extensive ore body may exist, he may apply for an extension to his area which the mining

officials are certain to grant him.

Exploration licences are exclusive in respect of the areas for which they are granted. Their exclusiveness can be implied from the fact that the Act in section 19 does not permit granting of prospecting licences with respect to areas covered by exploration licences and the same Act in section 31 provides against the granting of exploration rights which overlap mining areas. This exclusiveness is considered essential in exploration activities by mining investors as the holder of such a right needs a lot of time and confidentiality. Much of this time is spent in carrying out laboratory tests and making the necessary drilling to enable him to evaluate the ore body and to determine the complex factors which will affect his working. This is a very important stage in mineral investigation as it will lead to a decision whether to work a mineral deposit or not. The need for time and exclusiveness is currently becoming greater, because of the necessity for large-volume operations, and for the discovery of deep-lying deposits not usually out-cropping at or near the surface since most such deposits have already been discovered.

As already noted, neither exploration nor prospecting licences authorise their holder to exploit minerals, but because they can remove ore for the purpose of having it analysed and determing its value or conducting technological tests including tests on bulk samples,[34] they do accumulate large amounts of ore. The mining laws do not, however, provide for what eventually happens to the ore particularly in cases where no further work goes on. In practice the state, the owner of the minerals, does not have anywhere to store it. It is, however, necessary to discourage holders of prospecting licences and exploration licences from engaging in mining as this may encourage bad mining methods. In this

34. 1.40 (a). In fact it is an offence to do so, see s. 125.

regard the present situation seems to be unsatisfactory as it causes storage problems for most of the mining-right holders, who have ended up building huge ore sheds because the government does not collect the ore. It is suggested that provided the state is satisfied that the holder of a mining right has been conducting only such work as is reasonably necessary to enable him to test the mineral bearing qualities of the area, it should authorise him to dispose of the minerals on payment of the prescribed mineral taxes. The state should, however, retain some of the samples in order to keep a record of the work that has been done in the area.

Unlike the situation under the pre-1969 legislation, now mining rights may not be transferred without the prior approval

of the state.[35] Mining rights are valuable assets to their holders, and can be a source of considerable revenue in the hands of speculators, without actually benefiting the economy by mining development. The requirement of statement approval is intended to prevent the augmentation of mining companies by the sale and resale of mining rights. So far there has not been any resale of mining rights since the introduction of this new legislation. Another purpose for the evidence requested is to enable the state to ensure that the transferees of the mining rights meet the requirements pertaining to financial and technical ability already discussed. If this were not the case, the policy of the state that only people with adequate financial resources should be allowed to mine would definitely be defeated.

Mining Licence

The last category of the mining rights created under the new legal regime is the mining licence. The holder of any of the previous rights may obtain a mining licence, for any area or areas within his prospecting or exploration areas as the case may be and in respect of any mineral covered by his licence.[36] The area a mining licence can cover is restricted and is not allowed to exceed the estimated area of the mineral deposit, though it may include such additional areas as may reasonably be required for protection of the miner's machinery. Like the exploration licence, the mining licence is exclusive. It conveys on the holder the right to mine, that is,

35. s.39 (1)
36. s.45

a right to carry out the whole co-ordinated operation to obtain an industrial utilisation of a deposit from the extraction of the useful minerals to the processing that may be necessary. Like the lesser mining rights, and for the same reasons, a mining licence cannot be transferred without the approval of the state.

The Nature of Interest Created by a Mining Right

The interest created

It is important to have a clear understanding of the character of a mining right conferred by the mining licence in order to appreciate the degree of control the state exercises over mining rights in Zambia. In this respect, the character of interest transferred in any mining transaction throughout the world depends not upon the name given to the instrument, for mining instruments bear several names,[37] but upon the intention of the state as expressed in the mining legislation taken as a whole. From this observation, a mining right gives to its holder an exclusive right to prospect, exploit, process, and utilise the

minerals within the boundaries of his licence for a term of years. This right is renewable at the end of such a term of years, on condition that the holder has observed and fulfilled all obligations demanded by the state through the mining laws. It is apparent from practice and statute that the grant of exclusive mining rights includes possession of two separate interests or estates: the surface covered by the licence, and the minerals within the bounds of that licence. But the possessory interests in a mining licence do not fall within the standard classification of property interests under the common law. Thus between the mining-right holders and all persons other than the state, the mining-right holder is treated as possessing all the attributes of a free title, so long as the requirements of the law with respect to continued development are satisfied and subject to the statutory limitations discussed later in this chapter. The lands embraced within a mining licence are usually segregated from the public lands and are not susceptible to intrusion by third parties under mining rights en

37. e.g. they were called permits under the pre-1969 legislation and are called leases under the Botswana legislation.

tries or otherwise. They are, however, intruded upon by the government officers for purposes of exercising their regulatory powers[38] and by a private owner of the land where mining operations are taking place on his land. With the mining licence the holder of it is given the right, as well as the privilege, to go upon mineralised lands and sever minerals specified in the licence and the power by severence to acquire title to the minerals and dispose of them.

The mining right originates as a grant of a specific right from the state upon compliance with certain conditions. The tenure on which the mining licence holder holds his rights depends entirely on the statute. Generally, there is no consensus between the government and a mining licence holder. First, because the right of mining for and disposal of all minerals is by statute vested in the state. Second, the terms under which the licence is held and their interpretation, the rights and their scope, and obligations reciprocally of the holder of the mining licence and the government are absolutely fixed by the Act. Third, with respect of the land covered by his mining licence, the miner only enjoys the use of the surface of his ground for the purposes subsidiary to the main object of his tenure which is the extraction of minerals. The title is split, in that the legal title to both minerals and the land is retained in the state as owner while the use of land and title after the severence of minerals passes to the holder of the

mining licence. All mining rights are subject to the penetration of properly asserted extra-lateral rights into and within the physical boundaries of the subject matter of the right.

However, the nature of the relationship created between the state and the mining-right holder has not been discussed judicially in Zambia. But it has been discussed in a number of South African cases, a jurisdiction which was as shown, largely influential in shaping the Zambia mining laws and where the state owns the right to mine and adopts the practice of awarding mining licences. There is such a discussion of the relationship as in some detail in Neebe v. Registrar of Mining Rights.[39] Neebe applied for an order compelling the Registrar of Mining Rights to pass and register a transfer of certain prospecting claims as property rights. The Court rejected such an interpretation, concluding that the nature of a mining licence holder is one sui generis, specially created by

38. s.62 for instance authorises the Chief Inspector of Mines to inspect a mine under certain circumstances.

39. (1902), T.S.65.

statute, thus the incidents of such tenure must be gathered from the terms of the statutes which establish it.

In the Cape Province, where the ownership of diamonds is in the state and the state only grants mining rights, the Supreme Court of the Province has never decided that claims in a diamond mine upon Cape Town land are property rights. In the matter of the South African Loan and Mortgage Agency v. Cape of Good Hope Bank,[40] it was distinctly stated by the Court that the claim licences in such diamond mines were in no sense of the word property rights. It added that the mining licence holder takes no title to the minerals unsevered but only the power to acquire title by severing minerals from the title when they have become personal property and that therefore he never owns the minerals as long as they remain underground. In another South African case, Rocher v. Registrar of Deeds,[41] three people decided to divide land they owned jointly, but they intended to hold the mineral rights in common. When the parties applied to the Registrar of Lands and Deeds to register the deeds of transfer, he refused on the grounds that a separate deed was required for the minerals as the mineral rights were personal rights. The court commented that the exact nature of these rights was a matter of some difficulty and added that 'they confer the right to go on the soil of another person and extract the minerals for one's own benefit, but it is clear that until the minerals are extracted the owner of the surface remains the owner of the minerals.'[42]

The Privy Council had occasion to consider the nature of a

mining right in a case that arose in the state of Victoria, in Australia. In Osborne v. Morgan and Others,[43] mining rights had been issued pursuant to the Gold Field Act, 1874, which is based on the same principle of ownership as the Zambian mining laws. The Judicial Committee held that 'Miners' Rights' are documents in the nature of a licence which are issued by the Warden under the authority of the Governor to any person applying for

40. 9 S.C.182.

41. (1911), T.P.311.

42. Ibid., at p. 312; see also Lazarus and Jackson v. Wessels and Others, (1903), T.P.D. 499, where the court confessed to the same difficulty and commented, 'I must confess to having — a difficulty which pressed me during the argument — in finding an appropriate jurisdiction in which to place this right. Rights ofthat nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of rcil rights discussed by commentators' per Wessels, J., at p.510.

43. (1888), 13 App. Cas. 227. See also Burke v. Wright, (1882), 3 N.W.W.L.R. 145.

them. The Judicial Committee further observed that the document, of itself, created no interest in any part of the gold, either legal or equitable.

In Zambia, it is easy to confuse the position of the holder of a mining right with that of the holder at common law of a profit a prendre, which confers a right to mine coupled with the right to carry away the subject matter of the interest. This right like the Zambian mining right, does not confer an estate or interest in the soil or mine minerals before they are actually severed. There are, however, some differences between them. In the first instance, there is no statutory grant in gross. The duration of a profit a prendre and of the right arising from a mineral's licence are different. The former is an incorporeal hereditament, the latter are rights of known and short duration. There is no dominant tenement and subservient interest. Hence the ownership of minerals and land are distinct. Thus the Zambian right is more like a bare common law licence to mine which also only gives permission to mine, and gives property in such minerals as the licence holder holds. It is also like most licences at common law generally: as the Court stated in Robinson v. Blundell,

> a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day for his own use, are licences as to the hunting and cutting down a tree. And a dispensation or licence properly passeth no interest, nor transfers prospecting

in any thing but only makes an action lawful which without it had been unlawful.[44]

The rights of the holder of a licence in minerals are in Zambia analogous to those of the purchaser of standing timber, who if his permit is in proper form, gets a possessory interest in land but in principle not title to the trees until they are severed.

Because of their dependence on the mining statutes, the exercise of these rights can be restrained or new obligations imposed on them notwithstanding the provisions or the rules in existence when the mining

44. (1867), Mac N.Z. 683; See also R. v. Fayle; (1872), 27 L.T. 64 and Lowmoor v. S.anley, (1875), 33 L.T.436.

right was granted, such as the move now to increase the levels of obligations to take into account the effects of inflation. As long as there is no denial of justice, the state can therefore enact legislation which creates new obligations, subject of course to section 18 of the Constitution which forbids confiscatory legislation which does not include the provision of compensation. Changes which affect existing mining right holders adversely are unlikely, however, as this might result in the intimidation of mining investors. In this regard mining investment is likely to be attracted in a situation in which a miners' ability to forecast the nature and extent of his licence obligations would be impaired. Where rules need to be changed, it would appear the state will follow the pattern established in 1969 and treat existing licence holders as a separate class and arrange an amicable settlement with them. In that year when all preexisting prospecting and mining rights were extinguished by the introduction of the new system of mining rights, provision was made for the immediate granting of mining licences to protect the producing mines.

Mining rights holders and third parties

The nature of the relationship created between the state and the holder of mining rights has consequences in the area of the miner's relation with third parties. An example of this is the situation in which a third party other than the state interferes with the rights of a mining right holder. The interference may take several forms. It may be an unauthorised entry on mining ground, either upon or beneath the surface and in the case of extra-lateral rights under the general mining laws may be beyond the boundaries of the mining areas. Apart from the obvious cases of disputed boundaries, there may be a case where a third party deliberately and unlawfully extracts minerals. Another instance of harmful conduct which may arise on private land is where minerals are removed by the surface owner. Unfortunately, few

cases have reached the courts. The problems have, however, arisen. Thus, the Chief Mining Engineer in Nkumbula v. Mines Industrial Development Corporation[45] dealt with a situation where the plaintiff alleged that the defendant mined and removed minerals in his exploration area, constructed roads, and prospected over his prospecting area.

43. Chief Mining Engineer's file on disputes at Ministry of Mines and Industry, Lusaka.

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The remedies of a mining-right holder for wrongful interference with his rights by the owner of the surface or by a stranger are to be determined according to rules of law in no way peculiar to the miner. Though he has no proprietary interest in the surface, it is burdened in his favour with certain rights for the use of such portions as will enable him to exercise his exclusive privilege to minerals. Without the ownership of the minerals in the soil, the holder of a mining right cannot recover the value of the minerals wrongfully severed, for he never had title to the minerals. The right to recover their value is in the state. Undoubtedly, the act of the defendant is an infringement of the rights of the mining-right holder to exercise his mining rights. The injury, however, falls upon the state whose property has been taken. In any case the state having remained owner of the property, can protect its own ownership against injury. The mining-right holder too does not become obligated to protect minerals from trespassers and is in no manner made their guardian. The mining right holder can, however, sue for the invasion of his exclusive right. At common law when an exclusive licence is granted no one can interfere with the operations of the licence nor deprive the holder of the benefits of his licence.[46] In Fitzgerald v. Fir bank,[41] where a deed granted to the plaintiff for a term of years fishing rights in a defined part of a river, and the defendant wrongfully discharged into the stream water loaded with sediment, the effect of which was to drive away the fish and injure breeding; the Court upheld the plaintiff's claim for damages and ruled that the plaintiff had a right of action against any one who wrongfully did any act by which the enjoyment of the rights given to him by the deed was adversely affected. Lord Lindley further stated that the action rests absolutely on a man's right not necessarily to property, but to something which is valuable and is granted to him; whatever it is called if a stranger comes and interferes with or trespasses on his right, that ought to constitute and does constitute a right of action. He bases his contingent right in the minerals excavated by the trespasser and his remedy is the common law action requiring the trespasser to account.[48] This seems to have been accepted in A kumbula v.

Mining Industrial Development Corporation,[49] in which the Chief Mining Engineer assessed damages as the actual

46. Newby v. Harrison, (1861), 4 L.T. 397.
47. (1897), 2 Ch. 96.
48. Wright v. Pitt, (1871), 25 L.T. 13.
49. Supra.

takings from the minerals, less the costs of extraction, when the case was before him on the preliminary point of damages. But a mining right holder can maintain an action in conversion to recover any minerals actually removed from his mining premises and which are already severed from the ground, since title to minerals removed would have already been vested in him. Where the wrongful conduct is wholly confined to the surface estate, the mining right holder has a possessory interest in the surface, to the extent at least of such part of the surface as he is actually occupying.[50] On this principle, a mining right holder can also sue for trespass to minerals still unworked but covered by his licence. In this case his argument would be that the minerals are in his possession even though still unsevered, as was held in Greenwood Lumber v. Phillips,[51] where the plaintiff recovered for trespass to logs of wood whose ownership was in the Crown but whose possession was in him.

Obligations of Holders of Mining Rights

Purposes of the requirements

In order to ensure the discovery of mineral deposits and their early and rapid development and to avoid the earlier situation in which mining right holders blocked a considerable acreage of mineral land for speculative purposes, thus preventing others from occupying and developing the minerals, the state has introduced a system of obligations on the mining-right holders. These obligations also have the effect of protecting government revenue interests, in that the amount of taxes and their payment are determined by the extent and promptness of the mining operations of the holder of the mining rights and his marketing of the minerals.

It may be argued that this last reason is not important because the interests of the miner and the state in the development of a mineral deposit are the same. Yet no proof needs to be offered, beyond that in the previous chapter, of the fact that their interests in this respect are frequently conflicting. Some of the obligations on the mining right holders.

50. See Hawkins v. Rutter, (1892), 1 Q.B. 668, which supports this view.
51. [1904], A.C. 405.

however, are designed to ensure that mining proceeds with minimum waste of the mineral resources and also with minimum disturbance to the environment. Here the requirements are justified on the basis of the need to protect state property. Obligations calculated to influence the rate of development Mining laws have evolved a number of approaches to attain the above objectives. One is to restrict the exploration licence to a relatively short period, with few renewals while another is a stipulation for diligence in the form of stated work requirements, or minimum expenditure. The payment of advance royalties in fixed amounts to be credited against the state's earned royalties when the mine goes into production has been used. Also a system whereby any miner who does not show production during the preceding year of a quantity of minerals in adequate ratio to the mineral reserves covered by the licence pays a surtax, doubled annually as long as he fails to exploit his minerals.[52] Another is the requirement that fixed percentages of the original area be relinquished on each renewal,[53] or a charge of surtax, at the rate per unit of area increasing with the number of such units of area held and increasing every year. This is a reference to a sliding scale which is fixed in the original agreement, not a subsequently imposed increase in rentals or royalty rates.[54]

However, there is a particular problem where the state uses the withdrawal of area as a means of attaining a minimum level of activity. It may encourage bad mining methods and unnecessary damage to the environment, as it may encourage the mining right holder to prospect or mine quickly. It may also lead to inefficient prospecting, in that the mining-right holders might be forced to cover as much ground as possible, and not as efficiently as proper mining methods would dictate.

52. This for instance is the position in Paraguay, See Law 16; 066.

53. This practice appears to be prevalent in Australian mining agreements, e.g. Iron Ore (Dampier Mining Company Ltd. Agreement) No. 78, Statutes of Western Australia No. 18, Elizabeth II. This is combined with a requirement that the Company makes available a specified amount of iron ore per year.

54. For instance s.33 (1) of the Mines and Minerals Act of Botswana, Supra, imposes licence fees but in s.33 (2) provides that any fee paid under subsection (1) shall be refunded to the holder of the mining right by the Commissioner if such holder applies for such refund and approves to the satisfaction of the Commissioner that he has during any six months period in respect of which the refund is claimed carried out work on the mining area in the amount prescribed

in s.34.

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The solution adopted under the Act embodies four of the above approaches. Thus, for instance, a prospecting licence is valid for a maximum period of four years and there is no right of renewal.[55] Mining officials suggest that if you cannot find minerals in four years then you are not good enough at prospecting. The holder of a licence about to expire may, however, apply for a new licence over the whole or any part of his original area, but would then have to compete with any other interested parties.

Four years is generally considered long enough by most mining rights holders for the investigation of a normal mineral area. Problems have, however, arisen in rural parts of the country which are accessible only at certain times of the year, the effect of which is to considerably shorten the period available. The state so far has granted new licences to those who have found four years inadequate, such as in the case of the Kalengwa North licence area. The other area about which there is a consensus of opinion that the period of four years may not be adequate is the Western Province of Zambia, an area where the geology of the country has not been investigated so that a prospecting licence holder would have to do a lot of preliminary work which his counterpart, say, on the Copperbelt, would not. To appreciate this point it has to be realised that ordinarily before prospecting — crews are sent into the field in search for ore bodies, the areas to be investigated are usually selected and outlined from a study of geological maps. That way a great deal of information can be gathered from a detailed study of these maps.[56] Another added problem regarding Western Province is that most of the rocks are covered by sand and therefore, quite apart from the increased costs, it takes longer since one has to remove the sand before drilling.

An exploration licence is valid for up to three years with a right of renewal for a further two years, provided always that the progress achieved is satisfactory and the programme for future operations is adequate.[57] The state, it seems will almost certainly in special circumstances extend the period of renewal for a period longer than two years.

55. s. 18 and 22.

56. These maps are provided by the Geological Survey Department, whose main task under the Act is to provide a continuous updated inventory of Zambia's potential mineral resources and the background information required to explore for and develop these resources. See ss.10 and 14.

57. ss. 27 and 33 (1).

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A mining licence is granted for a maximum period of twenty-five years and may be renewed for a similar period,[58] provided that the miner can show that ore reserves remain to be exploited and submits a satisfactory programme for future operations and minimum expenditure obligations. So far all the mining licences are still under twenty-five years old and therefore the state has not had occasion to consider their renewal.

The periods of which mining rights are gtanted vary tremendously throughout the world[59] although the length of time is of the utmost importance to most mining-right holders. To be economically justifiable a mineral deposit's prospective profits must be sufficient to pay back the capital investment within a reasonable time, in addition to the normal rewards associated with the risk, and this partly depends on how long one will be allowed to mine. Opening and developing a mine is, at best, a costly business. Shaft sinking costs something like K1,000 per foot for a modest three-compartment shaft, while drilling costs run to the order of K200 per foot. Consequently, any mine layout entails a great deal of expenditure. In general, twenty-five years is considered long enough to recoup one's investment in mining by most mining investors. Opening and developing a mine takes an average of about five years, which leaves the mining right holder with twenty years of operation. The state will also renew a mining licence once it expires, as under on his operations in a manner required by the Act.[60] In the final analysis, in practice the life of a mining licence will naturally depend on the size of the ore-body and on its physical characteristics such as its quality and will normally continue until such time as the mimerals which are the subject of the licence and which can be profitably mined are exhausted.
The holder of a prospecting licence is required to commence prospecting operations within three months of the date of the issue of the licence. But where the state is satisfied that an initial period is required to make

58. s.Sl (1)

59. The most generous seems to be Sierra Leone which grants 99 years. See Minerals Regulations, Chapter 196, s.31.

60. s.Sl (1) reads 'Subject to the provisions of this Act a mining licence shall be valid for the period, not exceeding twenty five years, specified in the licence'. A fixed term of a Mining right would be bad business for the mining investor. For about the middle of the right if the investor wanted to raise money for investment, he would not be able to issue bonds easily for lack of adequate security.

(he necessary preparations before prospecting operations, a date is specified in the licence which in no way can be more than six

months after the date of issue of the licence.[61] He has to carry out prospecting operations in accordance with the programme of prospecting operations. He must expend in direct expenditure not less than the amount which would result if a sum of K50 per 2.6 square Kilometres or part thereof, of the prospecting area, were expended annually, during the currency of the licence.[62] Also, he must submit reports about his operations to the Chief Mining Engineer.

Similarly, the holder of an exploration licence has certain obligations. He is required to commence his operations within six months of the date of issue of the licence.[63] He is obliged to carry on exploration operations in accordance with the programme of exploration operations. He has to expend in direct expenditure during the period of the initial grant of the licence a total of not less than the amounts of Four thousand Five hundred Kwacha. During any period of renewal of the exploration licence, the exploration licence holder is obliged to expend not less than the amount which would result if a sum of three thousand eight hundred Kwacha per 2.6 sqaure Kilometres, or part thereof, of the exploration area, were expended annually during the period of renewal.[64]

The minimum expenditure obligations in both the case of prospecting and exploration are direct expenditures and have been set at a low level as far as prospecting is concerned in order to encourage the use of new reconnissance techniques over extensive areas. The state at the moment insists that the amounts stipulated must be spent in the year they are required. A prospecting right holder, for instance, who spends K10 per 2.6 square Kilometres per year in the first year and K60 per 2.6 square Kilometres per year in the second year is considered in breach of his obligations by the Mining Officials, if he spends K20 in the third year. It could be submitted that this is unnecessary rigidity on the part of the state, for, if it took the average as a guide to when there has been a breach, the same total level of expenditure would be achieved. And it also runs counter to mining experience, for although in the earlier years much expenditure is necessary because of the extensive drilling that has

61. s.26.
62. s.26.
63. s.37.
64. Ibid.

to be carried on, in the later years laboratory tests do not cost much. The taking of an average as a guide would also be advantageous to people who hold licences in the remote areas of the country where during the rainy season the roads are

impassable and work has to be suspended, such as is the case in the West Lunga river licence area. Already strong emphasis is placed, by mining officials, on the requirement that any applicant for any form of mining right must submit a programme of his intended operations. This programme is one of the more important criteria used in assessing applications for mining rights and in effect the issue of a licence means that the programme is approved especially that such programmes are examined, item by item, by mining officials. The work contemplated by the state and thus acceptable for inclusion in the programme is such as bears some direct relationship to the investigation and development of minerals in general and which tends to facilitate the extraction or investigation of ores in the licence areas. In the case of the actual labour to be performed in mining or improvements in the way of hoisting machinery, there is no difficulty as the relationship of the same to mining activities is direct and apparent. The same could be said about airborne surveys investigating mineral occurrences where there can be no problem or in the case of laboratory work directly connected with the mining operations upon the licence area. But such work includes less direct expenses such as that on the construction of roads for access to licence areas, to facilitate mining activities.[65] Thus the chief objection to the requirement of a minimum amount of work, as raised by some investors is that the mining industry is particularly susceptible to fluctuating prices. When the price of the product from a particular mine justifies operations, the mine will be developed or worked regardless of the minimum work requirement. On the other hand, during periods of deflated prices, the minimum work requirement merely adds to the economic woes of the already troubled mining right holder. However, even if this objection were valid, it would be so only to mining right holders who are actually engaged in mining. It would not, therefore, be applicable to those persons who acquire mining properties for speculative purposes and who are the target of this legislation. It is nonetheless important, in view of this possibility, to require levels of ex

65. Development work is not clearly spelt out in the Mines and Minerals Act.

expenditure which are easily attainable given the nature of mining activities, which the Zambian levels seem to be. In practice the minimum levels of expenditure are far exceeded by most mining right holders. There are extreme cases such as when in the West Lunga river licence area Roan Consolidated Mines Ltd., mounted helicopter operations as the area could only be reached by air. The effort of getting there was enough to cover

all needed expenditure obligations.

