

**A HISTORICAL PERSPECTIVE OF THE INVESTMENT
POLICY AND LEGISLATIVE FRAMEWORK ON
EXPROPRIATION: A CASE OF ZAMBIA.**

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ABSTRACT

Historically, international investment law encouraged states to exercise greater control over their affairs. Expropriation of property was done in the national interest, in accordance with national legislations and accompanied by compensation. This article focuses on the historical perspective of investment policy and law on expropriation in Zambia from 1964 to 1996, bringing out the gaps, which could be used to improve upon the current position. The research was underpinned by a doctrinal approach, utilizing both primary and secondary data obtained from various documentary materials. The main findings of this research were that; the policy and law on expropriation in Zambia regarding investment, mining, land acquisition, and Environment is not comprehensive enough to achieve the objectives set under international law, thus creating gaps. The research recommends the need to come up with a comprehensive investment policy and law on expropriation that takes into account the history and peculiar situation for Zambia.

KEYWORDS: *Compensation, expropriation, public interest, permanent sovereignty, regulation.*

1.0 INTRODUCTION AND BACKGROUND

This paper analyses the historical policies and laws on expropriation in Zambia from 1964 to 1996. The policies highlight some of the reasons that led to the enactment of the various laws governing expropriation. An analysis of the history on expropriation policies and laws from the constitutional perspective from independence up until 1996, highlighting some of the critical factors that were ignored by the law makers. The paper also discusses the historical expropriation policies and legislative provisions in Zambia.

The concept of expropriation includes direct expropriation where the state obtains a formal transfer of title or outright seizure and indirect expropriation where a state interferes in the use of property or in the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected.¹ It is submitted that protection of foreign investments is not the only requirement from the host country, but also to ensure that citizens benefit from these investments. Muchlinski has remarked that ‘it is important to balance the protection of investor’s assets with the right of the host country to regulate foreign investments in order to develop national economic policies.’² For the purposes of this study, it is this balance that ought to reflect in the expropriation provisions.

2.0 METHODOLOGY

This research falls in a qualitative research paradigm as it focuses on answering specific research questions on this topic, by collecting both primary and secondary data. This research employs a doctrinal approach to discuss the Zambian historical investment policies and legislative framework on expropriation, in order to evaluate the clauses on expropriation in relation to International Investment Law Instruments to identify the gaps that existed and to suggest how we can build on our past to improve the current policy and legislation.

A checklist of documents analysed was used. This study employed purposive sampling, which is a non-probability sampling method in the selection of the documents that were analysed. Data from various pieces of International Law Instruments, Statutes, Cases, Parliamentary Debates, Articles, Journals, Books and other documents were analysed by means of inference, deductions and comparisons. Content and thematic analysis was used to analyse the data, because the method comprises part of a narrative analysis. A research question was used to identify relevant issues to guide the study.

*This paper is based on the LL.M Dissertation submitted to the University of Zambia’s Law School.

¹ Organization for Economic Corporation and Development (OECD), *Policy framework for Investment 2015 Edition*, OECD publishing, Paris, 2015, p.24.

²Peter Muchlinski, "Policy Issues" in the *Oxford Handbook*, 2008.

The main objectives of this study were to examine, historically, the investment policies and legislative framework on expropriation in Zambia, to identify gaps in the existing literature and to determine the extent to which those gaps could be used in order to improve on the current policy and law.

The research question was; “What are the gaps in the historical policies and legislative framework on expropriation in Zambia in relation to international Law Instruments and how can these gaps be used to improve on the current policy and legislative framework?”

3.0 RESULTS

International investment law generally supports the right of the host state and the findings of this study can be summarized in the table below:

	INTERNATIONAL POLICY AND LAW ON EXPROPRIATION	ZAMBIAN HISTORICAL POLICY AND LAW ON EXPROPRIATION
1. Does the policy and law recognize the right to expropriate?	Yes	Yes
2. Does the policy and law define the interest to be protected?	Yes	Yes
3. Does the policy and law comprehensively define expropriation?	Yes it does as the definition includes both direct and indirect expropriation.	No as the definition only includes direct expropriation
4. Does the policy and law define the conditions for expropriation?	Yes, the conditions include public-interest, non-discrimination, due process of the law and compensation.	Yes it only includes public interest and compensation.

4.0.0 DISCUSSION

4.1.0 Expropriation in International Investment Law

The principle of permanent sovereignty over natural resources advances the argument that states should have full control over their natural resources. This principle is compatible with the concept of supremacy

of international law.³This principle came through various United Nations National Assembly Resolutions which culminated in the Charter of Economic Rights and Duties of States.⁴

According to Sornarajah, there is heavy reliance on general principles of law in addressing international investment issues as there are no relevant treaties among a number of states which form a comprehensive code of law on foreign investment.⁵Treaty law typically addresses only the conditions and consequences of an expropriation leaving the right to expropriate as such unaffected.⁶

International law recognizes the right of the host state to expropriate, however, it has developed three branches which regulate the scope and conditions of the exercise of this power. The first one defines the interests to be protected, the second one concerns the definition of expropriation and the third one relates to the conditions under which a state may expropriate an alien property.⁷The classical requirements for lawful expropriation are public purpose, non-discrimination, as well as prompt, adequate and effective compensation.⁸

The distinction between a compensable taking and non-compensable regulations remains unclear in customary international law and international arbitral jurisprudence makes it clear that a simple regulatory change resulting from a state's bona fide exercise of its regulatory powers does not amount to indirect expropriation and, therefore is not compensable even if it results in economic injury to the investor.⁹

4.2.0 Direct Expropriation Provisions in Historical Policies and Legislative Framework in Zambia

The laws that had provisions dealing with the historical direct expropriation are as follows; the 1969,1973,1991 Constitutions, Mine Acquisition Act, Land Acquisition Act and the Investment Act, which we discuss further as follows;

4.2.1 1964, 1973 and 1991