A useful programme of prospecting, it should be noted, involves a general reconnaissance which includes a search for previously documented mineral occurrences, the carrying of sediment sampling in appropriate areas at short intervals of say 200 metres, the geological mapping of the area, and a detailed examination of past workings, if any. In the second year, a more detailed programme of geological mapping is usually initiated, and in addition the overall structural relationship of rocks in areas of interest will be determined especially as they may relate to mineral occurrences and a lot of pitting and trenching is carried out in target areas. In the third year, the prospecting right holder will invariably require detailed pitting, trenching, and sampling. Such a programme will on the average require thousands of Kwacha per year in terms of transport and personnel costs. At the very least, money is required for the remuneration of geologists, for machinery and for laboratory work.[66]

An exploration programme of work also requires invariably up to three stages. The first will usually involve a detailed geological survey and rock sampling, a detailed ground survey of the anomalous areas exposed by prospecting and a systematic wagon or diamond drilling campaign. Drilling costs are extremely high. Though they vary widely depending upon the nearness or remoteness of the drilling location, the hardness of the work, depth of overburden and other factors, they are on the average in the order of K200 per metre. The second stage would involve exploration ore drilling to provide mineralogical parameters of the mineralisation while the last stage would involve an intensification of the first stage. Such a programme will require the same inputs as in the

66. See for instance the estimated expenditure of Mines Industrial Development Corporation Ltd; in one of their licences was; 1st year K9.SOO, 2nd year K 11,900, 3rd year K23.800. Licence P.L. 67 of 9 August, 1972. Registrar of Mining Rights, Lusaka.

case of prospecting already discussed.[67] Consequently, the levels of expenditure specified will not cause hardship to a genuine miner, and in any case, should that happen, the obligation may be waived provided the state is satisfied that the mining-right holder has been prevented from meeting the obligations by reasons beyond his control.[68] Admittedly as most mining investors justifiably complain, minimum expenditure obligations are a clumsy way of trying to ensure that prospecting operations proceed at an acceptable level as these entail much paper work, and expenditure returns can in any case be inflated by including

unreasonable charges, especially where the mining enforcement officers do not have a reasonable understanding of basic principles of mining. This has been mitigated in Zambia in that so far the calibre of the men to whom the returns are made has been high.

A holder of a mining right is required to commence production on or before the date fixed in the programme of development and mining operations as the date by which he intends to work for profit, a date in effect approved by mining officials. He is also required to develop and mine the mineral deposit covered by his licence in accordance with the programme of development and mining operations as required in terms of section 54 of the Act. A typical programme invariably includes such details as estimated tonnes of ore to be mined and milled, planned mine development and exploratory drilling, estimated mineral production and operating costs, capital projects, mining methods, and estimated staff and labour requirements. There are, of course wide variations in mining programmes reflecting the wide variations in the types of mines. They range all the way from small prospects which may have only a single level with lateral workings, such as Hippo mine in Mumbwa, through the deep and complex workings of mines that have been in production for many years such as Mufulira.

It has already been mentioned that a mining right holder is obliged to submit reports and information about his activities. The contents of such reports are confidential so long as the relevant licence remains in force and can be published or communicated only if and to a person consented

67. See Exploration Programme for Baluba Mining Area; 1st year K10.000, 2nd year K20.000 and 3rd year K30.800. Licence E.L. 41, Registrar of Mining Rights, Lusaka.

68. If it were not so then the obligations would be unduly restrictive on small mines. Mines Industrial Development Corporation has several small mines e.g. tin deposits scattered over an area of 31.2 Kilometres in Southern Province. Individually each of these deposits will contain no more than 3-5 tonnes of tin worth about K 15,000, to justify the present levels of expenditure one would have to spend on 20 deposits.

to by the holder of the licence.[69] The reports are used as another way of checking the activities of mining right holders, but are disliked by most mining companies on the grounds that they are time-consuming, but no better alternative has been suggested.[70] It seems, however, that they are resented partly because under the pre-1969 legislation no such requirement existed, so that as such most mining investors, particularly the

ones that operated in the country before 1969, tend to feel that this requirement is there largely because the state does not trust them.

There is, however, a problem where the mining right holder gives up any of his rights, particularly the lesser rights of prospecting and exploration. The problem is more obvious where a mineral deposit has been discovered but as a result of economic or other factors the holder is not in a position to start mining. The practice at the moment is that the state gives the information to the new company that takes out a mining right covering the area. There are two problems here. First, the new mining right holder gets an unfair advantage in that he takes free of charge information which cost the previous holder of the mining right several thousands of Kwacha and on which he depends a great deal. This may encourage the previous holder to give less than full information. On the other hand, if the state did not pass on this information to the new mining right holder, there would be an unnecessary delay in mineral exploration which would run counter to the country's interest in having resources discovered and utilised. The State cannot at the same time allow the holder to hang on to the area until the time is in his judgement conducive for its development, as this again would delay mineral development. It could be submitted that the way out may be for the new company to pay a small fee towards the cost of that information. It is only fair that a successful searcher should be compensated for the benefits accrued through his effort, acumen, and powers of observation and deduction. This could also act as an incentive to the previous holders of mining rights to give fuller information.

69. s.54.

70. But the complaint appears to be genuine when it concerns a small mine in that the preparation of reports needs a qualified surveyor and engineer, which is not an optimal allocation of its resources. Mines Industrial Development Corporation Ltd. has an Engineer who spends SO*[7]· of his time filling in forms.

Obligations relating to manner of operation

Wasteful mining practices

In addition to the requirements that are calculated to influence the rate of development, there are requirements within the mining laws which ensure that the activity of mining goes on in an acceptable manner as well. The objectives of the two are somewhat interrelated in that development at any cost can result in unnecessarily low recovery rates and also in damage to the environment, both of which can offset any benefit due from the development of minerals. Thus, a mining-licence holder is

obliged to work the mineral subject to his licence in accordance with accepted mining standards by avoiding wasteful mining and metallurgical practices.[71] It is an express duty to conduct mining operations with reasonable care and diligence. When the state mining officials consider that a miner is using wasteful practices, they notify him accordingly and require him to show cause why he should not cease to use such practices. In this respect three types of disputes most commonly arise. These are: claims by the state that the operations are being carelessly carried out in such a way that they are unnecessarily causing damage to the environment; claims of premature abandonment of mines; claims that the miner is failing to maximise the recovery from the mine by using outdated methods of mining rather than advanced production techniques.[72] Such an obligation on the miner respecting mining methods is like the common law convenant in mining lease to work minerals in a proper and workmanlike manner.[73] That proper mining methods be used is of the utmost importance to the state and the requirement is vigorously enforced by the mining officials. In benefit terms, it ensures that minerals are mined economically and at maximum recovery rates and that mine workings are carried on with minimum disruption to the en- viroment and danger to other human activities.

71. s. 55.

72. The state, for instance claimed the Roan Consolidated Mines Ltd. had breached this duty when the Company continued to use a method which had been found to cause too much dilution of ores in other mines on the Copperbelt, at the Baluba mine. See letter from Chief Mining Engineer to the Managing Director of Rokana Consolidated Mines Ltd., 19 April, 1974, File No. 17.

73. Except that the common law duty is contractual and also more strict as miners can not be allowed to escape performance on the ground that the minerals are difficult to get. See Clifford v. Watts, (1879), L.R. 5 C.P. 577.

Consolidation and problems common to it

The state's interest in making sure that proper mining methods are used is carried further in section 87 of the Act. According to this section if after the inquiry, the Minister of Mines considers that the best interests of the country or of the holders of mining licences covering contiguous or neighbouring mining areas will be best served with regard to the economic exploitation of minerals by the merging or co-ordination of all or part of the operations of such holders, he may direct the holders to effect such merger or co-ordination within such time and on such terms as he specifies and the holders have to comply

with his directions. The state is, however, bound to afford the holders of the mining licence concerned a reasonable opportunity to make representations in writing before giving any direction as to consolidation of mining rights. It is important that such rights as these which involve heavy outlays of capital are not altered without providing for such things as adequate notice, hearing, and an opportunity to participate in the planning of the joint operation.[74] So far there are no concrete examples of the state ordering consolidation, but state officials insist that they would order consolidation only where they believe co-operative development of the areas to be consolidated will be achieved, such as the reduction of operating costs and capital expenditure. When justified thus this should result in permitting the orderly mining of the ore body in accordance with engineering principles without regard for the priorities that might otherwise exist for developing one area before another. It should therefore avoid the conflict which might arise among licence holders. But consolidation will also be ordered by the state where it provides a method whereby small tracts of land may be mined when they cannot economically be separately explored or mined. It would appear the only problem that could arise in this area is a constitutional question as to whether the holders of the mining rights would have been deprived of their rights where they are opposed to the consolidation order. Because the problem has not arisen, there are no cases to assist us on the question of the constitutionality of this

74. The representations are required to be in writing. See s.91 (2).

exercise. But there are analogous situations in other fields of endeavour where, for instance, the state has compulsorily taken over land in the public interest without the concurrence of the owner[75]. Provided the state makes equitable compensation to anybody whose interest is thereby modified, there should be no problem. The justification for this view is based on the power of the state, as owner, to provide for the conservation, greater recovery, and more efficient use of the State's mineral resources as well as the protection of the correlative rights affected.

Standard of compliance of duty to develop and not to use wasteful mining practices

Sections 54 and 55, which impose the obligation to develop the mine in accordance with the programme of development and mining operations and the duty not to use wasteful mining and metallurgical practices, do not indicate the standard the Chief Mining Engineer is required to use in coming to any conclusion that the two obligations have been met or breached. Two possible

solutions suggest themselves: to measure the standard by (a) the good faith of the mining-right holder or (b) the test of the prudent mining-right holder. The first test suggests that as long as the mining right holder is acting in good faith in his judgement, he should not be held to be in default by the state. In a sense every man who invests his money and labour in a mining business does it in the confidence that he will be able to conduct mining operations in his own way. The state would not have power to impose a different judgement on him, however erroneous it may deem him to be. The State's right would not arise until it has been shown clearly that he is not acting in good faith in his business judgement, but rather fraudulently and with intent to obtain a dishonest advantage over the state. This standard would not be adequate for purposes of control and is not used in practice by mining officials. It is also implicitly excluded by the Act, since the holder of a mining right, once notified of wasteful mining practices, has to satisfy the Chief Mining Engineer that he is not using wasteful mining or metallurgical practices

75. See Land Acquisition Act, Chapter 296 of the Laws of Zambia.

or that the use of such practices is justified in the circumstances.[76] And in the case of the breach to develop in order for the mining-right holder to be so excused, the Minister of Mines has to be satisfied that in the circumstance the failure to follow the programme was justified. Thus in the case of Baluba Mining Area,[77] where production of recoverable copper fell below the target given in the programme, the state raised a query and stated:

This programme envisages a substantial drop in the production of recoverable copper from the Baluba mining area as compared with previous forecasts and also fails to give any information, in respect of the production of cobalt concentrates, 1 am unable to accept the programme pending submission by you of satisfactory and adequate reasons for the shortfall in production and of details concerning the production of cobalt concentrate.[78]

In such a situation it seems, and could possibly be submitted that the Act and practice of the state officials had taken the best standard in the circumstances. A test of good faith performance, being subjective, has two principal defects in relation to mining activities. It is difficult to apply and its meaning is vague, what does good faith mean in respect of mining operations? But more important it fails to meet the requirements of the purpose of the mining right. The purpose of a mining right is exploitation of the minerals covered in the licence. This purpose is not satisfied by mere good faith action by the

mining right holder — that is, refraining from fraudulent conduct will not by itself promote the exploitation of the minerals covered in a particular mining area. For the mining area to be mined properly, the mining right holder must conduct those operations as customarily conducted in the industry in those circumstances as the realisation of the purposes of the Act requires reasonable efforts towards that end.

76. s.55 (2) reads 'if within the time specified in the notification the holder of the mining licence fails to satisfy the Engineer that he is not using wasteful mining or metallurgical practices, or that the use of such practices if justified in the circumstances, the Engineer may order the holder to cease using such practices and the holder shall so cease within such time as the Engineer shall allow, subject, however to '„is right of appeal under the Minister of Mines.'

77. The production of recoverable copper was 13748 tonnes in 1972/1973 and in eight months to February 1974, 13543, which was the equivalent of 20, 314 tonnes for the year, which was 16.86 tonnes or 8% below target as given in the 1973/1974 programme. See letter of Cassidy, Chief Mining Engineer to Managing Director, Roan Consolidated Mines Ltd., 14 June, 1974.

78. Ibid.

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In any case the mining licence cannot be said to make the mining right holder the arbiter of the extent to which, or the diligence with which, the mining development of his area shall proceed. Mining operations are not to be likened to those of a private business, into which a man Duts property or money and labour exclusively his own. the profits and losses which are of concern only to him, and the conduct of which may be according to his own judgement, however erroneous it may be. By reason of the state property interest in the subject matter and the fact that the substantial consideration for the grant lies in the development of minerals and the provisions for payment of taxes on the minerals extracted, it has an immediate concern with extent to which and the diligence with which the operations are prosecuted. If mining-right holders were to damage the mine by reason of their mode of working, the interest of the state would be damaged too. In coming to a conclusion that one of the above duties had been breached, the state employs the standard of accepted mining practices, that is the standard of the prudent mining-right holder. For instance, in the dispute referred to above, the programme of Baluba mine was examined item by item and compared with standards of its past programmes.[79] The prudent miner standard has the same function in here as the reasonable man standard in other branches of the law. The prudent miner is

a hypothetical miner who does what he ought to do and does not do what he ought not to do with respect to mining operations. Since the standard of conduct is objective, a miner cannot justify his action or omission on personal grounds. It is no excuse that the defendant failed to mine, say, because he was short of money, was over-committed on mining programmes, had no need for more production, had no money to use conservationary methods, or preferred to spend his money on other things. In short, the question is not what was proper for the individual mining right holder to do, given his peculiar personal circumstances, but what a hypothetical miner acting reasonably would have done, given circumstances generally obtaining in the industry. Yet local conditions may differ from mine to mine, as was pointed out by Roan Consolidated Mines Ltd., in 1974, when the state

79. Letter of Chief Mining Engineer to Managing Director, Roan Consolidated Mine· Ltd., 19 August, 1974.

complained that it had breached its duty by using a method in its mine workings, 'which had been found to cause too much dilution of ores in other mines on the Copperbelt, at its Baluba mine.' The Company argued that it had not breached the obligations, since the ground conditions in the Baluba mine area made it unsafe to work in unsupported slopes.[80] In applying this hypothetical standard neither the interests of the state nor the miner alone are to be used as a criterion but, on the contrary, there must be a proper balancing of the interests of both parties. The determination of whether a miner has developed his mine with the diligence that would have been employed by a prudent miner under the same circumstances is a question of fact and depends upon a proper consideration of all the special circumstances affecting the particular mine involved and general conditions prevailing in the mining industry.

Circumstances when breach of obligation to develop and not to use wasteful mining methods may arise

It is obviously impossible to discuss the extent of these duties under the infinite variety of circumstances in which the problems may arise. Some generalisations, however, are possible. It requires that mining operations should be carried on using efficient mining methods, implying a duty to 'work in a workmanlike manner.' This means in such a manner as shall not be simply an attempt to get out of the earth as much mineral as possible for the particular purpose of the mining right holder, regardless of any ordinary workmanlike precautions which would, for instance, damage the environment or make mining more difficult for others who may take over the mining right. It also requires that after a mine had reached production, the miner

must proceed to sink additional shafts according to the programme of operations until the area covered by the licence has been fully developed or until the licence expires. An exception would be where, for instance, cuts in production are ordered by the jtate.[81] The mining officials are against the meeting of bare minimum requirements. What is to be regarded as full development will depend upon

80. Letter of Managing Director of Roan Consolidated Mines Ltd., to Chief Mining Engineer, 28 October, 1974.

81. The state has power to order cuts in production under the Act see s.56. This power has been used mostly in an attempt to influence commodity prices.

the productive qualities of the mining area as revealed by the mining operations on the area subject to the licence and upon other lands and upon proved ore reserves. If the area is sufficiently mineralised, it would seem that full development would require the mining of all the mineral underlying the entire premises subject to a licence. The duty not to use wasteful mining practices will often exclude negligent performance of mining operations. Thus it embraces within its scope all negligent conduct of mining operations other than negligent failure to follow the programme of operations, such as using methods which bring about pollution or low recovery of ore, or unnecessary inhibition of other economic activities. Though the mining officials are fairly vigilant in their enforcement of these requirements, they do not seem to harass miners unnecessarily. A miner would not be considered in breach where a mere mistake of judgement is involved. The breach has to be plain and substantial in view of the actual circumstances at the time, as distinguished from mere expectations on the part of mining enthusiasts. Mining operations require that the state mining officials should act with caution particularly with reference to the following of the programme. The large expense incident to the work of exploration and development, and the fact that the mining right holder must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the state. No obligation should rest on him to carry the mining operations beyond the point at which they will be profitable to him, even if some benefit to the state will result from such action.

We have mentioned the question of relevance of the practice of other miners being considered in determining whether a wrong method of mining is being used. Early common law cases dealing with the duty of the miner to mine in 'a workmanlike manner' suggest that this is a proper consideration. Lewis v. Fothergilft[2] a lease contained a covenant by the lessee for

working the coal in 'a proper and workmanlike manner'. The lessees proceeded to work the coal by a method of mining known as instroke, from their adjoining colliery. The lessor alleged that the lessees ought to sink a pit and work the coal from the deep and filed an action to
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stop them. The court held that under the circumstances, working the coal by the method of instroke was working in 'a proper and workmanlike manner.' The Court pointed out that 'a proper and workmanlike manner' may not mean the best possible mode of working for the lessor. It was found that working by instroke was the system almost invariably practised in the coal industry. Indeed the practice of other miners is often used as a measure by mining officials. In the case of methods, the state will not require a miner to change a method of mining simply because it prefers that method. An example of the use of this practice is the case of Baluba mine referred to earlier where the state queried the method used by Roan Consolidated Mines on the ground that there were other proven methods which caused less dilution of ore than the method employed by them which were being used by other mines on the Copperbelt. Yet it could also be submitted that practice alone, though important, is never the decisive factor. The question whether a particular method is unsuitable is a question of fact which can be ascertained by scientific methods. This is so because it is possible that the majority of mining right holders could be using an unsuitable method or one not suited for a particular mine, as was the case in the Baluba case where the ground conditions in the mine made it unsafe to work in unsupported slopes. Besides the rapid change of technology in the mining industry with the discovery of new and more efficient methods of mining makes it imperative to approach the question as one of fact.

Consequences of the breach of the obligations

The consequences of a breach of the obligations are in effect circumstances in which a right to mine may be terminated at the instance of the government. These circumstances, quite apart from the fact that they determine in effect the nature of the title conferred by a licence, are as much a matter of consequence to a potential investor as the duration of the rights which he seeks to obtain. They are also of significance to his financial backers where a mining company has raised loan finance which is secured by a charge on fixed assets located within the area of the mining licence. The security would be of dubious value, if not worthless unless the circumstances in which the miner's title was defeasible were
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limited by proper safeguards against arbitrariness.[83] Even where

loan finance is secured otherwise than by a charge on fixed assets, the title of the miner is of considerable significance. Most mining investors regard the present consequences as fair and the safeguards adequate. According to the Act any holder of a mining right is liable to a penalty not exceeding five thousand Kwacha.[84] The state may recover the difference between the required expenditure and actual expenditure, if any. A breach of the obligations of a mining right holder is a ground for the termination of the mining right.[85]

The obligations on the mining right holder are not absolute but rest upon the reasonable expectations of parties to a mining right. The mining-right holder will generally be excused where he is not himself responsible for the breach,[86] since it is thought that the mining right holder should not suffer punitive consequences for breaches not legally imputable to him. For a mining-right holder to be deprived of his right, therefore, there must both be failure to abide by the obligations and blameworthiness on the part of the mining-right holder. Thus, it is a defence to show that the failure to comply with the obligations that necessitated termination is due to circumstances beyond the control of the holder of the mining right, or the holder has a reasonable excuse for such failure to comply with the obligation. For example, it would be a defence to a charge of including false information in a report of failure to comply with any order, such as one ordering him to stop wasteful mining practices that the holder has a reasonable excuse for such failure, or has taken all reasonable steps to comply with the direction.[87]

The breach of any obligation does not ipso facto 'terminate the right granted, but merely gives the state the option of terminating the right.[88]

Sofar no mining right has been terminated as a result of the occurrence of a breach. The cases that have arisen have been resolved without

83. The sort of provision that is unlikely to inspire confidence is the Tanzania Mining Ordinance as amended by an Act passed in 1969. The statute provides that the President may cancel a mining lease during the continuation of the period of its validity if he considers it desirable in the national interest to do so. The amending Act further provides that an order made by the President under this provision is final and 'shall not be questionedin any court'. See s.65.
84. s.92.
85. s.94.
86. s.91. The mining right holder can appeal to a court of law against a termination of his right.
87. s.96.

88. s.93.

this necessity. The decisions of the state in respect of such matters can be appealed against to the Mining Affairs Tribunal, which has power to amend or vary the decisions of the state.[89]

These limitations on the life of a mining right should be distinguished from the general limitation relating to the life-span of a mining right. The operative effect of the expiry of the time limit of the light is that the right automatically terminates without the necessity of any affirmative actior. on the part of the state or the mining right holder, and in fact even without the knowledge or express wish of either party. This is particularly so with respect to the prospecting right which is not renewable. With respect to the renewable rights the mining right holder has to start moves to have it renewed before it expires. In the case of the limitation arising from the breach of obligations, the state may waive its right to terminate the right as it is in its discretion to initiate termination proceedings. The state, however cannot waive the termination of a right by operation of the expiration of term of a mining right. If the mining-right holder remains in possession after the expiration of the term of the right, he holds the right merely at sufferance. This is different from the position where there is a breach in that the mining right holder remains in possession after the happening of the event as the owner of the same right that he had before he breached the obligation, until the state takes affirmative action to bring his right to an end. A new mining right is necessary to revest a right in a mining-right holder once his term has expired. The expiry of the term does not operate to cut short the right but simply fixes one of the natural limits of the right beyond which it cannot endure.

Mining Rights and Surface Rights

A person who acquires a mining right does not thereby acquire any right of disposal over the surface, which right is retained by the state. As can easily be inferred from the earlier discussion regarding the nature of the interest acquired through a mining right, the division of the use of the

89. s. 126 These in essence are appeals against the state's refusal to allow an individual or company to mine and in some sense limit the state's exclusive right to decide on who can mine its mineral resources; except thai this is only after the mine has acquired vested interests i.e. after the miner has incurred some expenses. The jurisdiction of the Tribunal is not concurrent with that of the ordinary courts.
The jurisdiction of the courts is specifically excluded by the Act, supra, in. s. 126.

land surface between the land owner and the holder of a mining right is a very important issue to both mining-right holders and surface owners.[90] The surface may be required for use by the mining right holder for mining purposes or for purposes ancillary to mining, including the milling, processing, and refining of the minerals extracted and the construction of the necessary plant, works and buildings for these purposes. But it may be required simultaneously by the land owner for agricultural uses, or for other development purposes. It may also be required for roads or the provision of services such as electric power and water supply, or for the purposes of establishing a mine township.

During prospecting operations there is little area of disagreement between the mining right holder and the surface owner, but once exploration and mining activities have started, opportunities for disputes increase markedly. The mining-right holder may require some of the land for exclusive use; the surface owner may run his cattle over the tract on which mining operations are being conducted and a cow may fall into a mining pit, or a farmer's crops may even be damaged by the miner's activities. The miner may use water in such quantities as may affect other users adversely. Thus, as a result of this the rights of the mining right holder to the use of the surface and the circumstances in which the owner's rights are protected are the subject of strict regulation under the mining laws.

Land rights of holders of mining rights

A mining right holder is often granted the right to surface use over public and private land. He can enter upon land covered by his mining right with his servants and agents, make bore holes and the necessary excavations, and erect camps and any temporary buildings for machinery necessary for mining purposes.[91] Such erection of structures does not, however, confer any right, title, or interest whatsoever in the land. He may remove on or before the termination of his rights any camps, temporary buildings, or machinery which he may have erected. He may take

90. At the outset it is important to point out that an understanding of the position under the common law is helpful in regard to the position in Zambia. Under the common law, the relative rights of the land owner and mineral owner are, determined by a number of considerations and particularly by the express rights conferred upon the mineral owner by the land owner on the severance of the minera rights from the land by the terms of the mining lease, which expressly or by implication will determine the question of their relative rights.

91. ss.25 and 35.

for domestic use or mining purposes forest produce provided that where such taking is on private land, compensation is paid to the owner or occupier of the land involved. The reason for this is that the right to surface use cannot be construed as taking from the land owner or giving to the mining right holder any property in the product of the soil. He may make or erect roads, air landing grounds, and bridges.[92] In addition, a mining licence holder may purchase the mining area or obtain a lease of land covered by his mining licence from the owner of the surface area.[93] Where the land owner refuses to make the land available to the mining right holder, the President may acquire by compulsion in his name such private land or rights over or under such land for use by the holder of a mining licence. Even though this acquisition is regulated by legislation, it should be borne in mind that acquisition of property is an administrative act. The President, in effecting an acquisition of such property, must observe the well-established principles of administrative law such as principles governing the exercise of discretion and the maintenance of records. Before the President can acquire the land, however, the holder of a mining right has to show that he has taken all reasonable steps to acquire on reasonable terms, by agreement, the land or the right which he wishes to use and has been unable to do so.[94] The proper purpose of the President's powers renders it imperative that compulsory acquisition should only be resorted to if it is absolutely necessary to do so after exhausting the alternative possibility of achieving its object by means of purchasing. When the land is compulsorily acquired, compensation for the land so taken is payable by the mining right holder at a rate determined by the President.[95] However, the Act does not provide any guidelines as to how the compensation is to be measured. The High Court in Attorney-General v. Bobat[96] has stated that where the power of compulsory acquisition is conferred by statute and the statute is silent as to the basis upon which compensation is to be assessed, the court will act on principles analogous to those applicable under common law. Such principles will be: (a) the value to the owner of the land and not the value to the acquiring authority; (b) restrictions as to user applicable to the land are to be taken into account; (c) market price is not a conclusive test of real value; (d) any increases in value consequent upon the completion of

92 Ibid.

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93 s.79.

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94 Ibid.

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95 s.80.
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96 5
. N.R.L.R
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the undertaking for or in connection with which the action is made must be disregarded; (e) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the owner of the land; (0 the true relationship between the parties is not to be confused with and construed as that of indemnifier and indemnified and (g) that the arbitrator is entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant, i.e. to consider them not as conclusive evidence but as a check on extravagant claims.

Every person exercising a mining right is required to produce evidence of his possession of a mining right to the owner or occupier of the land upon which such right is being exercised or to the fully authorised agent of the owner or occupier, whenever demand is made for he licence. No mining right holder is allowed to exercise any mining right upon any land until he has given notice in writing of his intention to t'o so in the Government Gazette and in a newspaper circulating in the area where the land is situated at least fourteen days before the exercise of the right.[97] The notice is required to state the area in which the rights are to be exercised and the date of expiry of the mining right. The requirement for such a notice is to enable the surface owner to make arrangements to move livestock to another pasture, to gather crops in the area, and to guard generally against mishaps and thereby mitigate the damage which may occur as a result of mining activities. This is important since the surface owner or occupier of any land within a mining area has a right to graze stock upon or to cultivate the surface in so far as the grazing or cultivation does not interfere with the proper working in the area for prospecting, exploration or main purposes. However, the rights of the surface owner are somewhat curtailed. For instance, he cannot erect any building or structure on the land without the consent of the holder of the mining right, or if such consent is unreasonably withheld, the consent of the Chief Mining Engineer. This in practice means that the mining right holders have a right of action to stop interference with their rights by surface owners (as where, for example, surface clay impervious to water is removed, with the result that surface water percolates through to underground workings) and have a right to remove obstacles to their

97. s.76 (4).
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use of the surface, e.g. where building structures are placed on the land or the land is cultivated so that the minerals there cannot be worked or investigated. Most of these rights granted to the mining right holder are necessary for and incidental to successful searching for, production and disposing of minerals.

Water rights of holders of mining rights

Mine workings by their very nature are prone to intercept or interfer with water resources on a mining site. They, for instance intercept subterranean waters either as an incident of the mining activities or as an internal dewatering activity. The natural courses of the waters are thereby altered to flow along the mine workings from which they are either drained or pumped to the surface and are very often discharged at places different from their natural surface outlet. Mine workings also require surface water for various uses connected with mining. The basic common law concept that is usually applicable to the water problems of mining is riparianism. This is a variety of rights to water known as riparian rights, which arise solely from ownership of land adjoining a natural stream. Under the natural flow concept of riparianism, all riparian owners are entitled to have the stream flow past their lands as it was meant to do in its natural state, and except for minor domestic uses no riparian owners may impair the quantity of the flow of the stream to the injury of any other such owner. In tjje Zambian case the water Fights of the holder of a mining right are exercised in conformity with the Water Act.[98] In this legislation the state has totally deprived riparian owners of their common law rights. The general scheme of the Water Act is to divide water rights into three groups — primary use, covering domestic purposes; secondary use, covering the irrigation of land; and tertiary use, covering industrial purposes. The holder of a mining right may use private water which is on the land under his control but must do so with due regard to other users. The other users of water are entitled to complain against action of any other owner or occupier who fouls and contaminates the water and appreciably affects its quality in a manner calculated to interfere with its primary use by the person complaining. Where a miner wishes to make use of public water, he has to apply to the Water Board constituted under
98. See s.53 (1); and also Water Act, Chapter 312 of the Laws of Zambia.
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the Water Act." The Board will grant permission to use a reasonable quantity of water where such use does not prejudice the holder of existing rights, but where the water is being

beneficially used by others, by virtue of a statutory right or any other law or by agreement with the state, then the grant will be made only after full inquiry and payment of compensation. In addition to the water rights which he can obtain from the Water Board, the holder of a mining right is authorised by the Mines and Minerals Act to lay water pipes and water courses and ponds, dams, and reservoirs, lay drains and sewers, and construct and maintain sewage disposal plants.[100]

Dominant interest

The implications of the above discussion and the practice of mining officials are that a mining right holder's right to use the surface is superior to that of the surface owner. There is no doubt that the mining right is the dominant interest. Mining officials grant mining rights irrespective of the present use of the land. The dominance of the mining right is also clearly implied on section 74 of the Act and is reinforced by the provisions relating to the compulsory acquisition of land for mining purposes where owner of the surface refuses to have it purchased by the holder of a mining right.[101] In this sense a mining right holder, as a matter of law, has the absolute right to use, damage, or destroy the surface subject to limitations to be discussed later.

There is no doubt that the state and its mining officials clearly seem to regard all mineral development and exploration as having preference over all other uses of the land including agricultural and residential uses. This is basically so because mineral deposits are by their very nature rare and their location is determined by the geology of the country. Thus, they must be mined wherever they lie and when they are produced, the production requires less surface area than most other uses of land. It must be admitted that few uses of land are as unaesthetic as an operating or abandoned site for mineral resource extraction but it must also be agreed that the development of a productive mineral deposit is ordinarily

99. Water Act, ibid, s. 14.
100. s.53 (1) (9).
101. ss. 79 and 80.

the highest economic use of the land with enormous benefits to the country. Here any other interpretation of the situation would restrain the holders of mining rights from mining whenever their activities would injure the interests of surface right holders. Futhermore, the express mineral reservation implied by the theory of ownership in all rights in land carries with it, by necessary implication, the right to remove such minerals by the usual and customary methods of mining and thus reduce them to possession even though the surface ground may be wholly

destroyed as a result thereof. To hold otherwise would in effect amount to a determination that the state's ownership of minerals is of no effect in certain circumstances as the state, despite its ownership rights, would be precluded from enjoying or recovering that which it owned, where for instance there was a conflict with the interest of the surface owner.

The discussion so far implies that in every case where a clash of interest arises, the interests of the miner must prevail. It looks certain, however, that where the mineral to be mined is plentiful (such as limestone) and where the benefit from mining it is out of proportion to the interest it prejudicially affects, the miner's interest will not prevail. This for instance will happen when the agricultural interest is greater than that of any possible mineral output. This is contained at a very early stage by the mining officials refusing to recommend the granting of prospecting licences for plentiful minerals in residential and other areas where other industrial activities are going on.[102] But probably this is an area where legislation is needed to establish machinery for the protection of the environment and other industrial activities by way of a public inquiry. The policy and scheme of the legislation suggested here contemplates that in the pursuit of the conservation and protection of the above ends mining rights may be limited, or even at times denied. But it is suggested that before making an order, the Chief Mining Engineer should satisfy himself by way of inquiry that the order is necessary, and if so satisfied, he should then consider whether it would be just and equitable to make it. This can be achieved by the establishment of a board where objections to the granting of mining rights can be lodged by the general public.

102. If this were otherwise the exercise of a mining right for even common minerals like sand, it would paralyse any other economic use of the land.

No such system exists at the moment. The board could endeavour to take into account and to weigh against each other, all the interests to be affected by the grant of the mining right where objections exist and the board can then recommend to the mining officials whether or not such a mining right should be granted. But any such machinery should not allow disputes to drag on as this could lead to delays and unnecessary discouragement to investment.

Limitation on Surface Use

The mining rights surface uses are however, limited by section 77 of the Act, which provides that the rights conferred on the holder of a mining right shall be exercised reasonably and not so as to affect injuriously the interests of any owner or

occupier of the land on which such rights are exercised. The effect of the section is that these rights are considered to be restricted to those uses of the surface that are 'reasonably necessary' to mining operations. On their own these very general words do not convey the proper limitations imposed on a miner and this can only be achieved of course by the examination of the ways the same words have been interpreted in mining activities.

Use to bear reasonable relationship to mining

In the first limitation, section 77 has been interpreted as suggesting that the state or surface owner is enabled by the section to intercede when in its or his judgement a particular use of the surface lacks a legitimate or reasonable relationship to mining activities. It would not be permissible for the mining right holder to use the surface land and its resources for non-mining purposes, say, to set up a shop or a golf-course, except where they are for the well-being of his workers. Where a mining-right holder cuts timber with intent to sell he will be stopped. Whereas, while he is mining, a mining right holder is entitled to erect and occupy houses although he may not let houses to some one other than one of his employees. The test, of course, is whether the use is necessary or incidental to production and though considerations of custom, usa^e and pru-dent operation come into play, they cannot be the determining factors. It seems it is justifiable that the state takes this stand. When it grants a mining right it does not grant an interest in land as well. Since it has not

seen fit to give away the land containing the minerals, it would be wrong to allow the miner to exercise rights which are part and parcel of the ownership of land. While his licence segregates and withdraws the land from the public domain, in that no other miner could obtain any mining right to it until his licence has expired or been cancelled, it gives him nothing but the right of possession for the purposes of mining. Whoever wants to go further than this, and for any reason appropriate to his own use other than for his mining operations can only do so properly by paying the purchase price of the land and becoming the owner thereof. Indeed, it is difficult to see under what theory the public could gratuitously bestow upon an individual or corporation the right to devote mineral lands any more than any other public lands to value uses having no relation to mining, and for what reason could anybody construe a miner's surface right otherwise?[103]

Use not to disturb other land users unreasonably

The second limitation established by Section 77 of the Act has been interpreted as imposing on the holder of a mining right in

the exercise of his surface rights as that his activities must not endanger health or constitute a public nuisance. He will be liable for all surface damage which is a result of his excesses and his negligence even though he may not have made an excessive, or unreasonable use of the surface. Here again, as with the concept of 'reasonably necessary', one is faced with a very nebulous term. What constitutes and does not constitute 'negligence'? In mining practice, this will depend on the facts of each case and any attempt to formulate a general definition here would be unpracticable. Thus, as in any other instance of negligence, one must apply the general rules to determine if a duty exists and if there was a breach of such a duty, and the damage which resulted was a proximate result of such a breach. It must be noted that wjiereas excessive or unreasonable surface use is involved almost exclusively with damage to land, the negligence concept will usually be concerned with injury to livestock, or to surface drainage such as would result from chemical leaks. A mining right holder would be liable where, for instance, livestock died because the mining right holder in his use of surface negligently left poisonous substances in grazing areas. One of the cases that has arisen involved prospectors who put beacon cement in a cattle raffle to the annoyance of the owner of the

103. In some countries this is expressly provided for in the mining laws e.g. Botswana, see Mines and Minerals Act, supra, s.7 (3).

land rights.[104] It would also apply where escaping substances pollute the surface water supplies to such an extent that they interfere with the surface owner's use of the water for irrigation of stock. This duty not to injure the interest of the surface owner also applies where an existing use by the surface owner of the surface would otherwise be precluded or impaired, and where under established mining practices there are alternative methods of equal effect and efficiency available to the holder of a mining right whereby minerals can be investigated or recovered. This rule plus the rule of reasonable usage of the surface may require adoption of an alternative investigation or recovery method which does not preclude or impair use of the surface. But it could be submitted here that to force a mining-right holder to change his mining method where there is such a conflict there would have to be a determination that the use under attack was not reasonably necessary, weighing harm or inconvenience to the surface owner against considerations pertaining to the mining right holder. The situation is one requiring proof from which a tribunal could infer that the mining right holder is doing something which a prudent miner

would not do or is doing it in a way in which a prudent miner would not do it; considering the availability of other alternative methods, the balancing of the risks, costs and like factors.

The burden of proving that in the circumstances, the use of the surface for the mining right holder is reasonably necessary is upon the surface owner, since the mining right owner is entitled to make reasonable use of the surface for the production of minerals covered in his licence. Of course it is not ordinarily contemplated that the utility of the surface for agricultural purposes will be destroyed or substantially impaired.[105] Hence the question whether or not the use which is being made of the surface is reasonable or not is one of fact. A landowner claiming that a mine owner is using more land than necessary in the production or investigation of minerals is not required, as a pre-requisite to obtaining relief, to show evidence of industry custom, usage and practices of other mining right holders as to how much of the surface is necessary in mining, so long as there is evidence that the mining right holder involved in the dispute is using more of the surface than is reasonably necessary to

104. This happened in the Mumbwa area with a prospecting team from Anglo- American Corporation Ltd. The prospectors removed the beacon cement.

105. An analogy can be drawn from an American case where the miner applied for an. order requiring the land owner to shut down his operations to allow the lessee to use a particular method of exploration, Pennington v. Colonial Pipeline CO. 260 F Supp. 643.

the enjoyment of his mining right. Though oustom is a fact which any tribunal considering the matter will weigh and consider, it cannot be an absolute test of the reasonable use of surface rights in such cases, for though observing the custom and practice, the majority of mining right holders may be using more land rights than they require. In any case mining right holders tend to use more surface rights than is actually necessary where they are not likely to infringe anybody's rights or they may use a particular method simply because they prefer it.

Although all cases arising in this area so far have been settled out of court, it could be submitted that since the mining right holder is by law restrained from negligent acts and excessive use of the surface, the surface owner can if necessary, seek an injunction to prevent activities which are not reasonably necessary in mining operations. Where blasting operations at a mining area are carried on in a negligent manner so that stones roll down to lower ground occupied by others, for

instance, action to prevent this can be taken. The landowner can seek an order thave an excavation fenced, which if left unfenced could be a source of danger e.g. where the excavation is so near a right of way as to amount to a public nuisance. But it seems from the case of Steward v. Lusaka Management Board,[106] where the plaintiff fell in a pit which was originally used to get gravel and sustained a broken leg, the courts will not do this readily where ordinary care on the part of the plaintiff is deficient. In this case the court refused a claim for damages on the grounds that ordinary care on the part of the plaintiff would have prevented the accident. An analogy can be drawn from the common law position as exemplified in Pullbach Colliery Company v. Woodman,[107] where a butcher sought an injunction in respect of nuisance to him in his trade by the defendant's screening and breaking operations. The court stated that the grant of the right to carry on the trade of a miner did not authorise the commission of a nuisance without proof that the trade could not be carried on otherwise, and the plaintiff was not precluded by the terms or the circumstances of the grant from obtaining relief.

106 2N.R.L.R$_1$141.

107. 11915] A.C. 634. See also Attorney-General v. Cory Bros, and Company, (1912) A.C. 521. Conversely the miner should be able to sue where his rights are being injured by the surface owner. It is somewhat analogous to the cause of action for breach of the right of supitort at common law, see Dalton v. Angus, (1881), 6 A.C. 791.

Of course where there is only one manner of use of the surface whereby minerals can be produced, the holder of a mining right has the right to pursue this use regardless of surface damage. Where there is excessive use the state mining officials can order the mining right holder to stop his excessive activities and on state land order excessive structures to be removed, while on private land the owner of the land may presumably remove excessive structures provided there is no breach of the peace. Thus this could be done in the same way that at common law one can abate a nuisance by self-help.

Compensation to Surface Owner For Damage to His Interests

Liability for surface damage

Quite apart from the section establishing liability of a mining-right holder for negligence, claims in respect of damage caused by his activities can also be based on section 80 of the Act. The relevant part of this section provides that:

Whenever in the course of prospecting, exploration or mining operations the holder of a mining right causes any disturbances of the rights of the owner or occupier of land or damages to any

crops, trees, buildings, stock, or works thereon, the holder of the mining right by virtue of which such operations are or were carried out is liable to pay to such owner or occupier fair and reasonable compensation for such disturbances or damages according to their respective rights or interests in the property concerned.

The compensation payable is to be agreed between the parties, failing which it has to be referred to the Chief Mining Engineer who would deal with it as a mining dispute.[108] It is important to point out that without this section, a mining-right holder would only be liable where the damage caused was as a result of excessive or negligent use of the surface. This section, however, obligates the miner to pay compensation in respect of damage caused irrespective of whether or not the damage was the result of excessive or negligent use of the surface.[109] But it does not confer on the surface-right holder the right to stop activities involved as is the case where damage is caused by negligent activity. The liability is not based

108. s.81.

10». Ibid.

on any concept of fault and where, for example, crops have had to be destroyed to make way for exploration activities, the mining-right holders should compensate the owners of the crops so removed.

Measure of damages

The Act does not, however, give guidelines on how the compensation is to be calculated except to state that where the value of the land has been enhanced by the fact that prospecting, exploration or mining operations are taking place or have taken place thereon or nearby, the amount of any compensation payable under this section in relation to that land is not to exceed the amount which would have been payable if such value had not been so enhanced. This still leaves unresolved the question of how the amount of damages is to be calculated. The problem, of course, does not arise with reference to the value of crops and livestock, as those are easily ascertained by reference to their market value. It is in connection with straight-forward soil damage that the problem may arise where, for instance, agricultural land is denuded of its surface soil so that it has no agricultural value any longer whether this is caused by a flood due to mining excavation[110] or simply by mining excavations themselves. So far most of the problems that have arisen have related to animal and crop damage. It is, however, quite likely that with the increased use of the land for settlement and agricultural purposes, the other problem may increase in significance. Is the compensation to be

estimated with reference to the ordinary rules regarding expropriation of land?

When an interest in land is taken as in expropriation cases, the compensation is readily determinable on the principles laid down in these cases such as the owner being deprived of some interest in the affected land either permanently or for some predetermined term. Its value can be ascertained with some certainty. But the case of a mining-right holder causing surface damage is not, however, a case of compensation for land or for any interest in land taken — i.e. tort damages. It is compensation for the loss and damage caused by operations carried thereon. With property after the taking, there remains only to determine the value of the land or interest at the time of the taking. On the other hand, in the case of mining rights activities, there is no divesting of the owner of the sur-

110. Such as the dispute between Moxon and the City Council of Kit we where
Moxon's farm was flooded by water occasioned by the bursting of a sewage tank. The dispute was settled out of court in 1975. Disputes between miners can be brought before the Chief Mining Engineer but his jurisdiction is concurrent with that of the courts see s.99.

face of any interest. The statutes give the mining right holder a right of entry which precludes his being liable for trespass but requires him to pay compensation where damage is caused in the process. Thus, a claim for compensation by the surface owner does not arise with respect to a transaction whose efforts are completed in the past but it does arise with respect to damages whose effect will continue into the future simply because the principles governing the fixing of compensation in expropriation cases do not apply. In this case, some other principle must be adopted rather than that of determining the compensation on the basis of the value to the owner of the land or interest taken at the time of the taking. Common law cases[111] suggest that the amount of damages should be calculated with reference to the difference in the value of the land at the time of its damage and the value after its damage taking into account its uses at the time of the damage, but as stated in Attorney-General v. Mar- rapodi Trustees[112] without regard to any improvement or works that could be construed thereafter on the said lands, while making due allowance for reasonable expectation of its use. This last criterion entails taking into account not only the present purposes to which the land is applied but also any other more beneficial purpose to which in the conrse of events it might within a reasonable period be applied. But as emphasised in Attorney-General v. Bobat[11i] the words 'within a

reasonable period' are important and they exclude long term potentialities.

However, the mining legislation does not provide for the eventuality of the mining right holder being unable to pay compensation where it is due to a surface owner as a result of the miner's activities. It has been suggested by some mining officials that it should be a requirement that a mining right holder should deposit an amount of money with the state, which would be refundable at the expiration of any right, in the absence of any claim, as security for the payment of compensation for the disturbance of surface rights. The problem with such a proposal is that it may tie up a miner's much needed money and thereby operate as a cost to his investment. The best solution it could be submitted, is to make the nonpayment of claims a ground for the suspension of the operation of mining rights.[114]

111. e.g. Mordue v. The Dean and Chapter of Durham, (1872), L.R. 8 C.P. 336.

112. 5 N.R.L.R. 416.

113. 5 N.R.L.R. 520.

114. In some countries e.g. Botswana, the owner of land may require the holder of the prospecting right to give security for the payment of compensation for the disturbance of surface rights. See Mines and Minerals Act, supra, s.7 (5).

The Effect of the 1969 Mining Rights System on Mining Activities

The question that remains to be considered is whether in practice the new legal regime has removed the previous abuses and increased the state's capacity to deal with the problems of ensuring that mining rights are acquired by competent persons. Also whether the problems of access to mineral land existing under the previous mining legislation are likely to arise, or whether mining areas are no longer kept undeveloped thereby preventing others from taking out the areas involved, situations which existed during the pre-1969 Mining legislation.

Advantages of the new system

The Act has to a very large extent, succeeded in removing most of the anomalies of the previous legal regime and increasing the state's capacity for preventing their recurrence. It is now possible to suggest that the state is always in a position to control mining operations at every stage. It may remove at any time any tract of land from availability for mineral exploration. It may also change terms of exploration and other mining rights or the operating requirements and ultimately, it may terminate mining rights in circumstances where mining operations are not being carried out in the interest of the country. On the other hand, the state can grant the miner the

right to prospect over areas of sufficient size to enable him to select the sections of great potential in the prospecting area. If explorations are warranted because of the mineral potential, the mining right holder can get the exclusive legal right to occupy and explore for minerals of interest in a specified area based on his own technical judgement. Should he discover minerals, he will obtain the exclusive right to develop and produce from the deposit and. at the production stage, the right to develop the deposit and to sell and dispose of the product. The mining rights are granted under general restrictions calculated to influence the speed at which and the method by which mineral wealth should be extracted. Some of these general restrictions, where a mineral policy exists can be used for key development requirements in the industry to the needs of the country. This means that healthy changes in policy cannot permanently be retarded as they were under the pre-1969 mining legislation which conferred vested rights upon the claimant from the date of his discovery.
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The obvious advantage of the new system, however, has been the fact that the state, having power to grant or withhold the granting of prospecting rights at its discretion, has been able to exercise a judicious power of selection of miners and has thereby ensured that mining rights are not granted to irresponsible persons and to people who have not the means to initiate and carry out mining development. The constant augmentation of the capitalisation of mining rights which can result from the sale of mining properties again and again, passing through the hands of agents and middlemen to the working mining company, has been completely avoided as the transfer of mining rights can be affected only with the approval of the state. This has meant that the system has, eliminated the chance of an individual taking up mining rights, through the obligations on miners relating to expenditure, which will almost certainly prove too high for him. Such a position had eventually happened even under the pre-1969 mining legislation, and it is an economic fact that whatever system of mining rights is adopted, the cost is such that it is more or less impossible for an individual to acquire control of most mining properties with the exception of the very small deposits. Besides the geological reality in the country seems such that most surface outcrops have been subject to at least a cursory examination. It follows from this that it is highly probable that those ore bodies with outcrops on the surface have already been found and are being worked. So that invariably a future mineral discoverer has to be able to extract information from situations overlain by heavy burden or by rock capping which an ordinary individual without

technical competence and financial ability will be incapable of accomplishing.

There are, however, very small deposits, e.g. of tin in the Southern Province, in Zambia, where the services of a small miner are still useful. A big company will not look at such deposits because the overhead expenses which its management structure requires would not justify it. During the interviews, it was suggested by miners involved in small scale mining that they should have their own legislation. Although it is preferable that all miners be treated equally, there is a case for separate legislation for small scale miners — for although they can get exemptions from expenditure obligations, the fact that it is only after application is

and may cause delays. The state could also create a machinery and skills pools from which such prospectors and miners could hire machinery and skilled manpower for their use. It is in the interest of the nation that even small mineral deposits be worked properly if resources are not to be misused and therefore wasted.

It is obvious too that the new Act has minimised the possibility of monopoly of mineral land, through its expenditure obligations, fixed tenure of mining rights and its requirement of programmes of operations which to a large extent was a feature of the pre-1969 Mining System. It has thereby also eliminated the holding of mineral land for speculative purposes.

Practical results of the Legislation

Most of the assertions above can be proved by the practical results of the change in the mining rights system soon after the new Act was introduced. The state mining officials were inundated with inquiries relating to the Act and requests for geological information concerning the areas that had been relinquished by the special grant holders. These enquiries stemmed from companies based in Canada, the United States, Britain, France, Italy, Czechoslovakia, Yugoslavia, Rumania, Japan and South Africa. It is a measure of the interest shown that the majority of interested companies sent senior technical personnel to Lusaka to examine the available data. Of course interest centred on areas on the Copperbelt; Mokambo was regarded by many as the most promising area since economically significant mineralisation had been to a large extent proved by an extensive diamond drilling programme. Information concerning areas adjacent to the Copperbelt and its possible extension to the west, the former Chisangwa and Mwinilunga areas, was also very much in demand, and there was some interest in the more widely scattered economic potential which had at least been demonstrated to exist e.g. in Semberere. The majority of the

inquiries were concerned with the prospcct for copper mineralisation, but some also were interested in the potential for other metals.
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Soon after the Act was passed, it is reported that Mitsui and Mitsubishi Shaji Kaisha both Japanese companies, sent representatives to study the feasibility of an international corporation jointly prospecting for copper and other minerals. They suggested that if the government would agree to freeze the mining legislation as represented in the new Act for 30 years, they would then promise to invest heavily in exploration. In the belief that mining investors regarded the new Act as favourable to them, however, the government rejected this suggestion.

The government has granted licences in several parts of the country. Anglo-American have taken three prospecting areas at Kansanshi and Luangwa North. Roan Selection Trust Ltd., have taken out three areas at Mukimbefi, Kalumbi and Kalengwa. Sidco, a Yugoslavian company, has one area at Mulinanshina. Somiren, an Italian company, is prospecting for Uranium and Copper in the Mwinilunga area. Sinico, a Japanese-American Consortium, took out a licence near Solwezi. Geomin, a Rumanian company, took out two areas, one at Ntambu and another around Kasempa. Mokambo Development Company, a joint venture between Mines Industrial Development Corporation and Geomin of Rumania, is undertaking geological and mineral investigations into the Mokambo copper ore body situated near the Zambia-Zaire border. The deposit is thought to contain sufficient ore to enable production of 15,000 tonnes of copper concentrates to be mined annualy for over twelve years. Mindeco-Noranda, a joint venture between Mines Industrial Corporation Ltd., and Noranda Mines Ltd., of Canada, is undertaking mineral prospecting, exploration and mine development and holds licences in the Central, Copperbelt and North-Western Provinces.

On the Copperbelt itself a number of prospecting areas have been taken out by Anglo-American Ltd., and Roan Selection Trust Ltd. In the Eastern and Central Provinces, various companies, including Equitex, Petroleum Ltd., and Dc Beers Consolidated., have taken up prospecting licence. In 1970 a Yugoslav Consortium to prospect for copper was formed and five Yugoslav enterprises and the Yugoslav Investment Bank joined the Zambian, Sidco; the Zambian partners have 51 per cent of the
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capital and the Yugoslav company, Energoprojekt 48 per cent. The French company Redimey Ltd., sent representatives to prospect, De Beers Consolidated Ltd, took out five exploration rights over Kimberlite areas in the Luangwa valley. Nchanga Consolidated Copper Mines Ltd., holds prospecting rights in the Luano area,

and Roan Consolidated Mines Ltd., holds prospecting areas around the Mufulira area, Chibuluma exploration, and prospecting areas, and Mufumbwe prospecting area.

Of course, at this stage all these groups are undertaking prospecting and exploration, and it will be some time before it is possible to assess whether or not the prospecting activity is producing results. The operating mines have continued active exploration in their licence areas.[115] Some indication of the level of prospecting activity can be obtained from the proposed expenditure noted in the applications for prospecting and exploration licences, though there has been a definite slowdown in the past year because of the difficulties of the industry brought about by the current recession.

Largely, the effects of the Act have been beneficial to the country. However, the extent to which it will continue to be beneficial will depend upon the state's willingness to adapt the legislation to changing circumstances in the mining industry, so that it ensures the best climate for investment and vigorous entrepreneurship in mining aimed at promoting increased production and discovery of copper and other minerals. But side by side with increasing mineral production and its discovery, the state should devote some thinking to a mineral policy which will consider the problem of the rate of development. To this end it would be submitted that the rate of development should relate to the expansion of other industries so that when the mineral resources are exhausted a viable economy will be left behind. As things are the government does not seem to have adopted any policy at all. All mining efforts seem to be geared towards the maximum production possible of whatever mineral that is being mined. Zambia's mineral resources will necessarily be exhausted at some time. Present estimates are that some of the mines will be exhausted

115. The existing mines also continued to increase their production. See Mines Industrial Development Corporation, Zambia Mining Year Book, 1974.

by the turn of the century,[116] and it is therefore of paramount importance that the exploitation of the country's minerals should serve to diversify the government's source of development revenue.[117] Quite apart from the possibility of exhaustion, Zambia's folly in depending on its mineral wealth was exposed in 1976 when low commodity prices plunged the country into one of its worst economic crises. [118]

116. The declared ore reserves of the Copperbelt are reported to total 745 million metric tonnes. Mines Industrial Development Corporation, Prospects for Zambia's Mining Industry, 1970, p.20. Of course in rich mining areas, the

proved reserves tend to increase as mine development proceeds. However, the life span of a mining complex depends upon the level and intensity of exploitation.

117. For discussion of the Zambian economy and its agricultural potential, see Elliot, 'Constraints on the Economic Development of Zambia,' 1971; Bamber 'The Economy of British Central Africa: A Case Study of Economic Development in a Dual¡stic Society,' 1961.

118. See Daniel, 'Increasing Strain on Zambia's Copperbelt', The Guardian, 31 March, 1976, p.22.

DOMESTIC PARTICIPATION IN MINING VENTURES

The Mines and Minerals Act[1] makes mandatory domestic participation a pre-condition for the establishment of any mining enterprise by a foreign investor. And the law fixes the conditions, of the requisite domestic capital participation.

Background to the Policy

The policy of requiring domestic participation was announced in 1969[2] and was subsequently incorporated into the Mines and Minerals Act in the same year. It is not a novel provision in the context of the history of mining activities in Zambia. In the early period of mining in Zambia, the British South Africa Company required every registered mining location to be held by the registered holders on joint account with it in the proportion of two-thirds to the registered holders and one third to the British South Africa Company.[3] It exercised this interest at the time formal permission was requested to work for profit.[4] In the case of the Zambian government in the period following the attainment of independence in 1964, it virtually confined itself to increasing the tax revenue obtained from the mining companies and demanding that the existing companies Zambianise mining posts at all levels as rapidly as possible.[5] This was despite a 1963 United Nations Economic Commission recommendation that in view of the significance of the industry in the economy of the country, the government should have direct participation,[6] and also despite the fact that in 1964 the existing mining companies had offered

1. Mines and Minerals Act, supra s.20.
2. Kaunda 'Towards Complété Independence' 1969, p.36.
3. In fact the Company wanted a fifty per cent interest it wrote 'So far as Northern Rhodesia is concerned, the Board has decided to retain a fifty per cent interest in all minerals, with the object of reserving to the Company full liberty of action in exceptional cases. It does not however, attach great importance to this point, and is prepared to substitute a one third interest for fifty per cent'. See Letter from Secretary of the Company to the Colonial Secretary, 5 May, 1911. C.O.

417-507. Later, this could be substituted for royalty payments, See Imperial
Institute, The Mining Law of the British Empire and of Foreign Countries, Northern Rhodesia, 1930, p. 17.

4. The requirement was unpopular among miners who complained that it made it impossible to procure capital for many propositions which would otherwise attract capital by their intrinsic merit, and that where investors were prepared to invest their capital subject to the condition, it resulted in an undue inflation of the capital and in a consequent repetition of mining propositions. See Letter of High Commissioner to The Colonial Secretary, 5 November, 1906,
C.O. 417-424.
5. The year after Independence, export tax was introduced and the Income Tax rate was increased. See Copper Export Tax Act, 1966 and Taxes Charging and Amendment Act, 1965, s. 19 (2).
6. U.N.I.E.C.A./F.A.O. Economic Survey Mission of the Economic Development of Zambia, 1964, p.39.

the government minority participation in their mining ventures.[7] The government's attitude can be attributed to the fact that soon after independence there was general insecurity on the part of mining companies and their workers. As a result, it did not want to take measures which might have increased the insecurity.[8] And not unnaturally, there was also lack of confidence on the part of government in its own ability to manage such a large enterprise. The policy change in 1969 was in fact a government reaction largely due to the behaviour of foreign firms in Zambia, both mining and non-mining. In the 1953-1963 period when the country was still a British protectorate, and a member of the Federation of Rhodesia and Nyasaland, the tendency was for secondary industry in the Federal Sector to be concentrated in Southern Rhodesia. Thus the North retained a status of a supplier of revenue from the copper mining industry and a market for manufactured goods.[9] It was not only the Southern Rhodesia industries which served Northern Rhodesia, but also those of South Africa.[10] The major mining companies, for instance, were subsidiary companies of South African mining houses. It had been the custom over many years for the Zambian subsidiaries to be administered from the South. Hence, most foreign firms, mining and nonmining looked to South Africa for supplies and stock was brought up from Southern Rhodesia or South Africa as needed. After the Unilateral Declaration of Independence in Rhodesia, the companies went on as before, although it became increasingly contrary to government policy, especially as Zambia responded to the United Nations' call to impose sanctions on Rhodesia.[11] Apart from Rhodesia, the country was also committed to reducing her

dependence on imports from South Africa. But it seems many companies appeared unwilling to seek alternative sources of supply of goods in East Africa and elsewhere despite government requests. A marked reluctance to set up genuine separate company structures in Zambia was also apparent. Besides some branches had little

7. Prain, Address to the National Affairs Association, Lusaka, 1964.
8. The government attributed its lack of action to the fact that the mines were too big. See Kaunda, Zambia's Economic Revolution, 1968, p.50.
9. The scale on which this was done was massive and it is estimated Zambia lost well over 84 million Kwacha over the ten year period of the federation. See U.N.I.E.C.A./F.A.O., Economic Survey Mission on the Economic Development of Zambia, 1964, p.36.
10. In 1964 Southern Rhodesia supplied 39 per cent of all imports and South Africa a further 21 per cent. See Central African Research — 4, The Significance of Zambia's New Economic Programme, 1965, p.l.
11. Ibid, p.2, for example, coke from Wankie had to be replaced for mining use at great cost with supplies from Germany, see Zambian Economic Survey, African Development, 1973, p.13.

more than a nominal existence and were used to ordering imports from Britain which were off-loaded enroute in Rhodesia to circumvent sanctions.[12] Allied to these economic consequences were political side effects. Africans could find little opportunity to acquire managerial or technical expertise. During the colonial period it was impossible for them to obtain loan capital on the terms granted to Europeans and various legal restrictions prevented them from advancing beyond certain levels. .For example, until 1960 Africans were' barred from becoming apprentices.[13] Academic limitations were also severe such that at the time of independence, Zambia had only 960 Africans with school certificate qualifications and less than 100 graduates.[14] As a result, the mines were staffed at senior levels totally by expatriates. In 1969, of the employees of the mining companies operating in the country, 40,000 were Zambians (mostly unskilled) and about 7,000 expatriates were in skilled jobs. On the boards of the mining companies there were two Zambians, one indigenous Zambian and one expatriate who had taken Zambian nationality.[15] Efforts to Zambianise in the five years since independence had been largely unsuccessful.[16]

TABLE VIII

EXPATRIATE LABOUR STRENGTH IN THE MINING INDUSTRY

YEAR	Average Strength	Engagements	Résignations	Displaced by Zambianisation
1965	7,035	902	1,131	247
1966	5,981	1,213	1,403	360
1967	5,378	1,011	1,058	292
1968	4,845	1,088	1,134	178
1969	4,727	947	1,127	100

Source: Mining Year Book of Zambia, 1969. Mosl replacements of expatriates were in the personnel divisions of the min ing companies and noi on operational levels. E.g. in 1965 there were only 9 Zambian shift bosses out of 823 See Prospects of Zambia Mining Industry, supra, p.18.

12. Republic of Zambia. Commission of Inquiry. Report of the Tribunal on Detainees, 1967. This report revealed many practices that were going on and showed that there was general sympathy among the white population to Rhodesia's point of view .

13. Central African Research — 4 supra, p. 2.

14. U.N.I.E.C.A/F.A.O., Economic Surrey Mission on the Economic Development of Zambia, supra, p.34.

Zambians, one indigenous Zambian and one expatriate who had taken Zambian nationality.[15] Efforts to Zambianise in the five years since independence had been largely unsuccessful.[16]

In the years 1964 — 1969, the Zambian economy expanded rapidly. With the end of Federation, the return of control over the country's revenue made possible a great increase in government spending. Manufacturing developed at a fair pace and its contribution to the gross domestic product rose significantly.[17] But this rapid expansion was inevitably accompanied by inflationary pressures and these were made dangerous by the desire of some companies to extract high profits from a relatively small capital investment. Some companies committed the smallest possible paid up capital and exported most of their profits while relying extensively on local borrowing. Quite apart from the fact that local borrowing was in conflict with the interest of the host state, it also meant less credit available for domestic entrepreneurs.

There was no exchange control For the first^ few years after independence and the absolute freedom to export profits was used to the full.[18] Some resident companies purchasing merchandise from oarent organisations abroad added as much as a third on to the cost price when making payments. This allowed them to remove capital at a still higher rate whilst at the same time increasing Zambia's cost of living. This behaviour did much to whip up an anti-foreign companies feeling within the country. Thus, the major reason for the introduction oÇthe policy of

government participation therefore was to ensure that mining rights' holders operated within the framework of the overall economic and social goals of the country. The policy was also borne out of a desire to

15. Central African Research — 4 supra, p.2. The situation has not changed much with government participation in existing mines of the over 30,224 workers only

107 Zambians held senior staff positions. See Nchanga Consolidated Copper Mines Ltd., Annua/ Report, 1974. And yet government target was much higher, see Zambianisation Committee, Report Progress of Zambianisation, 1972.

16. An official inquiry in 1966, however, found no reason to doubt the sincemy or good faith of the companies with respect to their programmes for the training and promotion of Zambians Report of the Commission of Inquiry into the Mining Industry, 1966, pp.73-74. But there is a contrary view e.g. Buroway, The Colour of Class on the Copperbelt Mines; From African Advancement to Zambianisation, 1972. The local employees seem to believe that the companies are to blame, see Times of Zambia, 11 February, 1974, p.l.

17. The contribution of manufacturing to groil domestic product rose from £14,100,000 in 1964 to £30,000,000 in 1967. Its volume rose by 25% per year on average. This was despite the limitation imposed by the Rhodesian situation, see Central African Research — 4, supra, p.2.

18. This led the government to limit the amount of dividends that could be externalised to SOVt of profits. See Kaunda, Zambia's Economic Revolution,

1968, p.7.

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ensure that the mining industry was not completely foreign owned and controlled — a desire widespread among developing countries, particularly in relation to extractive industries.[19] In most of these countries, the ordinary man in the street sees no value in theoretical political independence if most of the decisions relating to employment, inflation, pricing and basic economic considerations which affect his ability to work and look after himself and bring up his family are in the final analysis dependent upon decisions made in other countries. Hence, the need for this domestic involvement can best be understood when it is realised that before 1969, there was no direct indigenous Financial participation in mining activities as such, although some local capital had been invested in the big mining companies and there were a few local companies exploiting minerals such as mica and limestone.[20]

The new policy was first implemented in 1968 with regard to nonmining activities.[21] Two other precedents could be said to

have been drawn on Zaire, a neighbour and a fellow member of the International Copper Organisation which had taken similar moves in relation to its mining industry in 1966, and another example was Chile also a fellow member of the Copper Conference.[22]

However, this desire for economic independence should be distinguished from a desire to cut off all foreign investment. In fact in the Second National Development Plan, one aspect of the government's mineral policy was stated as being the creation of a favourable investment climate in order to encourage the private sector to increase its .level

19. This desire though widespread among developing countries is not confined to them. Such rich countries as France and Canada have been concerned about the limitations on their independence created by large scale American investments and Britain is frequently worried by the loss of freedom that arises out of running a reserve currency with inadequate backing. Canada's concern has been so great that in 1973 the government passed the New Foreign Investment Review Act which in clause 2 states, 'This Act is enacted by parliament of Canada in recognition by parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of National Concern'. See also Wahn, Towards Canadian Identity, the significance of Foreign Investment, (1973). 11 Osgoode Hall Low Journal, p.517.

10. United Nations, Report of the Commission of the Permanent Sovereignty over Natural Wealth and Resources, 1962, p. 170.

21. Kaunda, Zambia's Economic RevohUkm, 1968, p.11.

22. Members of the C.I.P.E.C. have undertaken to keep each other informed of important developments in their own mioiag industries and to co-operate on measures aimed at improving the price of copper e.g. cutback on production, see, Chairman's Statement. Nchanga ConsoUdMad Copper Mines Ltd., 1973.

of interest in exploiting the mineral potential of the country.[23] It emphasised that legislation must always reflect this objective and, as it seemed, there was a general realisation of the need for foreign capital in the development of the country's mineral resources. Throughout its history, the industry has been developed by foreign capital.[24] In the early part of its development, it was largely British, American and South African capital which put mining on a sound footing. In fact to this day foreign capital has a significant interest in the existing

mines, although now control rests in the state. Moreover, even if foreign investment were not to take the form of financial investment, at least in the beginning 'Know-how' would have to be controlled from abroad and financing arranged by borrowing from abroad if new mining projects are to be generated and successfully realised. Because of these and other benefits discussed later which the country derived from foreign capital, it did not wish to nationalise the mines completely.

The Terms of Participation

Various ways exist of enforcing domestic participation. One such way, which has been adopted in Botswana, is for the government to be issued with a certain percentage of all equity stock free of charge to itself. Another, of which the operations of the government of Ghana in relation to that country's gold and diamond mines provide one of many examples, involves enunciating a policy that a certain proportion of the equity of all major mining companies should be owned by the government and then inviting the companies concerned to enter negotiations with a view to giving effect to this policy.

The Zambian mining legislation follows neither of the above two out instead legislates a government option to participate up to the extent of 51% of the equity shares on terms fixed by it. TTiis option is in practice held by the Mines Industry Development Corporation whose issued capital is held 100% by the state. This condition is imposed by section 20 of the Mines and Minerals Act, and the granting of a prospecting licence is made dependent on the applicant agreeing to this condition being included in the licence. So far all prospecting licences that have been issued

23. Second National Development Plan, 1972, p.91. Se« also K»unda in Industrial and Mining Corporation Ltd., Annual Report, 1974

24. Basic sources on the history of the industry include; Bradley, Copper Venture 1952; Bancroft, Mining in Northern Rhodesia, 1962; and Coleman, The Northern Rhodesia Copperbelt 1899-1962, 1971.

have carried this condition and no licence has been refused on the grounds that the applicant does not wish this condition to be included. The relevant part of the section reads as follows: An application for a prospecting licence may be granted subject to conditions, including, in particular (a) a condition requiring the applicant to agree to the Republic or any person nominated on behalf of the Republic, having an option to acquire an interest in any mining venture which might be carried on by the applicant or by any person to whom he transfers his mining right, in the proposed prospecting area.[25]

The Decision to Participate

The state does not have to participate, and has in fact refused participation in one case,[26] although the case in point is not a very good example of government's non-exercise of the option, since it was an existing mine and the mine was operating at a loss. It may also indicate that the state will not exercise its option in the case of projects of doubtful viability. It makes a decision whether to participate or not and the extent to which it will participate within limits of 51%. It may also ask another person to participate on its behalf. The procedure for the implementation of the policy where a condition as to participation has been included in a prospecting licence or carried over into an exploration licence is that, prior to applying for a mining licence, the holder of a prospecting licence or an exploration licence must notify the state and the holder of the option that he intends to apply for a mining licence and requires the holder to exercise his option.[27] An application for a mining licence may only be granted if the holder of the option exercises the option or informs the holder of the licence in writing that the option will not be exercised or

25. This is carried on in the exploration licence in s.31 (a) which provides that 'An application for an exploration licence may be rejected where the applicant is unable or unwilling to comply with any terms or conditions on which the relevant prospecting licence was granted and which are applicable to the granting of the exploration licence,' see Mines and Minerals Act, supra.
26. This is the case of Mkushi Copper Mines Ltd.
27. See s.46 (1) (b) of Mines and Minerals Act, {upra.

fails to act within six months of being required to exercise his option.[28] Should the option not be exercised at the time of the grant of the mining licence, it is not exercised thereafter except upon the invitation of the mining right holder. This stipulation appears in an annexure attached to prospecting licences. The provision is generally interpreted by miners and mining officials as meaning that once the government does not exercise its option at this time the mining right holder can operate without any fear of government participation as any such measure would be a breach of the prospecting licence. Any other interpretation would be contrary to the concept of vested rights, which, is an essential element in the encouragement of mining investment in that it would be eroded if negotiations relating to participation by government or its nominee were to take place after the issue of prospecting or exploration licences.

Government participation in prospecting

The state's policy at the moment is that as far as possible prospecting in all fields should be by the private sector and that prospecting by the government or a parastatal group should only be undertaken when there is no probability by the private sector.[29] This attempts to rule out the possibility of domestic participation in the earlier stages of mining activity. The stage at which the state decides to take an interest is regarded as a disincentive by many mining rights' holders, in that the high risk part of mining is left to private companies. In the initial stages of prospecting and exploration there is a relatively low capital requirement but a very high risk element. This gradually changes as a project matures until at the time of the exploitation of a mineral deposit there is a very high capital investment and the risk factor has been reduced to a minimum level. It also means in practice that domestic capital jumps on the bandwagon of the the winner but not on that of the losers in that if a firm spends K8,000 on finding minerals, it may then have to give 51% of its shares to the state; whereas if a firm loses K8,000 in trying to find minerals and finds none, the state will not be interested in its ventures and it will have to bear the loss alone.

28. Notification takes the form of a notice which states the percentage of the ordinary shares in the company to be acquired and signed on behalf of the government and sent by registered post to the registered office of the company. Notification is given where the option is held by any person on behalf of the Republic of that person and where it is held by the state to the Minister of Mines.

29. Government of the Republic of Zambia, Second National Development Plan, supra, p.91.

It is understandable that the state should insist on minimising the use of its funds in the high risk period as it would be difficult to justify in a _E0Qr country, the expenditure of much-needed public revenue for what is to the public eye seemingly unproductive activities in the short-term except in exceptional circumstances where prospecting has virtually dried up which is not the case in Zambia.[30] Besides, if government participates at low levels without technical back-up, it is not very helpful. Also it is not exactly true to state that when the government does not participate in prospecting directly it contributes nothing. The government in fact contributes indirectly in several ways. When a company is prospecting although on the debit side it has risk and the amount of its investment, it has on the credit side, the mineral to be discovered, the infrastructral costs though limited,

general social and educational costs and it uses free of charge the basic geoscientific data compiled by the Geological Survey Department. The actual contribution of the government in respect of the last item alone can usually be as high as 10% of the expenditure incurred by the prospector in a normal prospecting programme.[31] Nevertheless, perhaps there is a need to re-examine this policy in the light of better resource utilisation and the realisation that with the acquisition by government of the natural resources in its country, the long-term is now much more significant than the short-term goals. The development of a logical mineral policy and rational mineral resources management becomes increasingly significant. Since the cost of the shares can be either in cash or properties, the state could modify its policy by, for instance, building the infrastructure where it does not exist and use this to earn a proportionate equity share. One advantage would be that it would be spending money on non-risk factors which are also of some use to other spheres of the economy. The setting up of a mining investment fund should also be considered, whose aim should be the promotion and development of mineral exploration. The fund could be owned jointely by the government and private mining interests. Its funds could be lent to miners to finance mineral development on a loan basis at reasonable rates of interest, particularly for programmes of prospecting and exploration. Increasingly there should be a move by the state from

30. lor instance it is ex peeled that the production of copper will increase by 39.5 per cent from 645,300 metric tonnes in 1971 to 900,(XX) tonnes in 1976 which gives 6.K per cent average annual rate of growth for 1972-1976 as compared with 0.6 per cent for the 1969-1971 period. See Government of the Republic of Zambia, Second Motional Development Plan, 1972, p.91.

31. See Woakcs, Some Personal Notes on the Mining Industry in Zambia, 1972.

simply taking over existing properties to creating new instruments and tools for achieving mineral development.

Indeed the state seems to have modified its policy in practice to take account of the complaints by miners as may be evidenced by two recent participation agreements. Two new ventures have been formed before the stage of mining has been reached. Firstly, the Mokambo Development Company has been established as a joint venture between Mines Industrial Development Corporation and Geomin of Rumania.[32] The Company, incorporated in May 1974, is undertaking geological and mineral investigations into the Mokambo Copper Ore body situated near the Zambia-Zaire border.

Secondly, there is the Mines Development Corporation — Noranda Mines Limited of Canada.[33] The Company, incorporated on 29 July 1974, is undertaking mineral prospecting in five licence areas in Central Copperbelt and North-Western Provinces. Mines Industrial Development Corporation is also carrying out its own prospecting on a small scale through its prospecting wing, Mindex.

Payment for the government interest

Unless otherwise agreed to by the government and the holder of the mining right, the consideration for the interest for which the option is exercised is payable in cash to the holder (if shares are transferred by the holder) or to the company (if shares are issued by the company). In the first case the cash paid has to be a sum equal to such proportion for all expenditure reasonably incurred for prospecting, exploration, development and relevant evaluation, metallurgical test work, feasibility studies in or in relation to the prospecting area as well as a reasonable proportion of overhead and general administrative expenses in cases where the holder holds or had held, or his predecessors in title have held, mining rights for other areas in Zambia. The expenses have, however, to be those incurred by the holder of the mining right and his predecessors in title from the date of issue of the prospecting licence under the Act to the date of exercise of the option as may be equal to such interest (not exceeding 51 per cent thereof) as the state may decide to acquire in the mining company.[34] In the second case, the cash paid is ascertained by

32. Mines Industrial Development Corporation, Zambia Mining Year Book, 1974, p.ll.

33. Ibid.

34. See Annexure attached to prospecting licences.

reference to the following formula: X = y X z/100 - z where X = the amount to be subscribed, y = the total of the said expenditure and z = the percentage interest nominated by the government. The expenditure must be reflected in annual accounts certified by a firm of independent accountants, acceptable to the government and the accounting year relating thereto shall be agreed upon by the holder of the mining right with the government, where upon the accounts are to be produced to the government within three months after the end of such an agreed year. However, it is important that the government pays for its shares in a fair form, if its action is not to frighten away other mining investors. On the basis of the formula above, the state agrees to pay for its share of prospecting and development, carried out in the whole of the original pro-specting area in which the new mine is found, and to pay for

mine construction expenditure on the same terms as other shareholders. Although, of course, for all the original prospector's outlay on prospecting, he ends up getting only half a mine instead of a whole mine. The only loss he incurs is the interest and reward for risk on the prospecting expenditure. In fact a problem has arisen at times with regard to exploration expenses. Where a company finds minerals, does the state on acquiring an interest pay exploration expenses for the whole licence or only for those expenses that can be said to be related to the mineral to be mined? Such was the case in the Lumwana licence area where there was a dispute as to whether the state was to pay for investigations of uranium when the mine in which it is to participate is going to be one of copper. The state refused to pay the exploration expenses for uranium. This problem may not easily arise with respect to prospecting because at that stage the mining right holder is investigating mineral occurrence generally, whereas at the exploration stage specific ore bodies are investigated. Such misunderstanding really arises out of the problem already discussed of the state's non-involvement in the high-risk stages of mining. The government's decision concerning Lumwana was consistent with its declared policy. And the payment of exploration expenses by the state of minerals not being mined would be unjustified in that the state would be reimbursing the better off miners in so far as such a miner would have had some results for his expenses as it does not reimburse miners whose prospecting programmes produced no results. In so far as this practice is a disincentive to the attainment of an increased level of prospecting, the

cost to the prospector could be mitigated if a company wishing to utilise data could pay something and also by the establishment of a mining fund from where some of the money for prospecting might have been obtained at a reasonable rate of interest. Also, it must be realised that whatever the position, the company does in fact recover the money when it starts to mine for profit as the tax laws allow for such expenditure. Once payment of the government share in the expenses has been made according to the formula outlined, the government then requires the mining right holder to make available to it free of all encumbrances such number of the issued ordinary voting shares in the capital of the mining company being formed These shares represent the percentage of voting rights of the issued share capital of the company equal to the percentage of the interest in the mining company for which the option is exercised. A new mining company has to be formed with itself and the private investor as the sole shareholders in the new company.

There is usually no difficulty in valuing the shares to be

acquired by the state. The value of the shares is usually taken to be the estimated value of the investment. There is no difficulty largely because the circumstances in this case are different from those prevailing in an on-going mining venture. In an on-going concern a government is usually mindful of the historical cost of the project and the write-offs that have been allowed, as was the case in 1969 when the state acquired a majority interest in the existing mines. A company running an existing mine will be mainly concerned with its current and future cash flow from a project, as was the case with the pre-1969 mining companies.[35] In such cases the state tends to discount the reward due to the investor for originally finding a deposit and for taking the risks of bringing it into production. In doing so, it is usually influenced by high levels of past profits earned by the project.

Participating in new mining projects is a different matter. In this situation the participation required by the state is in a sense part of the price a company is paying for its mining right. It is directly analogous

In the negotiations leading to the settlement over the 1969 Nationalisation there were differences of opinion as to how much compensation; see Martin, Minding Their Own Business, Zambia's Struggle Against Western Control, 1972, p. 176.

to a tax on distributable profits. To the mining right holder the financial aspect of participation is more or less just a form of taxation.[36] The investor is interested in his next return on the money he puts into a project. When he does, his calculations before making his investment decision or before determining whether to continue with a project, he estimates the profit he will make, and then deducts the various taxes he has to pay, thus arriving at his after-tax profit. If there is participation by the state, he must then also deduct the dividend he has to pay to the state as shareholders. This gives him his true net profit, though of course he has also to allow for the fact that the government contributes to expenditure on investment once the state has decided to participate.

Objectives of the State and the Reaction of Mining Rights' Holders

The country aims to derive from this policy the well-known advantages of local equity participation in foreign ventures in developing countries as cited by several writers on foreign investment.[37]

Obejelives of the state

Government participation reduces deeply ingrained suspicions of foreign economic domination. This is particularly important in mining operations because usually their size is large in

comparison with other industries. Whether such suspicions are justified in a particular case or not, they have been recognised to be a real and an important aspect of that national sensitiveness which characterises many emancipated peoples who were formerly held in a state of political and economic dependency. It stimulates the engagement of responsible local capital in productive enterprises where the option is exercised in favour of a private local

36. The joint company will pay mineral tax 51% of the pre-tax profits in the case of a copper mine — and company tax — currently 45 per cent of the balance of the pre-tax profits — though neither tax is payable until all the pre-production costs have been offset i.e. all capital expenditure is immediately deductable. See Nchanga Consolidated Copper Mines Ltd., Annual Report, 1974, p.9.

37. Friedman and Beguin, Joint international Business Ventures in Developing Countries, 1971, p.2.

company.[38] It may even help to develop a nucleus of experienced managerial personnel in the public and private sectors in proportion to the participation of public authorities and private capital in joint ventures, in that local labour becomes directly involved in the industry through the equity participation.[39] This in fact has been the result in the other spheres of the economy where the state has participated. These companies have made the deliberate choice of hiring local talent, which has paid off in the sense that several former employees of the state- owned companies have gone into business for themselves, providing an indirect benefit to the economy. In addition to the skills which the inhabitants of the country acquire from employment in these enterprises, equity participation is also simply a mechanism for the transfer of technology from the developed countries. However, the overriding consideration for this policy is control of mining activities so that they operate within the overall economic and social policy of the country. There are many areas of conflict between the state and the mining rights' holders in their mining operations; one was the rate of development in the 1960s, when the mining rights' holders were keeping the minerals in the ground while the state was concerned to increase the speed of extraction. Another major area of conflict which has often emerged is the use to which investible resources should be put. In the past, for instance, the miners have wanted the reinvestible profits confined to mining activities whereas the states wanted them applied to other spheres of the economy. There is also the problem of how much of the profits should be reinvested at all.

Sometimes the conflicts arise because of a conflict of

interest between the state and the mining companies. A case in point arose over the use of formed coke in processing lead and zinc at Broken Hill mine. The government, mindful of its obligations to the international community in relation to sanctions against the Rhodesian regime, proposed that Waelz Kilns should be constructed to produce 'coke' locally which should be used in the reprocessing of slag. This, it was anticipated could prolong the life of Broken Hill mine by eight years, since the reserves were diminishing. The process cost approximately K70 to produce a ton of coke, whereas the cost of importing a ton of coke from the Rhodesia

38. Ibid.

39. Nwogugu, The Legal Problems of Foreign Investment in Developing Countries. 1965, p.12.

Wankie coal mines was about K27 per ton. Anglo-American Corporation Ltd., favoured leaving the Wankie market still open. In the first place they argued that it was cheaper to do so, but at the same time one must remember that the Anglo-American Corporation Ltd., owned equity interests in the Wankie Collieries.

There are conflicts about sources of equipment and other resources. The state, mindful of its duty to develop the country would prefer local sources even if it means a small sacrifice in performance whereas the mining rights' holders tend to insist on the best and cheapest sources of supply. This was the problem over the development and the exploration of Zambia's coal resources for use in the mining industry. Although the problem was partly also due to the fact that the coal is not as good in quality as the Wankie coal.

Thus, in theory participation of domestic capital in foreign enterprises is acknowledged to have positive advantages in the possibility of fair policy decision of the enterprise in that government directors sitting on the board are in a better position to scrutinise the activities of the business and to deduce its intentions correctly than would be an external group of officials to whom the miners might otherwise have to report in its absence. Further, the state has financial interests also by way of participation. Its equity participation in the existing mines has proved to have overall benefits in the area of profits in that it has effectively increased government revenues from mining activities.[40] It has also reduced the concern that any immediate benefit to the balance of payments arising from the inflow of foreign capital would be more than offset in the long run by the onflow of dividends. The burden of dividends transfers and repatriation of foreign capital is thereby reduced, while still achieving the gains in acquisition of techniques and management skills, as well as in industrial

activity, that a sole venture would have provided. State participation has also given the state an opportunity to control the extent to which companies allow their parent bodies to profit from their relationship with their subsidiaries. This in certain circumstances is important particularly with regard to the fact that most of the mining companies operating in Zambia are worldwide. It has been established that multinational corporations develop a planned and global

In 1974 quite apart from its tax receipts a dividend of K43.2 million was decided[1] · by the holding Company to the state. See Zambia Industrial and Mining Corporation Ltd. Directors Report, 1974.

strategy in their foreign operations and that sometimes through transfer of products within a vertically integrated company, the prices which are used for these transfers are often a major avenue for a subsidiary to receive or transmit financial resources to another subsidiary or to the head office. Participation affords the government directors an opportunity to scrutinise purchasing and marketing arrangements, the fees for provision of technical and consultancy services and investment of surplus funds all of which can be used by companies to make hidden or disguised profits outside the host country.

Reaction of miners to government participation

There has been a change in attitude from ten years ago so much that now there is no doubt that the great majority of mining rights' holders within the country welcome and are prepared to undertake joint ventures with the government,[41] in mine development and exploration although given a choice they would prefer minority rather than majority participation. So far there has not been any case in which mining capital has had to withdraw because of the government's insistence on acquiring equity in a new mining venture and there are no mines that have been discovered but are not in production because of this policy. In some cases the mining right holders consider that there is an absolute business advantage in the association of the state with their enterprise. They may be short of capital, as in the case of Mjcushi Copper Mines, which several times invited government to take an interest in it, as a solution to its liquidity problems.[42] Also, the country presents certain political and economic risks, such as nationalisation, devaluation, foreign exchange blockage, depreciating currency and excessive taxation and so some mining right

41. Mr. Oppenheimer has recently given lome indication of the thinking of hi« group. In the course of hu Statement to Shareholders at the 1974 Annual Oeneral Meeting he said: 'No government like* it* basic industries to be entirely foreign

owned and yet in many developing countries individual members of the public either do not have the resources to invest in industry or, for ideological reasons are prevented from doing to. The only alternative in such cases to full foreign ownership is for government to take a direct interest. In these circumstances we wittingly IT a partnership between the government as owners of the mineral rights and private companies that can provide the necessary financial resources and technical know how'. -

42. MfrTf*[1]* Mine has ****** doted. See Mining Mirror, 3 October, 1975, p.7.

holders are often willing to accept domestic participation in order to reduce the financial risk involved in mining investment. Their reaction to risk is to ask themselves whether the company is able to absorb a possible loss before proceeding and then inquire into the possibilities of diminishing its exposure to risk. This was partly the reason why Anglo- American Corporation Ltd., and Roan Selection Trust Ltd., in the early 1960s invited the state to take minority interest in their mining activities. Financially, they could have gone on without difficulty on their own.

More recently this attitude is particularly noticeable in the new companies; the larger the capacity for investment in relation to the amount of the pre-discovery investment, the better able the company is to absorb a possible loss. It must be realised that new mines are expensive to bring into production. For instance, any investment in exploration must be backed by a determination to follow up by further investments of ever-increasing amounts, the indications proved by initial prospecting efforts. An example of this is that an aerial geographical survey generally requires an additional expenditure of the order of ten times its costs, on follow-up checking of indications provided by the survey. Thus, an investment of K1 million on a large aerial survey will require an investment of an additional K10 million for follow-up on the ground and unless these follow-up works are carried out, the purpose of conducting the survey is negated. The following-up will in turn lead to the development of one or more mines involving the expenditure of millions of Kwacha. One way of reducing the impact of risk is by reducing the amount of capital investment. From this point of view, the availability of government or any other local currency loans is a very important incentive, in that it minimises the amount of equity capital committed by the mining company and therefore reduces the impact of risk. There is a good example in the case of Lumwana prospecting area which is supposed to come into production in two to three years time. The prospecting was

done jointly by Anglo-American Corporation and Amax, the prospecting wing of Roan Selection Trust Ltd. When they reached the stage of exploration, the two companies indicated that they would not go on unless the state joined them. Although it contains one of the largest ore bodies, Lumwana has very low copper content but the state has decided to join the companies. Anglo-American Corporation Ltd., seems to be

coming to nearly the same position over the recently discovered nickel deposits in its Munali prospecting area. The Company seems to be particularly worried over infrastructural costs. Other positive benefits derived from such associations by the mining companies are that local voting control causes the state to feel a greater sense of responsibility for the success of the enterprise. For some it provides ready access to know-how, manpower, and knowledge of the geology of the country. The government, through its geological survey department, has the most complete information about the geology of the country. Writers on foreign investment recognise that a joint enterprise provides a bulwark against government interference or greater government participation,[43] in that the state will be more reluctant to impose profit restrictions, import controls, or even expropriation in most cases sufficiently satisfies nationalistic aspirations to forestall any need for greater participation by the government itself by deflecting harmful emotional charges which the foreign venture may attract when it is big, successful and still completely foreign. Better still state participation provides a helpful liaison with local government authorities and financial institutions mainly because the local directors are able to influence government action by private negotiations with government officials and politicians. This is especially true in a small country such as Zambia, where the limited population means that the individuals sharing power will often have much of their life experience in common. It is true that the foreign officials can do the same but it is also equally true that the function is better performed by local patners mainly because they know the local situation better. In any case it is obvious that reports about the companies in which the state has participation will be given more credence if they are made by government officials than when they are made by the foreign company's men. It appears also that since the state began taking equity participation in the mining companies, greater local interest has been generated in their operations. The companies themselves have also become more interested in local programmes such as education, sport and the like. Friedmann suggests that there is an important managerial advantage of a relatively intangible kind which could result

from this. He suggests that it has a favourable effect on the
43. Friedmann and Reguin, supra, p.385.

morale of the local employees, since it is a major step in the process of localisation by which a foreign investment assumes a local character and status. When this is achieved, it makes it easier for the local employee to integrate his loyalties, with a consequent reduction in tension and improved work performance.[44]

Participation as a disincentive to investment

Some international mining companies dislike the requirement of participation and try to avoid areas in which it is an established policy. To this extent it is a disincentive to investment. It has been cited as the reason why for instance low grade minerals of porphyries are being mined in the United States while exceptionally fine deposits of the same mineral are being neglected in Chile and Peru.[45] Several reasons have been suggested by writers on foreign investment for the companies' dislike of such requirements. Friedmann suggests that local participation can seriously inhibit an internationally integrated company in its operations. What might otherwise be complete freedom to fix transfer prices, marketing areas, and so forth, may be substantially circumscribed in the case of a joint venture with local equity participation. And that to some, political and psychological conditions militate against joint ventures. The reason for this is that when difficult and unstable conditions prevail in a country, the association of a foreign investor with local interest may increase the precariousness of the situation.[46] Yet perhaps the most widespread discouraging factor to a foreign investor is what has been widely acknowledged to exist — the disparity of outlook between the foreign investor and the local partners. In the business activities of developed countries, there is a certain community not only of tradition but also of scientific, technical and legal standards, and there has also been more experience with responsible investment practices and legal supervision.[47] In a country like Zambia, this stage has not yet been reached. Power and wealth are concentrated in relatively few hands, and are not matched by a corresponding sense of responsibility. For instance,

44. Ibid.
45. Carman, 'Notes on Impediment! to Mining Investment! in the Developing World,* (1975), 14 Bagmnda Paper.
46. Friedmann and Begum, supra, p.388.
47. Ibid.

the partner from an industrialised country, usually a large corporation with world-wide experience, generally takes a long

term view of profits, placing the development of the enterprise before quick dividends.

Some of the investors, it is stated, resent direct participation by the government or a government-owned corporation in a capital importing country.[48] This is particularly so in American mining circles where it is felt that there is something inherently unsuitable about mixed government-private enterprises, since the government 'wears two hats' — as regulator and partner. Others fear government partnerships because they feel they would be subjecting themselves to the dangers of frequent changes in government policy. But it cannot be denied that in a country like Zambia the only alternative to initial participation by government is no local participation at all. There simply is nobody big enough to form a mining concern.

Some writers have suggested that the policy of requiring domestic participation in foreign ventures is somewhat inconsistent with a declared policy of attracting maximum foreign investment. The government option, when exercised, utilises local capital that could have financed alternative development and thus would have enhanced the development of other sectors of the economy.[49] It has further been argued that the inconsistency between the two sets of motives stands out sharply when it is realised that through government participation outside investors may be forced to divest themselves of their equity to make room for local interests, resulting in true disinvestment, with the foreign investor repar- triating part of the capital he would otherwise have used. If this happened it would be unfortunate because this is capital which would already have been attracted into the country. However, it is unlikely to happen in Zambia because section 20 of the Mines and Minerals Act ensures that prospecting licences, the very first mining rights, are granted to discovered. It must also be realised, as has been demonstrated by the example of Lumwana and Mokambo licence areas, that the reverse is equally possible — that is that lack of government participation may discourage some investors who do not want to take a greater risk in

48. Ibid.

49. Nwogugu, supra, p. 13.

searching for minerals and would prefer to share their risks with the state. Besides the arguments also make a basic assumption that all mining companies that start or wish to start a mining venture have adequate financial resources to engage in such a venture. Mining being an expensive and risky business,

this is not always so. It is not necessary to go further than Mkushi Mine which closed after the government had refused its invitation to take equity participation to prove that not all mining companies have enough money to complete their venture. Even when they do have the money, they may not be willing to use it because of the size of the risk its use entails without government participation. As observed earlier in the Lumwana licence area for instance, the companies have indicated that they might not have gone ahead without government equity participation. More recently, Anglo-American Corporation Ltd., has invited government participation in respect of its Munali nickel prospect and has indicated that it might not go on if this is not forthcoming.

It has been suggested that since the government in the event of it deciding to participate would have to get its money from some other source, it is open to question precisely what the state receives for the percentage of the development costs that it subscribes and that since the funds would readily have been provided by others, the state money would not be optimally allocated.[50] It is submitted that where the government indemnifies the company to the total amount spent on prospecting and exploration, it still gains. In the first instance, it cuts out the risk part and anyway the recoverable value of the mineral discovered will always be far in excess of the prospecting and exploration expenses. In that sense the money is optimally allocated. And as already stated, money is not readily available once a deposit has been found.

Nowadays, the disincentive impact of government participation is minimal since direct government participation in mining ventures has spread both among developed[51] and developing mining countries, so that its disincentive impact can no longer be as serious as when its practice

30. Bostock and Harvey, supra, p.203.

51. Britain is now for instance insisting on participation before issuing any prospecting licences. See the Guardian, 28 May, 1976, p.l. Canada has government participation, see Drolet, Mining Legislation and Responsible Authorities, paper presented at International Symposium of technical Research in Mineralogy and Management of Mineral Patrimony. Orleans-Lasource, 197S, p. 11.

was limited. This means that there are less and less alternatives available. In fact among developing countries recent demands for a new international economic order have led to an ever increasing number of governments, in these countries, demanding participation in the mining sector of their economies. In fact the disincentive impact is definitely not placed very

high on the list of disincentives by most mining rights' holders currently operating in the country. Several others are considered as more discouraging — such as the threat of outright nationalisation at undefined compensation levels, the political environment, which may threaten the validity of contracts or result in the imposition of onerous controls, cost of services, legal complexities which make it difficult to know what the law is, foreign exchange restrictions, taxation and the sheer magnitude of the investment required where the mine to be brought into production is on a large scale.

It may be questioned whether it is wise at all to have any measure which has the least prospect of discouraging any amount of much needed capital. In the final analysis the answer becomes a question of balancing two evils. Thus, the cost of discouraging some mining investment, a government may argue, may not be too high a price to pay for the control of the mining industry, the direct participation in profits which results, and the consequent reaction in the outflow of profits. Similarly it is important for Zambia to attract mining investment as it is for her to regulate the repatriation of profits which considerably reduce the investment resources in the country and limit its positive effects within the country which could well be greater than the amount of investment discouraged.[52] The key to the government policy should be fair play with

52. The Organisation of African Unity Conference of Head] of State at iti 1973 meeting recognised this problem and resolved among other things to: (a) defend vigorously, continually and jointly the African countries' inalienable sovereign rights and take concrete measures to recúlate the repatriation of profits which considerably reduce the investment resources of African Countries, see Organisation of African Unity, Declaration on African Co-operation. Development and Economic Independence. 28 May, 1973. Part of the problem faced by the countries in playing host to foreign private investment is illustrated by the following quotation: 'During the period 1950-1968 foreign assets of United States based Corporations rose from S121.000 million to $174,000 million. In that same period net outflow of U.S. direct investment fefl short of income by over $15,000 million. In other words overseas assets race by 53,000 million while there was a net flow of money to the U.S. of $15,000 million. With reference to British private investment in the developing countries, for example, the following Figura are equally pertinent: In 1967, British private investment in the developing countries was £60 million whereas Britain earnings from the pml investment amounted to £140 million, the same year' See Economic Development and Co-operation Among Non-Aligned Countries, Draft

Document No. 23. Third Summit Conference of Non-Aligned Nations, Lusaka, September, 1970. (NAC/CONF.3/C7/23) and also Boctock and Harvey, supra, p.9.

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the private sector over its terms of participation to minimise the disincentive effects of the policy.

The Level of Equity Participation

It has been mentioned that the state is at liberty to acquire any amount of shares up to a maximum of 51% in any new mining venture. A decision whether or not to take minority or majority shares in a venture must depend on which of the two levels is more likely to reflect effective control.

Minority participation

The desire to make mining rights holders operate within the wider terms of government's economic and social policy rather than in their own narrow terms can be achieved to some extent by limited participation of, say, 51% to 30% with two or three directors on the board but in reality this achieves little more than increasing the information available to the state about the company. State-appointed directors sitting at board meetings receive reports and schedules, but the real decisions continue to be made at the head office of the parent company. It would also only have the advantage that the state directors can ensure that the board of a company is fully apprised of government's policies in respect to matters which come up for discussion.

Thus, majority participation by a foreign company will entitle it to a virtual power of veto in respect to a wide range of motions and decisions of the joint venture since its equity holding would entitle it to a majority of seats on the board. Several majority corporate actions would require the approval of the foreign firm with the result that the state would not have effective legal control of the source of all executive functions (the board of directors) and over matters on which it is necessary to have a say if government control of the industry is to be effective. Some relate to all decisions on finance and including the development of new mines which would be subject to the majority veto. Thus, if the state wanted the company to engage in further exploration which did not appeal to the foreign partner then it cannot push forward its views very forcefully. The area of finance and planning of capital programmes of mining compan

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ies is one in which the state must exercise some control or rather have the opportunity to exercise meaningful control if any appreciable influence on the activities of mining companies is to be achieved. For as a United Nations study on multinational companies[53] has noted, even in the most loosely

knitted international firm the minimal control or restriction which is exercised is control over the capital budget. Where the state participates only to the extent of less than 50%, it would not also be in control of the general meetings. Under the Companies Act of Zambia only three resolutions can be passed, a simple solution, an extraordinary one and a special resolution. The first one requires a simple majority and the other two require much higher majorities in order for them to be passed.[54] Free voting at these meetings is out of question in that in practice only two people attend a general meeting of a joint venture, since its members are the two holding companies of the equity participation. Admittedly, the same limitations apply to the foreign mining companies as they too may not be in control of the board of directors when they take less than 50% of the equity. Thus, they cannot change any major areas of policy in a general meeting without the consent of the state if the company's amount of shares make it impossible to pass a resolution without the state's co-operation. These lfmitations, however, are likely to hurt the government more than the private miner in that it is the government that is interested in changing certain attitudes of the mining investors.

Majority participation

If the government is to have a chance of a real say in the decision making of a mining company in which it wishes to participate, it must acquire majority equity participation. This will then entitle it to have half the directors, as in the Mokambo Development Company and Mindeco Noranda, so that its directors on the board have a real sanction to apply in terms of voting numbers. The state in Zambia is insisting on at.least 51 % participation and there Is at present no îndïcaTîon that it will exercise its option in a mining venture for any share less than this. A large number of mining rights holders hesitate to agree to participation at over

53. United Nations, Report on Multinational Corporation in World Development. 1976, p.46.

54. Companies Act, Chapter 686 of the Laws of Zambia, ss. 12, 14, 15 and 112.

50% without a management agreement. This was the case in the 1969 partial nationalisations of the then existing mines. The experience of the state has been that these should be resisted, as they go a long way towards negating government control and influence on mining activities and it has recently terminated its previous management agreements.[55] However, the control of the board of directors is not sufficient in itself. The board does not run a company, its affairs are manned by executives, who are charged with implementing the board's policies. It is therefore

important to have some control over the executives. This in fact sometimes explains why foreign investors although not concerned with staffing of the operational levels and in fact do encourage it because of the political pressures in favour of localisation and the lower cost of labour, they have a strong interest in controlling decisions with regard to the staffing of the management functions. It must be acknowledged, however, that it is also because it is not easy to get expatriates on hire except on secondment and management agreements. But it is preferable that joint ventures should be self managing. The employment of management agreements could only be justified if there was such a thing as the 'neutrality' of management i.e. that management systems are capable of universal application regardless of the social-political context and the ideological basis of the economic system. This of course is not the case. Management agents have their own values and their judgements on policy matters are going to be influenced by these values. Besides their employees will obviously owe their first loyalty to them.[56] It may be argued that their recommendations are not imposed on their principles and that their job is only to offer a possible solution to the organisation. This argument assumes that a technocratic board is capable of perceiving alternatives, which as will be pointed out later, is still lacking in Zambia. In addition they are extremely expensive, (sometimes deliberately so that their advice will be regarded as pre-eminent) as they proved in the case of the management agreements concluded in 1969 between Anglo-American Corporation Ltd.. Roan Selection Trust Ltd., on one hand and the government of Zambia on the other.

35. For the announcement cancelling the management agreements, see Times of Zambia, 31 August, 1973, p.l.

J6. Sklar supra, quoted some mining executives of Anglo-American Corporation as saying, 'I feel as though 1 belong to the Company more than any country' and 'My first loyalty is to Anglo, Harry Oppenheimer sent me here and there is something I can do for the group in this place', at p.203.

TABLE IX

MANAGEMENT AND CONSULTANCY FEES PAID TO ROAN SELECTION TRUST LTD., BY ROAN CONSOLIDATED MINES LTD., 1970 — 1973.

Elements of Fees	Fees Paid Million Kwacha			
	1970	1971	1972	1973
3/4% of sales proceeds	1.335	1.461	1.434	1.779
2% Consolidated Profits before Income tax but after Mineral Tax	1.045	.82	.526	.742
Total	2.380	2.473	1.960	2.521

OURCE: Calculated from figures of gross sales and profits in the Company's Annual
Report.
This is disregarding the recruitment fees of 15% gross emoluments of a recruit in the first year of duty if not less than six months in service.
The employees of management agents tend to stay for short periods of time and thus make themselves open to the criticism that they frequently use developing countries as a training ground for young staff fresh out of business schools. There is some truth in the criticism that most expatriate employees, particularly at the higher levels, tend to be largely more concerned with furthering their careers with the foreign company that is employing them[57] than with the service they give to the local company.

57. Since, for instance, the termination of the management agreements; the mines have experienced loss of senior staff. See Chairman's Report Nchanga Consolidated Copper Mines Ltd., 1975.

Factors affecting control

The distinction between majority and minority participation may of course and in certain circumstances be rather artificial as equity alone even when accompanied by joint management can not lead to effective control. Thus, participation needs to be backed up by government insistence on formalised planning. Only if management techniques such as corporate planning and managment by objectives are used, will the board be consulted on all major matters. These techniques are designed to see that a company has a clearly defined policy. After careful thought and consultation on each facet of its operation, this policy is made known throughout the company and related to each employee's job. These techniques are particularly relevant in that they will reveal the areas in which there is a conflict of interest between the partners so that an explicit policy is laid down to remove such conflict. At the moment the existing joint ventures have a very poor working relationship with government. There are no accepted policy guide-lines, for instance, for state officials who have become board members.

There is no doubt that the State must appoint directors and executives to represent it on the board who are capable of looking after its interest. Its nominees must have a general knowledge of mining, finance and management in order that they can withstand any arguments from their fellow directors from abroad when pressing for the carrying out of government objectives such as localisation and reinvestment of profits. The effectiveness of the control government appointed directors can

exercise on a mining venture will depend on their being a capable, alert, astute and qualified team so that together with the foreign directors they can supervise the activities of management. Care must be taken to see that people appointed to these posts understand and sympathise with the government's objectives because some local people, because of their training, tend to be very sympathetic to the point of view of foreign companies.[58] In this respect the Zambian government is fairing rather badly. Owing to the relative youth of the country and the colonial neglect of education, there is no local stock of retired executives on which the

58. This is particularly so if they have been trained by one of the companies involved as such companies teach them how to approach problems from their own point of view.

government can draw to strengthen the technical knowledge of the government side of these boards. The paucity of available technical management is also a result of the disproportion established at the university level between the student population in technical faculties and other faculties, and this is also reinforced by the high percentage of failures in the technical faculties.

The problem is more complex than that. Board appointments are usually a contentious question, as political and other factors such as ethnic considerations seem to play significant roles.[59] Even in the cases where reasonably able people have been given such positions, they have been transferred from company to company and also in and out of companies far too often and frequently for political rather than technical reasons. In this regard several cases can be cited of managing directors being moved three times in a year[60] with the result that few of them have the opportunity to become familar with their management tasks or conversant with the industry and its difficulties. Consequently, they are rarely able to make rational judgements based on time tested operations. Their difficulties are increased too, by regular reorganisation of companies. Another problem arises in cases where the government has appointed civil servants to the boards of directors of some mining companies.[61] In practice this is unwise, because civil servants simply do not have the time to do the work effectively without sacrificing efficiency in their real jobs, and this problem is exemplified by the fact that they are usually unable to attend board meetings by either being on tour or busy in another way. All these factors combine to produce board members without the necessary knowledge and ability. And the scarcity of available people produces a situation in which it is common practice to find one person who is a member to several boards, much more

than he can cope with. In consequence, his supervision and control diminishes considerably and his contribution becomes weak.

59. Complaints by members of parliament are frequent that appointments are made on political grounds, see Times of Zambia, 28 January, 1976, p. I.

60. For instance Mines Industrial Development Corporation, Managing Directorship changed hands three times in 1975 alone.

61. See Mines Industrial Development Corporation Ltd., Directorate of 1974, and Roan Consolidated Mines Ltd., Directorate of 1974. Both in Mines Industrial Development Corporation, Zambia Mining Year Book, 1974.

The need for directors who have mining experience cannot be overemphasised. After all management is largely a question of decision, and decisions cannot be properly taken unless the mind is clear about objectives and priorities. It is not being suggested that a director needs to possess a huge intellect to do his job properly but that what he needs far more urgently is a clear comprehension of what he is aiming at — the object of the exercise — from which he is able to issue clear and unequivocal instructions because he is in no doubt about the purpose of his management task. In a highly technological industry like mining, there are very few management tasks that do not call for a general understanding of technological operations.

Additional measures towards effective control

Zambianisation is not only an important instrument in the transfer of technology to one's nationals, it is also an important way of increasing control over foreign ventures. Therefore the state should ensure that it operates efficiently but reasonably. The well-intentioned policy of Zambianisation can create management difficulties which can endanger the performance of the industry where haste results in people with little or no knowledge at all of the operations they are supposed to manage being placed in management positions.

It is the policy of the government to increase local employment, But the measures employed to implement it do not seem to be very effective. The main check on the rate at which the industry is being localised is through the control on immigration of expatriates. The Immigration Department will not grant any entry permit to an expatriate unless the Ministry of Labour and Social Services certifies that there are no local citizeds with the necessary qualifications and experience, to fill the job he is to take up and further that adequate steps have been taken to train local personnel.[62] The problem with this provision that the Labour and Social Services Ministry acts mostly on the recommendations of senior mining officials who are

themselves expatriates, for occupying the positions they do only they are better placed to judge on questions of qualifications and experience required by people to fill the jobs

62. Immigration and Deportation Act, Chapter 122 of the Laws of Zambia, ss. 18. 19, and 20.

concerned. Another check could be the application of tax on ex-patriates[63] in the mining industry as is applied to other categories of industry. It is suggested that an additional measure to the one pertaining to the control of immigration could be taken by creating a financial incentive to the localisation of a different nature and one which does not create the same problems as the one already discussed. By providing that when a company has Zambianised to a given percentage — a level to be determined by the educational standard of the country — it can deduct a fixed percentage of its net income free of taxes, to reinvest in the activities of its own firm or in other mining activities.

Foreign investors draw their special strength from their ability and opportunity to think in terms that extend beyond any single country. They also think of the use of resources that are located in more than one jurisdiction,[64] and sometimes try to end up making the largest profit in the lowest tax country by transfer of pricing. It is important to start thinking in terms of devising measures which can assist in the control of this phenomenon where it exists. This can be done by regulations through which the state can get hold of the total accounts of a company, to supplement the present limited regulations in the Companies Act, which were originally devised for national companies.[65] An example of what is being suggested is the recent agreement among the members of the Organisation for Economic Co-operation and Development establishing a code of conduct among multinationals. Among other things, the code out-laws transfer pricing methods and requires multinational companies to give wide ranging information about themselves including annual financial statements of profits and sales, investments and numbers of employees on a geological basis and the disclosure of a consolidated profit and loss account.[66] Although this can best be undertaken on an international basis a start can be made with some measures on an individual national basis.

In the final analysis the ultimate source of power of foreign companies

63. See Selective Employment Tax Act, No.9 of 1975.

64. For a detailed discussion of this, see Vernon, Sovereignty at Bay: The Multinational Spread of United States Enterprises, 1971, p.265.

65. Companies Act, supra. All information relates to a company's domestic activities, see ss, 29, 90 and 120.
66. The Guardian, 22 June, 1976, p. 14.

is in their control over the process of technological change.[67] Even if Zambia purchased advanced machinery, it may well find itself backward in a space of ten years. This is also the primary vehicle for foreign companies in their acquisition of abnormal profits where they exist. They retain this power by keeping research and development at home. Thus, Zambian legislation should try to encourage foreign companies to conduct research related to their projects in Zambia. This could be done by creating incentives such as exempting profits to be spent on research studies from any form of taxation.[68]
67. The problem of technology is discussed at length in Kapalinsky, 'Accumulation and the Transfer of Technology; Issues of Conflict of Mechanisms for the Exercise of Control,' (1974), 80 Institute cf Development Studies Discussion Paper.
68. A limited incentive exists but one has to spend the money first as it is allowed in ascertaining the gains or profits of a business, see Income Tax Act, supra, s.43.

MINING RIGHTS AND MINERAL TAXATION

Governments in most mining countries tend to exploit the fiscal capacity of mining-rights holders to the fullest extent through a variety of fiscal measures. The rates and types of measures have implications which are not always realised by those who propose them and often fail to provide a framework within which a just balance is struck between the political and financial needs of the country and a reasonably effective incentive in prospecting and mining thereby discouraging much needed investment.[1]

Taxation and Investment Decisions

The imposition of a tax on mining rights will tend to affect investment decision-making in several ways. In order to understand these influences, the cost-price structure of an extractive industry must be reviewed. The basic economic unit of the extractive industry is the mineral reserve. Pretax costs of development of a mine ore-body include discovery of the ore-body, acquisition of the rights to extract the resource, equipment for the mining and extraction of that resource, and the marketing of the product. Factors which determine the cost of extracting the resource include the grade, size, shape, continuity, and depih from the surface of the resource, rock conditions and other impediments, and the rate of recovery. Besides a mining-rights holder usually competes in regional or world markets and is able to exert little influence on the

prices in these markets. Consequently, while costs of production of the resource are subject to some control by the producer, the prices received for resources are fixed by market factors. A mining-rights holder will therefore extract those resources which he determines through cost-price analysis can be profitably removed. Those reserves below the break-even or cut-off point will be left in the ground and considered waste until changes in prices or extracting and processing methods or other factors make

1. For the exploitation of mineral resources, massive capital is needed e.g. Rokana mine is to spend K5 million on the - edeeming of Number one shaft from 240M to about 350M level. See Mining Mirror, 3 October, 1975, p.3. Another good example is the construction costs of Otjhase mine in Namibia which are reported to be K423 million. See Mining Mirror, 3 October, 1975, p.4. In 1970 it was estimated that a minimum of K1.000 was required for every one tone increase in annual production of refined copper. See Bostock, Murry and Harvey, Anatomy of the Zambian Copper Nationalisation, an Occasional Paper by Maxwell Stamn (Africa) Ltd., 1970.

extraction profitable. The break-even point determines the level of recovery. As the break-even point rises, a large portion of reserves falls into waste, or into the delayed production category. The rate at which a deposit is exploited generally depends upon the relationship between the costs that vary directly with production and the costs that are independent of production. If a miner expects market prices to rise more rapidly than variable costs, then his present rate of recovery may be increased to allow more production. However, fixed costs do not vary with the rate of recovery, but recur each year that the mine is operating. With high current fixed costs, a mining-right holder will tend to extract the resource in as little time as rising variable costs will allow so as to lower the total fixed cost.

The Basis of Taxation in Zambia

The basis of taxation in Zambia is income that has its source in Zambia.[2] The recipient of the income may be resident outside Zambia, but so long as the income has its origin in Zambia he will be taxable on it. The Income Tax Act makes no attempt to define income. The reason is not that the legislature has deliberately left it vague with a view to include everything but because it is almost impossible to provide a precise definition which would include everything which is assessable and which would exclude everything which is not assessable.[3] It could be said that income is what capital produces e.g. if a mining-right holder invests some money and earns more money in return, that

money is income. In this example the income flows out of capital, as it were, in the same way that a man's salary has its origins in his work. Income can often be related to a period of time e.g. it can be said that a man's dividends are so much per year while capital may appear to be fixed in comparison. Thus, if the mining right holder invests K1,000, it would remain at K1,000 year after year and any increase of the amount in the account would be because of the income.

2. See s. 14, Income Tax Act, 1966, supra. The rationale for this test is that a country which produces wealth by... virtue of its natural resources or the... activities of its inhabitants is entitled to a share of that wealth wherever the recipient of it may live.
3. This lack of a definition is true of other countries as well. See, Spiro 'The Receipts or Accrual Basis of the South Africa Income Tax' (1973) 3 Comparative and International Law Journal of Southern Africa, p. 199.

The question of source, however, poses a little problem. As a general rule it has been held that the originating cause of income decides its source. Where a person holds mining rights, the originating cause of profits are the minerals let to the miner by the state. A good example of the principle that the originating cause of income determines its source is found in the South Africa income tax case of Millin v. C.I.R.[4] Mrs. Millin had written a book in South Africa. Although the right to publish was granted to an English publisher and although the contract with the publisher was concluded in England, it was held by the court that the source of the royalties from the book was in South Africa because it was in South Africa that she had actually conceived and written the book. Unlike the United Kingdom Income Tax Act, the South African Act resembles the Zambian one in having 'source' as the main criterion when deciding whether or not various types of income should be taxed. In each charge year, however, only income received is charged[5] and income is received by a miner when in money or in money's worth or in the form of any advantage, whether or not that advantage is capable of being turned into money or money's worth, it is paid or granted to him or it accrues to him or in his favour or it is in any way due to him or held to his order or on his behalf, or it is in any way disposed of according to his order or in his favour.[6] This makes it plain that, as used in the Act, the word 'received' is very far from its normal everyday dictionary meaning because it includes income which is due to a taxpayer but which has not yet come into his actual possession.[7] Here circumstances can arise in which a mining-right holder is entitled to income on a different date from that upon

which it is due to him. Thus, for example, income may accrue to a miner in one tax year but it may be several years before the miner is able to gain possession of that income. In circumstances like these the state may either not charge such income or alternatively, charge such income to tax in the charge year in which it may be realised.[8]

4. [1912] A.D. 207. This case was approved in Mufulira Copper Mines v. Commissioner of Taxes', (1958), R. & N. 336. But its specific mineral taxes are different from the Zambian taxes. It has different taxes for different commodites and its system of capital allowances is different.
5. Income Tax Act, supra, s.17.
6. Ibid, s.J.
7. Ibid, s.5 uses the word 'accrued'; for all practical purposes it has the same meaning as 'due to' or 'entitled to'.
8. The taxpayer must apply to the Commissioner of taxes to avail himself of his law. See. s.16 of Income Tax Act, supra.

The Pre-1970 Legislation

Before 1969 there were three main taxes on mining-rights holders in Zambia: the royalty; the export tax and the income tax.

Royalty

As used here a 'royalty' describes the rent or tax payable to the owner of the minerals purely on the basis that he is the owner. It has a long general history in that royalty (regalia) is said to have been charged by Roman Emperors on the produce of all mines.[9] In feudal times, landowners were in most cases not at liberty to open mines on their own ground without the consent of their sovereign. They were nevertheless, admitted to a participation in the produce of such minerals, in proportions which varied according to the nature of the produce and according to the particular law of the state. In some states the royalty was divided equally between the ruler and the landowner, in the case of some minerals the ruler claimed no portion of the produce. At times the royalty was generally modified according to the circumstances of the mine, sometimes royalty was wholly relinguished. Thus, the concept of royalty is that it is a share of the product or profit reserved by the owner for permitting another to use his property. In England the word was also used to designate the share in production reserved by the Crown from those to whom the right to work mines and quarries was granted.[10] In Zambia until 1964, the royalty was fixed by and was payable to the British South Africa Company.[11] Just before it was repealed the royalty was a levy of 13.5% on the price of copper less K16 per long ton produce.[12] The reduction of K16 was intended to eliminate royalty when the price of copper was low. Thus, the formula exacted no taxation at a price of less than

K118.52 per long ton. 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

9. Collins, supra, p.A 22.
10 Webster International Dictionary,
. 1973.
11 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.
12 Prospecting Licence Condition No.
. 14.

in an appreciable amount of income for the state.[13] It was also a political decision in that the government was not very sympathetic to mining- rights holders on this issue as they had done little about it under the British South Africa Company.[14]

However, the figure estimated by the royalty formula bore little relation to modern costs of production but was established in the 1930s when costs were low.[15] In 1966 the average cost of transport alone was for instance £50 per ton.[16] This is the cost from miner to customer. But royalty, being a tax on production, ignored costs and the government always received the same royalty share of each long ton on mineral produced regardless of great fluctuations in the cost of production to the miner in different mines, and even in the same mine between different shafts. The costs of extraction from the various mines of course varied tremendously in most aspects of production arising from differences in ores and several technical factors. Chililabombwe, for instance, had to drain 62.82 million gallons (282.7 million litres) of water per day, whereas Chambishi drained 1.60 million gallons (7.2 million litres) per day. Further, Chililabombwe needed 1053 thousands of cubic feet 31.6 thousand cubic metres of air whereas Chilibuluma needed only 491 thousands 14.7 thousand cubic metres.[17] The price used in calculating this tax was an average of eight prices on the London Metal Exchange at the time of production. This frequently bore little relation to the prices reported as actually received by the companies. Generally, the price had risen beyond what it was when the royalty formula was fixed in the 1930s[18] as the comparison of the following two periods shows in Table X.

13. In 1966 for instance the mines paid a total sum of £37,324,126 in royalty payments alone. See Copper Service Bureau, Copperbell of Zambia Mining Industry Year Book, 1966.
14. Kaunda, Towards Complete Independence, Zambia, 1969, p.35. The president remarked that 'I don't remember any of the chairmen of the mining companies in their annual statements to their share holders complaining that the royalties charged by the British South Africa Company were too high but after independence we have been hearing nothing else'. But this was denied publicly by one of the companies. Roan Section Trust Ltd, stated that it had been opposed to it for years, see Statement by the Chairman, August 22, 1969.
15. Imperial Institute Mineral Resources Department, Mining Royalties and Rents in the British Empire, 1936, p.35.
16. Mines Industrial Corporation, Mining Year Book of Zambia, 1974, p.35.
17. Ibid, p.26.
18. The problem was largely due to the post 1949 rise in the price of copper to levels not foreseen when the royalty formula was fixed before the war. The royalty payment affirmed a dimension which lost any reasonable relationship either to other costs or to profitability.

TABLE X
AVERAGE YEARLY PRICES PER LONG TON OF COPPER
(London Metal Exchange)

1965-1968		1947-1950	
Year	Price	Year	Price
1965	£541	1947	£130.6
1966	£411	1948	£134.0
1967	£517	1949	£133.0
1968	£611	1950	£179.0

SOURCE: Zambia Mining Year Book, 1974 and Repon of the Commission of Permanent Sovereignty over natural wealth and Resources, United Nations, 1962, p. 165.

The exchange price was much higher than the actual price at which the mining companies made their sales. But as a tax on production the royalty constituted a direct operating cost. It increased the cost to the mines of each ton of copper produced and thus made it unprofitable to mine every type of ore because of such factors as quality, position, and grade. In 1963, for

instance, the average cost of producing a long ton of primary refined copper in the world was about K330.[19] This was the cost of a ton delivered to the buyer, and included provision for depreciation after subtracting any credit from the sale of by-products. It did not include company tax. Of this figure (K330), the Zambia average cost of K320 in the same year was very close. Zambia copper production costs mcluded K46 per long ton in transport costs and royalties on the 1963 scale (averaging K48 per ton making a total in the way of costs in transport and royalties of K94 per ton.)[20] Furthermore, as an additional cost of the mines, the royalty could of course prevent development of an otherwise profitable mine by reducing or eliminating the potential profits. This was a real, and not a hypothetical problem for a mine like

19. Prain, 'Some Thoughts on Copper-Production' Selected Papers, 1963-7, Roan Selection Trust, 1968, p.21.

20. Ibid.

Chililabombwe, which made a loss of K9.18 per long ton in 1967 after paying K 102.60 per long ton royalty.[21] Any tax reduces the rate of return on an investment, but a profit-oriented tax cannot eliminate a profit whereas a royalty could. Royalty also affected the recovery rate of minerals.[22] As an added cost to production it pushed the cost of marginal ores over the cut-off point thus making marginal ores to be considered as waste. To a large extent the state was the loser in that some lower grade ores that were not mined in the past because of the royalty may never be mined because it would only have been possible or profitable to mine them at the same time as higher-grade ores.

TABLE XI

COPPER ROYALTY PAYMENTS COMPARED WITH ORE GRADES, 1968

Mine	Copper subject to Royalty	Ore grade	Average royalty per ton
Chambishi	21,542	2.70	88.52
Chibuluma	25,505	2.29	89.00
Chililabombwe	55,919	3.40	81.84
Luanshya	103,729	1.90	88.85
Mufulira	197,979	2.47	87.91
Nchanga	225,337	2.57	88.09
Rhokana	103,299	2.11	89.77

SOURCE: Copperbell of Zambia Mining Year Book, 1969.

21. Copperbell of Zambia Year Book, 1968. A mine could however have royalty remitted as did Kabwe at times. The conditions attached to this procedure were such that it still

left the mine with a zero profit and that remittance of royalty was not certain beforehand.

22. This meant that minerals that could be economic to mine in other countries would be uneconomic to mine in Zambia. A Phillipine Corporation is known to have been mining 0.74% copper ore on martinique Island which would have been impossible in Zambia with royalty. Roan Selection Trust, Bulletin, 1968.

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The royalty was also inequitable between mines in that it could and did take a higher proportion of the profits of less profitable mines than it took of the profits of more profitable mines.[23] Although the major mining groups in Zambia contain both high-and low-cost mines, the individual mines also had other shareholders, who were differentially and unfairly treated by the royalty. So far thejnsensitivity of the royalty system to changes in production costs can best be illustrated by examining the figures in respect of two hypothetical mines, designated A and B. In an extreme case in which Company A has a production cost of K300 per ton and Company B has one of K600 per ton, then at a price level of K!,000 per ton the amount of royalty in both cases is K119.00 since in calculating royalty the cost of production has to be ignored. Still using the K1,000 price level, Company A has an advantage of K300 per ton over company B in that it suffers less expenses in the production of its minerals. Given such an example and with the rise in the cost of heavy machinery and other inputs required in the production of minerals, the royalty had over a period of time the effect that those mines which were previously profitable and were so profitable because of high copper prices remained profitable as only the profit margin was reduced. Quite apart from its influence on profitability, the royalty also had an influence on other spheres of mining such as exploration as there would have been no point in pursuing any search for mineralisation below certain grades which would be uneconomic to mine. Here, one is tempted to say that the problem could have been forestalled by exempting from royalty tax very low-grade ores. The problem with this is that the high grade mines are not necessarily the cheapest producers, e.g. Konkola is a high-cost mine but has the highest grade while Luanshya with one of the lowest grades is a low-cost mine. Sometimes this is due to the fact that low grade mines are open-cast mines where the greatest advances in pro-duction machinery have been able to offset the increasing wages per ton an hour as well as the decline in grade, resulting in the labour cost per pound of minerals remaining virtually static.[24] Perhaps one way out of the dilemma of royalties is to abandon the idea that royalty rates should

23. Between the highest and lowest production costs there is a variation of about K3 per long ton.

24. E.g. in 1965 in the United States, mines with less than 1% grade showed an average cost of 17 cents per pound, those with 1-2°7o showed 22 cents per pound and those over 2% showed 24 cents per pound, Northern Miner Press Ltd., Mining Explained 1968, p.191.

be uniform for all mines or any group of them, of a particular mineral within a country. This is entirely logical in economic terms but there are other reasons of a political and administrative nature, such as the arithmetical complication involved in administering different rates for different ores which is why mineral owners are reluctant to take this course. Another way out is to attach the royalty rate to some measure of profitability and a third possibility is to abandon the idea of a royalty as a charge upon production and to take the rest of the payment for the ore in another form.

Export tax

Another tax imposed was the export tax. This tax was charged, levied, and collected on every long ton of finished copper exported.[25] The rate of the tax was 40 per cent of the price of copper per long ton of copper, above the price of K600 per ton. No export tax was payable when the copper price was below K600. It was introduced in April 1966 when the producer's price was dropped, in order to try to obtain for the government a large share of the ensuing windfall profits[26] and it was moderately successful in its main objective.[27] Since it was charged on exports, it was effectively a tax on production since virtually all production of minerals in Zambia is exported. Furthermore, it took no account of cost so it simply added to the bad effects created by the royalty.

Income Tax

The third tax charged was income tax. The first income tax laws in the country were rather general. Persons deriving income from mining, whether they were companies or natural persons, were governed by the same principles.[28] Thus, the allowances deducted against profits were

25. Copper (Export Tax) Act, Chapter 669 of the Laws of Zambia. The Minister of Finance could grant exemption to any person from liability to pay export tax.

26. Previously the Zambian Companies had been selling copper at a producer price which was much lower than the London Metal Exchange market. This was mainly to counter the threat to subsitution for copper by lower priced metals. E.g. in 1966 they were selling at £336 per ton while the market price was £700 per ton.

See Sklar, supra, p.S3.
27. In 1968 alone the mines paid £65,185,585, in export tax alone see Copperbeil of Zambia Mining Year Book, 1969, p.34.
28. Income Tax Proclamation, 1921.
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as for ordinary business. Miners were allowed to claim for reasonable wear and tear of any machinery arising out of its use or employment in the trade.[29] Although company tax was then introduced, its application to the mining industry was moderated by granting mining allowances. Just before the change in the tax system income tax was charged on profits at the rate of 37.5 per cent of the first K200.000 of profits and 45 percent of the remainder.[30] In computing profit for the purposes of tax, a deduction was allowed for expenditure on surveys, boreholes, trenches, pits and other prospecting or exploratory works undertaken to acquire the right to mine minerals or incurred on a mining location in the country.[31] Also allowed were incidental expenditures, provided their sum total did not exceed K200,000 in any one year.[32] Separate and distinct mining operations in non-contiguous mines were allowed deductions calculated separately according to the approved estimated life of each mine.[33] But miners could elect to deduct such expenditure on income from a producing mine.[34] At the cessation of mining operations the miner could deduct his undeemed capital expenditures.[35] In addition to the above deductions a miner was allowed a redemption allowance at the rate of 2%. It was however, not allowed to companies that were liable to be taxed in a country outside Zambia on the income from mining operations carried on by the company within Zambia in respect of which a deduction similar to a depletion allowance was not made in terms of the tax laws of that country.[36] Where such an allowance was made, the depletion allowance was not to exceed that allowance. No depletion allowance was allowed to a person where the amount due by the formula exceeded his income attributable to mining operations.[37] The effect, however, of the export and royalty tax system was to render these capital allowances somewhat ineffective and this position was partly reflected in the resultant level of mining activity.
29 Income Tax Proclamation,
. 1926, s.5.
30 Income Tax Act, 1966,
. supra, charging
schedule.
31 Income Tax (Amendment)
. Act No. 26 of 1970, s.19
(1).
32 Ibid., s.2 (1).

.
33 Ibid., s.20 (2).
.
34 Ibid., s.23.
.
35 Ibid., s.21 (1).
.
36 Income Tax Act, supra,
. s.33.
37 Ibid.
.

During the period 1964-9 the rate of development of mines was very slow. Mining companies were disinclined to reinvest their profits in the development of new mines. There is no doubt in fact that the government's anxiety about the rate of development of new mines was justified although there is sharp disagreement about the causes. Table XII below shows that among the leading copper exporting countries, Zambia had the lowest projected rate of expansion.

TABLE XII

PRINCIPAL COPPER EXPORTING COUNTRIES PRODUCTION FORECASTS

(Thousand Tons)

Country	1969	1975	% Growth
Chile	700	1,100	57%
Peru	350	500	43%
Zaire	320	430	35%
Zambia	700	811	16%

SOURCE: Potter, Some Aspects of the Zambia Nationalisation, 'African Public Sector Economics', Edinburgh, 1973

Although marginal increases in capacity can be produced fairly quickly by increasing the production of existing mines, the gestation period of a new mine may be as long as seven years. The mining companies gave the tax system as the only reason for the lack of adequate mineral development.[38] Without denying that this was a major reason, it is

38. Kaunda blamed the inadequacy of mining development on the investment policies of the companies, Kaunda, Zambia Towards Economic Independence, supra, p.45-46. But both mining groups blamed the problem on tax, see Anglo-American Corporation of South Africa Ltd., Statemem by the Chairman, May, 1968„p.4 and Roan Selection Trust Ltd., Statement by the Chairman, November, 1968, p.7.

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important to point out that there are additional reasons. Though

denied by the companies in 1968, it had long been their practice to distribute most of their disposable earnings as dividends abroad. This can be shown by examining the period 1945 — 56 before the impact of the royalty system was severe because of the relatively low prices at the London Metal Exchange and before the export tax was ever introduced.

TABLE XIII

ACCOUNT OF MINING INDUSTRY SHOWING INVESTMENTS AND DIVIDENDS, 1945 — 57

(Million Pounds)

Year	Gross Investment	Flow of Direct Private Investment into Federation of Rhodesia & Nyasaland	Dividends Paid Abroad
1945	1.09	—	1.7
1946	0.9	—	2.8
1947	2.4	—	8.6
1948	2.9	—	9.3
1949	6.6	—	11.1
1950	8.5	—	18.6
1951	11.4	—	22.0
1952	15.2	—	20.3
1953	16.5	—	17.9
1954	14.5	—	18.3
1955	21.4	3.4	20.8
1956	18.0	2.5	25.5
1957	—	2.9	—

SOURCE: Report of the Commission of Permanent Sovereignty over Natural Wealth and Resources, United Nations 1962, p. 170

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Another reason was that the mining companies suspected, and rightly so, that nationalisation would come sooner or later and were consequently not particularly anxious to plough profits back into capital investment which could be expropriated in the near future, at a compensation level which was undefined.

Post — 1970 Legislation

Mineral Tax

In 1969, to correspond with changes in the system of mining rights, the government changed the taxes affecting the mining-rights holders. The royalty and the export tax were both abolished and a new tax, the minerals tax, was introduced.[39] The new tax is entirely based on profits and is at the rate of 51% of profits for copper, 13% for lead, zinc, and amethyst, and 20% for gold. The mining-rights holders continue to pay income tax of 45% on their profits after payment of mineral tax, giving a rate of tax on profits of 73.05% for copper.[40] Here section 7 of

the Mineral Tax Act is also particularly significant. It provides, 'that a company shall be entitled to a refund of mineral tax in respect of any prescribed period if its average income in the prescribed period is less than twelve per centum of its average equity in the period. Where a company is entitled to a refund of mineral tax, the amount of the refund is the difference between 13% of its average equity in each charge year while average income means the prescribed period'.[41] The average equity is the sum total of assessable income less mineral tax and income tax for each charge year in the prescribed period divided by three. The implication of this refund provision in the case of new copper mines is that there is in fact a sliding scale in the overall rate of taxation ranging from a minimum of 22.05% when all mineral tax is refunded, to a maximum of 73.05%. However, most mining companies tend to feel that the protection of 12% level of profit is actually of no use, since most of them would not carry on a venture that indicated such a low yield. They argu« that, since they can earn that level of profit in a bank at no risk

39. Mineral Tax Act, 1970

40. Ibid. This was very nearly the same as the sum total of previous taxes except th the base changed.

41. Mineral Tax Act, supra, s.7.

there is no greater incentive to go into mining which is a heavy-risk industry, and that since this is an exemption rather than a repayment, the taxable profit would still bear income tax at 45% even when the whole of the mineral tax is exempted. Thus, a mine with this exemption would still be at a disadvantage compared with a mine without it if the mine were earning net profits less than 12% of equity. The government on the other hand, believes that the refund system is of great incentive value to both potential and existing investors. The exact value of this concession cannot be generalised since it depends largely on the debt — equity ration of the initial investment. The higher the debt proportion the less the net profit on which the refund may be claimed. In normal times, there has not been a single occasion when the average income of any mining company has fallen below 12% of its average equity, although this year (1976) it appears that no mining company will pay any tax to the state, on account of the extremely low commodity prices brought about by the current world recession.[42]

There is no doubt that a flat rate tax of 73% based on profit clearly removes most of the anomalies discussed earlier. All mines now pay the same percentage of profit in tax. Tax can no longer amount to more than 100% of profits nor can it be charged on a mine making no profits at all. Besides the percentage of

profits paid in taxation is constant as the metal prices changes since marginal and average rates of taxes are now identical. Furthermore, the net-income related tax has the least economic effect on the level and rate of recovery. The tax liability approaches zero when the extractive industry reaches the cut-off point, and operators are not thereby discouraged from developing marginal ores.

Capital expenditure

Other new measures involved mining allowances. Companies operating mines which commenced production after April 1, 1975 are allowed to offset capital expenditure in the year in which the expenditure takes place. Capital allowances in respect of mining operations for established

42.

See Daniel, supra, p.21.

companies are allowed according to the length of time a mine has been in production.[43] They are provisionally permitted to claim allowances on the basis of the legislation which existed prior to the enactment of the Income Tax (Amendment) Act of 1970. The effect of this legislation is that in the case of mines which have been in operation since 1953,of which there are seven, expenditure is allowed in full in the year it is incurred. In the case of the pre-1953 mines, of which there are four, the expenditure has to be allowed under specified headings and allowances are calculated at fixed rates. The rates are for plant and machinery (40% in year of purchase, thereafter 20% on diminishing balance); heavy earth-moving mechanical equipment (50% in year of purchase, thereafter 30% on diminishing balance); industrial buildings (15% in year of construction thereafter 5% on original cost); low cost housing (20% in year of construction, thereafter 10% on original cost); and for capital expenditure not covered in the above groups, the rate allowable over the life of the mine is one-twentieth of diminishing balance.

The main point on which the treatment of allowances for old mines seems to differ from that of the new mines is the timing of such allowances. In the final analysis, the whole of the capital expenditure for both categories of mines is written off against taxable profits. The basis of the difference seems to be that to allow both categories of mines to deduct the whole of their capital expenditure in the year incurred would allow the established companies to deduct their expenditure on new projects from their tax liabilities for current profits. This advantage would not be available for new entrants. The Income Tax Act of 1970 allows a deduction against both mineral tax and income tax. This is because the meaning of capital expenditure

has been extended beyond the pre-1970 concept. It now means expenditure in relation to mining operations, buildings, works, railway lines or equipment including any premium period for the use of these including land.[44] It further includes shaft sinking, money paid on the purchase of or on the payment of a premium for the use of any patent, design, trademark, process or expenditure of a similar nature, and expenses incurred prior to the commencement of

43. In the 1970 Income Tax (Amendment) Act all mines were permitted to deduct the whole of the capital expenditure in the year incurred. But in 1973 the Income Tax Act was further amended by the Income Tax (Amendment) Act of 1973. The amendment withdrew the 100% immediate deduction from established mines.

This is now incorporated in the Income Tax (Amendment) Act 1975.

44. See Income Tax (Amendment) Act No. 10 of 1975, s. 19 (a).

production or during any period of non-production on preliminary surveys, boreholes development or management, and interest payable on loans used for mining purposes.[45] However, it does not cover non-capital expenditures such as labour. Previously, the system in force was one of capital allowances that varied according to the category of expenditure and could only be offset against income tax and not against royalty or export tax.

Thus, the amount of capital spending that is effectively paid for by the government under this system is now 73% for all mines compared with 45% previously. In addition, tax relief is available immediately in the case of all companies with the exception of Nchanga Consolidated Copper Mines and Roan Consolidated Mines Ltd. Instead of being spread over a number of years with respect to prospecting and exploration activities, now section 21 (1) of the Income Tax (Amendment) Act of 1970 provides that a person or company incurring the expenditure may retain it as a deduction, or a company may renounce the deduction in favour of its shareholders. Thus, any person who contributes money to a prospecting enterprise can offset the expenditure against his current taxable income in Zambia instead of waiting for the chance to offset it against ultimate profits. If the contributor is a non-mining company then the value of the immediate deduction in terms of tax paid will only be 45% as he can only offset his expenses against income tax. Expenditure that is retained for tax purposes by a prospecting company also may be renounced in favour of a subsequently formed mining company of which it is a shareholder.[46] Thus, all the expenditure of a prospecting company that finds a workable deposit (including expenditure in areas outside the location of the

ultimate mine) can be offset against profits of the mine. This may be attractive for a group of investors prospecting in several areas at once and who decide to form a mining company to exploit a mine in one of the areas while they continue prospecting in the other areas. If other investors are brought into the mining venture, this operation will only be attractive if the new investors compensate the prospecting investors for tax advantage so conferred on the new mine, on the whole this is acknowledged to be quite an incentive to mining-rights holders.

45. Ibid. s.22.

46. Ibid. s.23.

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The amount of capital effectively paid for by the government is increased if a mine is subsequently opened. This happens through Section 22 of the Income Tax (Amendment) Act of 1975 which allows a new mine to deduct pre-production expenditure incurred in each charge year increased at a rate of 10% per annum compounded for the period commencing with the first day of the charge year in which such pre- production expenditure is incurred and ending with the last day of the charge year to the production charge year. This in effect means that the unamortised part of any pre-production expenditure and capital expenditure incurred during production would, for tax purposes, be increased by a factor of 10% per annum until the first year in which the-Company is charged tax in respect of its mining income. An owner of a mine, who is also the owner or has the right to work a non-contiguous mine from which he had no production during the year, may elect to deduct the amount of capital expenditure incurred on that non-contiguous mine from his income derived from his other mining operations in the same year in which such capital expenditure is incurred.[47] This certainly encourages expansion projects in the industry for if the tax position were otherwise, with respect to contiguous mines, mining holders would be reluctant to spend money derived from their mining operations to develop new mines. The effect of this provision is to treat noncontiguous mines as though they were part of existing mining operations where there is actual production.

Weaknesses of the new system

This system of mining allowances relating to operating mines has created some problems. The allocation of expenditure which has to be made for tax purposes differs from that given in the accounts and consequently time and effort is wasted in extracting information. Development naturally depends very largely on viability and the tendency must be to favour the projects which offer the best returns. The 100% write-off on ‘new mines’ would, however, give them an artificial advantage

over ‘old mines’, and this in turn could lead to decisions which might not be the most economic from the national point of view. Although one can argue that since no write-off on capital is given for manufacturing companies,
47. Ibid. s.23.

it cannot therefore be right for mining companies. However, the pattern of expenditure of mining ventures is vastly different from that of manufacturing concerns. The latter given the right conditions, could continue to operate almost indefinitely and large outlays of capital expenditure are normally only related to expansion or modernisation programmes. Mines on the other hand are wasting assets with limited life spans and to operate them require the constant outlay of large amounts on what could easily be termed ‘recurring capital expenditure’. This arises from two main causes, namely: mining at constantly increasing depths which are also hotter and wetter and diminishing ore grades which compel increasing tonnages of ore to be hoisted and treated simply to maintain the level of finished metal production. Increased production through output capacity generally lowers the point at which the ore grades become marginally viable and by bringing this down, the effect should be to extend the life of the mines quite appreciably, which would be in the national interest.

Perhaps the problem the government finds is that capital allowances are likely to be easily inflated, especially where all machinery is imported. Also that the allowances are made to help infant industry, there seems to them little justification for assisting the older mines, some of which have been in existence for over 40 years. However, since capital allowances are against income, it is obvious that they are no incentive if one does not have a Zambian source of money. They thus tend to favour a company which has a taxable income in Zambia. Another problem is that the new tax incentives, being geared entirely to capital spending, has the effect of making capital cheaper than other inputs such as labour. In general, import duties, tax on industrial inputs especially capital equipment, are relatively low, while duties on consumer goods are relatively heavy. Since the prices of consumer goods affect the cost of living, they tend ultimately to be reflected in wages, while import duties have the effect of making labour expensive relative to all other inputs. In addition, the employer’s contribution to the National Provident Fund, based on wages, has the effect of a tax on labour despite its principal intention and so does the introduced tax on expatriate labour. However, generally to think that a government could legislate special tax provisions in order to make labour cheap on the mining industry, is

unrealistic. The present high cost of labour is a general feature and it applies to all industries and other employment institutions throughout the world.

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Another problem arises with the writing-off of capital in that this en- ;ourages capital-intensive mines. These drain foreign exchange, and also reduce available employment. Sometimes it can provide a way for companies to manipulate their costs to avoid tax. For example, if companies A and B each spent K200,000, A on labour and B on capital, they would be entitled to the same deductions. And yet A spends most of its money in the country whereas B invariably spends it out of the country. Why should A pay the same tax as B? It may be argued that this sort of argu- ment encourages ineficiency, but as a counter argument very few mines are going to be different just to gain a tax advantage.

It can also be argued that mining technofogy does not allow much substitution between capital and labour,[48] but a great deal of evidence las been given to show that the relative cost and efficiency of African abour, expatriate labour, and capital equipment has caused significant :hanges in their relative utilisation in the past,[49] although it has also been hown that at times of relatively low African wages and high African abour efficiency technical processes in the mines fell behind other opper producers in the sense of not using the latest labour- saving echnology.[50]

depletion allowance

>ome mining-rights holders contend that a depletion allowance should be ntroduced. Such an allowance would have the effect of reducing the nining right income upon which tax is assessed. Conceptually, it is irgued that depletion is necessary in view of the fact that minerals are ex- laustible resources and that when they are exhausted, the investment in he mine will have next to no residual value.[51] It would be recognised that)art of the income from the mine constitutes consumption of capital, ind that therefore an allowance, analogous to the depreciation which is Ulowed against plant and equipment, should be established to reflect the

18. Bostock and Harvey, Economic Independence and Zambian Copper, 1972, p. 142.

49. Ibid.

50. Baldwin, Economic Development and Export Growth: A Study of Northern Rhodesia, 1920-60, 1966, Chapter 4.

51. Reasons often advanced for depletion allowance can be found in Lynch v. Alsworth Stephens Company, 267, U.S., 364.

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gradual depletion of the orebody.[52] Other proponents of the depletion allowance take a different approach. They cite the

risk attached to mining enterprises, especially in the early stages with the large outlays of investments which have to be made during exploration and prospecting, much of which is certain to be abortive, as reasons why income from mining should be effectively taxed, ihrough the depletion allowance, at lower rates than income from other types of endeavour. It could be submitted that under the Zambian system of mining tenure as described in Chapter 6 this would be unnecessary. First, the mining-right holder does not own the orebody and as such it is not his capital which is being depleted but that of the state. It may well be that the factors cited above have the effect of raising the minimum expected rate of return required before Finance can be raised or committed for a mining venture and - about the average minimum expected rates required for investment in other sectors. But this does not in itself indicate any misallocation of investment funds, nor does it constitute, in itself, any reason why a government, particularly of an exporting country, should take special steps to lower the tax rate upon minerals as opposed to other enterprises. Moreover, even if it were decided that special encouragement should be given to the mining sector because of the desire to open up new mines the percentage depletion allowance is both a crude and expensive tool for government to use. Crude, because it does not differentiate between projects which require special encouragement and those that do not; expensive because once established, it will extend over the whole life of the mine, and not merely assist in the early years when measures to allow for a reasonably early return on investment may indeed be sensible. In any case in respect of their exploration and prospecting expenses one may argue that manufacturing enterprises are liable to go out of business if they do not modernise or diversify their product, and changing conditions may well induce them to change location. The expenditure that has to b<f put into research, market survey, product re-design and the purchase of patents, may be regarded as similar to the outlays that a mining company has to make on prospecting and exploration if it intends to stay

52. See for instance Faulkner ‘Some Notes on Mine Taxation’, (1939-40),
Transactions of the Institution of Mining and Metallurgy, p.21 where he argues that profits from mining must be considered partly as interest on the capital invested and partly as a return of capital, source in calculating operating profit no deduction is made for the raw material — the ore in the mine — that has been used up in the process.

in business. Besides, in Zambia, an investor in mining will have

recovered the cost of his own capital by way of capital allowances. The expenditure on exploration, prospecting, and on proving the deposit and all the preliminary expenditure incurred in establishing a mine are deduc- table allowance against, mineral tax and the written value of plant and equipment which has to be scrapped, or the shortfall below such value realised in a final sale of property where a mine has to be closed down is similarly allowable as a cost against income. These allowances, one revenue and the other capital, take care of two aspects of a mine's exhaustible nature.

Tax Incentives and the Attraction of Mining Investment

The rate of taxation

The preceding chapters show that the burdensome taxes on production have been abolished and the new mining-right system , has led to the release of large areas for prospecting which previously were not generally available. The state now it seems, expects that future prospecting and development will come in large measures through private initiative. It is with this background that it is necessary to examine the question of the attraction of mining investment.

Despite the tax reforms the existing mining companies were up to 1974 taking as much .money out of the country as they could and were still disinclined to reinvest their profits at least to the extent that the government would have liked them to and they still rely instead on external borrowing for their project.[53] The period between 1975—8 is difficult to judge as the companies declared little or no dividends.[54].

53. At 31 March long-term and short-term loans totalled K68.2 million for Nchanga Consolidated Copper Mines Ltfl., Annual Report, 1974, p.9. See also Kaunda 'Our experience in the last three and a half years has been that they have taken out of Zambia every ngwee that was owed to them. A major part of the capital for expansion programmes of both mining companies has been obtained from external borrowing and not Irom regained profits. You may be interested to that right now, my government is being asked to approve external borrowing by the two companiesbf about K65 million.! Times of Zambia, 31 August, 1973, p.l.

54. Nchanga Consolidated Mine Ltd., Annual Report, 1979 and Roan Consolidated Mines Ltd, Annual Report, 1979.

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TABLE XIV

PERFORMANCE OF THE COMPANIES:

(a) ROAN CONSOLIDATED MINES LTD., (1970 — 4).

(All figures in Million Kwacha)

Year	1970	1971	1972	1973	197

Total Sales		218.8	191	237.2	407.7
Profit before Taxation	108.7	84.9	53.7	75.7	222.5
Profit after Taxation	38.8	48.8	43	47.2	78.5
Dividend declared	15	22	20.5	31	44.3
Capital expenditure	12.7	28.4	33.6	28.3	26.6
Total loans borrowed	6.9	5.3	7.7	7.2	6.1
Percentage dividend distribution	39%	45%	48%	66%	56%

SOURCE: Roan Consolidated Mines Limited., 'Annual Report'.

MINES LTD.

(b) NCHANGA CONSOLIDATED COPPER (1971 — 4)

(All figures in Million Kwacha)

Year	1971	1972	1973	1974
Total Sales	449	348	363	555
Profit before Taxation	204	100	100	277
Profit after Taxation	97	68	77	113
Dividend Declared	51	36	36	67
Capital expenditure	43	42	59	69
Total loans borrowed	25.2	47	64.7	41.6
Percentage dividend distribution	53%	53%	47%	59%

SOURCE: Nchanga Consolidated Copper Minies Ltd., 'Annual Reports'.

The mining-rights holders cite the rate of taxation as the factor inhibiting development in that it reduces their liquidity.[55] The new level of taxation, for example, 73.5% for copper, it is argued, is very high by any standard, and although the tax system ensures that tax will not frustrate the recovery of the capital outlay, the very high rate of tax applicable as soon as the capital is recovered makes it a comparatively lengthy process to achieve both the return of the capital and a minimum profit.[56] The present rate of tax means that a new mining investment has to earn a higher pre-tax rate of return than other investment in Zambia in order to earn the same rate after tax. This in a sense is strange in that one would expect the reverse to be true — i.e. that mining being a high-risk industry, a higher prospective rate of return is required to

attract new investment than in other industries. The reality, however, is that throughout the world, proceeds from mining rights are taxed more heavily than those from ordinary industry despite these apparent contradictions. It seems most governments regard mining as a very profitable industry and there is a feeling that minerals, because of their exhaustible nature, are a special commodity.[57] Further, most governments are aware that there is a limitation in time to benefits that may be extracted from a mining industry and take the view that through taxation, they must make the largest possible contribution over the shortest possible period towards preparation for the inevitable end. It is important to i point out that although the rate of tax is 73.5%, no company has paid that much since the new tax formula was introduced. The average payment of taxation is around 50% because of the writing-off of capital — a rate not much higher than the combined effect of the pre-1969 taxes though much better and fairer in that it is based on profit. The high rate of taxation has led to suggestions by mining companies that the government should introduce investment allowances to encourage the opening of new industries. Some years ago the government introduced the

35. Letter from Roan Consolidated Mines Ltd., to Minister of Industry, 5 June, 1974.

56. Oppenheimer has stated 'The change over to a taxation system based entirely on profits is a.deyelonment which I very much welcome., though-thr nfijv low combined rate of mineral and income tax at 73.5% is very high indeed; too high I would judge to give adequate encouragement tb'the development of new low- grade minig projects' Statement by the Chairman, Anglo-American Corporation, 1970.

57. Papua-New Guinea has a rate of 10Vt. See Faber 'Boungainville Re Negotiated: An analysis of the New Fiscal terms. ' (1974), December, Mining Magazine, p.2I.

Pioneer Industries Act and more recently, the Industrial Development Act, under which industries could apply for a tax-free period of five years. In addition, all manufacturers may claim the 'investment allowance' which entitles them to write-off 100 per cent of the cost of industrial buildings and 120 per cent of the cost of plant and machinery used in the manufacturing process. Since to explore for minerals and develop a new mine to the stage of regular production is a capital-intensive operation lasting several years and one which usually involves more financial risks than setting up an industrial venture, it has been suggested that these should be extended to the mining industry. And that similary, no taxes should be

levied on any dividends paid by the mining companies until a mine reaches the stage where it first pays tax on its mining profits. This would enable shareholders in a company which developes a new mine to recover not only the capital expenditure on the mine but also the rate of return.free of tax.

Taxation concessions and investment decisions

While agreeing that the level of taxation is one of the major reasons adversely affecting the level of mining investment in Zambia, it is suggested that it is not the most important and that the keeping of the level of taxation low would not solve the problem unless other factors are attended to as well. It is important to be clear about the extent to which tax rates affect investment decisions. Tax allowances which cannot achieve the desired results could simply be ignoring a ready source of much-needed revenue, and ignoring income in the case of minerals is more serious than in the case of other industries because of their exhaustible nature. In any case unnecessary tax holidays over a fixed period would only encourage earlier extraction of ore than other economic and technical factors dictate. Indeed a high rate of taxation reduces both outflow of profits and the building up of foreign owned assets'out of earnings from mining operations. It also directly affects a basic, economic factor, namely the investment rate of return.[58] From the mining investor’s point of view, any increase in taxes corresponds to a charge

58. Fatorous, Government Guarantees to Foreign Investors, 1963 p.51.

in the profit rate of his investment, without doubt very important consideration to mining holders. It is important not to lose sight of the fact that capital required for mining investment is owned by ordinary people who will be motivated by the above predictable considerations. The emphasis on taxation is also based on the investment theory that in order to persuade and induce foreign firms to invest in the Zambian mining industry, foreign operations should be expected to yield higher returns than those available in their own countries to compensate for the extra trouble of and risk of doing business abroad. This line of reasoning is based clearly on the well-known arguments of classical economic theory, assuming unchanging technology, perfect competition, and a perfect knowledge of all future investment opportunities, prices, costs, and revenues. Further it assumes that the only motivation of the investor, who is the sole decision-maker, is the maximisation of profits, the investment decision becomes a simple mathematical formula: investors should' maximise the difference between the discounted (known) streams of earnings and the discounted

(known) streams of costs of every possible investment. As long as the rate of return on any investment arrived at By this calculation is higher than the market rate of interest, the investment will obviously increase the value of the enterprise and this should be implemented. Therefore investment in foreign countries will be made when the rate of return abroad is higher than the rate of return in the domestic home market. Of course, no sophisticated economist would argue that this stereotyped model is an accurate or even approximate description of the real world or of the way businessmen behave. Indeed, many of the assumptions of this classical model have been relaxed or refined. It is well recognised that the businessman of today is usually not an individual enterpreneur, motivated solely by an urge for profits, but a large organisation each with its own set of goals and objectives. A forecast of high profits will not suffice by itself to attract mining investment at all.[59]

Theoretically, tax concessions are a form of subsidy granted to investors in a field of economic endeavour the government would like to promote. Governments hope that by granting such subsidies they will attract investors who would not invest otherwise. A tax concession is, therefore

59. Most studies are agreed that foreign investors say tax concessions and pioneer status play only an insignificant part in bringing them to a country. See Aharohni, Foreign Investment Decision Process', 1966, p.24.

effective if it brings about incremental investments. The larger the benefits to the economy per Kwacha of government income foregone, the higher the efficiency of the measure. Clearly, it is inefficient to grant a subsidy to investors who would have invested even without it. The higher the number of beneficiaries of the subsidy who would have invested without it, or who receive the subsidy although they do not fulfil the conditions and goals desired by the government granting the subsidy, the lower its efficiency. But if the government spends a large part of its resources on ineffectual subsidies, it may not have resources left to promote other important economic endeavours, or it must resort to inflationary means to finance its expenditures. In the allocation of its resources, a government should therefore weigh various measures according to their efficiency. Also when the efficiency of tax concessions is gauged, there are at least two governments whose policies should be taken into account: that of the capital-exporting country and that of the capital-importing country. The two may be looked upon as rivals in a game, the policy decisions of one being able to wipe out the effect of a policy decision of another in the absence of bilateral agreements. If income tax in Zambia is

lower than that in a foreign country, income tax exemption would have almost no effect on the earnings of a foreign company if it is subject to tax in the foreign country. One has to consider the policies of other mining countries as well in that owing to their differing initial capital allowances, depletion allowances, tax holiday periods, and treatment of losses, income or profits and taxes even when the actual rates set in the budgets appear identical, in reality many affect mining- right holders differently. Within Africa, for instance, many governments have without regard to the policies of other African countries, promulgated investment laws which offer competitive concessions in the hope of attracting investment,[60] thereby cancelling out each other's efforts. Similarly foreign companies in the same country may be differently affected by the host country's tax regime depending upon whether or not they operate in more than one country. With multinational companies, there is also the danger that costs may be manipulated as they naturally prefer to end up with the largest profits in countries not only with tax incentives but also with generous exchange control regulations which a country such as Zambia cannot afford.

60. For »me of the examples see Akimumi 'A plea for the Harmonisation of African Investment Laws', (1975), 19 Journal of African Law, p. 134.

Theoretical calculations based on the traditional economic model point out that a tax exemption significantly increases the stream of earnings when such earnings are available (i.e. when there is a taxable income). The increase is greater, the larger the difference between the rate in the absence of concession and the tax rate during the exemption period, the larger the rate of discount used, the shorter the investment horizon, and the higher the expected taxable profits. Thus, in gauging the effect of tax, one assumes a profitable venture, and it is only then that taxes imposed become relevant. Here it is suggested that a number of things can be done other than the mere granting of tax concessions. As the mining investor's first consideration is to avoid the loss both of capital and management time and uncertainty, an inducement that is merely a function of profit will not alone suffice. Measures that reduce the size of investment, the cost of capital and the cost of production, in that order of importance, will be the most effective. According to the Mining Year Book, Zambia's costs are high and in 1971 compared very nearly with costs of production of minerals in the United States, South Africa, Peru, and Chile.[61] More recently, they have escalated in the aftermath of world-wide inflation.[62] Of course the main reason for Zambia's relatively high cost

price, in spite of the very high grade of its ore, is its land-locked position. Distances from mineral production centres to its main shipping points on the Atlantic and Indian Oceans range from 1,600 to 2,300 kilometres and are to a large extent beyond the capacity of the government to influence.[63] But other cost-increasing factors are within the capacity of the government.[64] One such factor concerns infra

61. E.g. cost of production in 1969 in the United States of America was 28.9 cents per lb., in Zambia 29 cents per lb., in Peru 22.4 cents per lb., in Chile 24.3 cents per lb. and South Africa 23.3 cents per lb. Mines Industrial Development Corporation Year Book, 1971.
62. One of the country's two big mining groups, Nchanga Consolidated Copper Mines Ltd., has reported production costs per tonne (excluding transport) of about £507 in the year to April 1975, See Daniel supra, p.21.
63. See Chairman's Statement, Nchanga Consolidated Copper Mines Ltd., 1975. In fact this problem even affects delivery of supplies of the mines with the result that the completion of capital projects and repairs to existing plants is delayed.
64. Production costs include all operating costs and other costs; for example administrative costs, depreciation, export taxes, duties, and interest on charges on loans excluding taxes on profits. See De Vletter, 'Mining Costs, Memorandum by the Director of the Metals and Minerals Development Unit' Ministry of Land and Mines, 1968.

structural costs. The mining-rights holder is expected to provide houses for employees, roads to areas of mining, his own water systems, and so on. These infrastructural costs are proving to be an increasing large part of project costs — as much as 25% — and can turn a commercially profitable project into an unprofitable one with the result that the project does not proceed.[65] It must be realised that even when other things are equal, the costs of operating at a geographically remote property will inevitably be greater than at one in a more accessible and easily serviced mining area. This comes about in several Ways, including the obvious one of transport of personnel and supplies, and of the mine output. Mines are heavy consumers of electric energy, and the transmission costs to a remote property will tend to be heavy. Even historically, this point has been very important. It is generally recognised, for instance, that mining could never have emerged from the experimental stage until railway transport became available to carry machinery, fuel, and ore. Thus, measures should actively be considered for the establishment of machinery to prevent projects which are in the national interest being shelved

because of this situation. The state should also take measures to create such infrastructure independently, thus effectively reduce the costs to the mining-rights holders. The point to be borne in mind is that unlike ordinary business, say a factory, one cannot site the mine where one wants, and unlike other business too there is no insurance. Measures to offset costs of infrastructure will also encourage the prospecting and exploration of areas far away from the present line of rail and unlike tax concessions can be used by other economic activities. In this context, the role of new mining investment would be not only to generate new opportunities for employment but also to develop new centres of economic activity away from existing urban areas and the line of rail.

Another factor is the customs duty imposed on mining equipment, which significantly increase costs. This is completely within the power of the government as its imposition is in the discretion of the Minister of Finance.[66] It would be understandable if there were a local source of machinery in that the duty would be aimed at forcing mining-rights

65. The amounts involved often run into millions of Kwacha. See Mining Mirror, 3 October, 1975, p.7. Nchanga Consolidated Copper Mines Ltd., spent K2.4 million on housing and other social amenities in 1974 alone. See Annual Report, 1974, p.9.

66. See Customs and Exercise Act, Chapter 662 of the Laws of Zambia.

holders to utilise the local source; but there is none.[67] It is submitted that government could reduce costs to rural miners, where costs are higher for reasons referred to earlier, by charging lower customs duties on all machinery, plants, laboratory equipment, and instruments employed for the mining or prospecting of minerals in very remote places.

There is also the shortage of Zambian technological expertise, whose direct co-operation is essential for the effective operation of the mining enterprise. This means that the mining-rights holders have to engage in training programmes, which not only add to the cost of the investment but also cause delays in the completion of projects. Of course the scarcity of skilled manpower and trained personnel who can be used in both high managerial and technical positions is a general problem throughout the economy. But its existence places a special responsibility on the government to formulate labour laws aimed at restricting the employment of expatriates in industry in the light of the educational standards of the country and not to pursue policies which make it impossible or difficult to recruit competent expatriate manpower or delay the availability of local manpower to industry. Mining costs should not therefore be

increased by a premature application to the mining industry of the tax on expatriate labour introduced in 1975[68] for such a measure can only not operate as a cost when it is justified by the local education standards.

Another factor completely out of the control of any one country but on which commodity producers can work together with consumers to eliminate is that of severe fluctuations in the prices of minerals which are likely to discourage investments in the development of new mines. High prices usually entail higher costs in the form of tax and wage increase that weigh heavily after prices have fallen.

Other non-cost factors affecting mining investment

Quite apart from the factors that affect the rate of return on investment, there are other factors such as the political situation and the exchange control restrictions whose disincentive effect is placed very high on the list of disincentives by the majority of mining-rights holders.

67. See Nchanga Consolidated Copper Mines Ltd., Chairman's Statement, 1975.

68. Selective Employment Tax Act, No.9 of 1975.

Exchange control

Exchange Control[69] restrictions. affect mining-rights holders in two ways. At best it means that they have to submit to various requirements, formalities, and delays whenever they wish to transfer their earnings or their capital outside the country; at worst they are not allowed to take out any. It also renders difficult the employment of foreign technical or managerial personnel in view of limitation on the transfer of their salaries abroad.[70] Closely associated with this is the withholding of tax and the restrictions on the percentage of profits which can be exported. However, new mining investment is more deterred by remittance restrictions on dividends than by taxation. This is because to the investor the earning of a profit which he can remit home is the fundamental value and attraction of any mining venture. This is particularly so because of the risks involved in actually finding a mineral and then profitably mining it. Admittedly the problem is not an easy one to solve. The country cannot be expected to eliminate all measures of exchange control but since mining investors are justified in preferring to invest in countries where they will be less affected by exchange control measures, reasonable provision should be made for foreign companies to transfer dividends abroad to their shareholders. This entails a realisation on the part of responsible authorities that although in the short term when money goes out of the country due to the easing of restrictions the country loses, in the long run it may

benefit in that further investment will be forthcoming from the same source. At the same time measures designed to encourage investors to reinvest their profits should be considered such as allowing them to reinvest in the activities of their own company or in other mining activities, free of tax up to some percentage of their profits before tax with a

69. It is imposed by the Exchange Control Regu&tions Act, Chapter 593 of the Laws of Zambia. In law a state is competent to regulate its own monetary matters. Consequently, the imposition of exchange control is in no way unlawful? See Hyde, International Law as Interpreted and Applied by the United States, 1974, p.690. The International Monetary Fund allows member states to 'exercise such controls as *fe necessary to regulate international capital movements' but members may not 'exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay the transfer of funds in settlement of commitments....' The states which have accepted the obligations of the fund agreement are bound by its articles not to 'impose

restrictions on the making of payments or transfers for current international transactions' without the prior approval of the Fund except under certain conditions governed by special or temporary authority contained in other provisions of the articles, see Article VI, Section 3 Article VIII, Section 2(a) also Article VII. Section 3(b) and Article XIV, Section 2, Articles of Agreement of the International Monetary Fund.

70. See Fatouras, supra, p.35 and Nwogugu, supra, 19.

maximum annual limit. This could reduce money available for export while at the same time promoting the developments and discovery of mineral resources.

Political and legal climate

With all the risks inherent in mining, the final criterion for an investment climate depends primarily on the political and legal security of the region and the country in which a deposit is located. One of the factors slowing down investments in the mining industry is that the mining-rights holders, particularly those that have operated in the country for a long time, are suspicious of the government. They are not reasonably certain of the future in view of the government's conflicting statements with respect to the future of private investment.[71] This situation is worsened by the naive but frequent pronouncements by politicians equating any form of profit with exploitation. There is need to convince miners that there is little or no possibility of the creation of an unfavourable legal situation at a later date which will be harmful to their investments. With

the existing major companies, the credibility of the government has suffered to some extent by the government's unilateral cancellation of management agreements in 1973 which though necessary could be said to have been gone about in a wrong way.[72] The reaction of the companies affected is justified too in that no government should expect the respect of the industry if it attempts to change agreements unilaterally and overnight. Perhaps measures to restore such confidence in investment are urgently needed.

In general the special responsibility of the state in this area is to create a favourable political climate. To create and perpetuate an atmosphere of trust between itself and investors. It can only do this by committing itself to the future, to promise with reasonable credibility that arbitrary measures are not going to be taken once an investor has established his operations. Also that existing measures and agreements will continue

71. Even local businessmen have remarked that 'government measures had created uncertainty, despondence and lack of confidence in the Zambian economy here and overseas,' Times of Zambia,29 August, 1975, p.l.

72. The lawful redemption of Bonds and of local stock did not give the state legal title to revoke any of the 1969 take-over agreements which were not tied to redemption; see Master Agreements and also Ushewokunze, 'The Legal Framework of Copper Production in Zambia,' 1974, Zambia Law Journal, 75 at p.92.

to be respected or that should changes be desired, investors will be compensated for any loss due to such changes. In short, mining investors have to be assured that they will receive, both today and in future, legally defined and controlled treatment, specified in the relevant legal instruments. Consequently, they need not fear that many major changes in local legal or political conditions would be unfavourable to their interests. It must also be borne in mind that Zambian problems are compounded by the fact that Zambia is in Africa and that most investors consider Africa not only too risky anyway but also a continent ruled by dictators who have no regard for law and who do not keep promises. For them, an investment in Zambia is fraught with unknown factors. Thus they are reluctant to become involved in uncertain situations when there are other opportunities on much more familiar grounds. Associated with this is the need for skilled people and establishment of conditions which are necessary to attract and retain such skills.

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MINING RIGHTS IN ZAMBIA Mona Ndulo
1 his book examines the mining laws of Zambia, with primary attention in the early chapters of the book to the history of the laws and in the latter chapters to the current requirements

that must be met within the country for the acquisition of tenure to permit the development of its mineral resources. The objective of any miners! system is to encourage the development of the country’s mineral resources. The book discusses the'mining law in this context. Thus the author is mindful to examine the issues discussed against the criteria of.the extent to which the mining legislation that has been adopted encouraged investments in the mining industry.

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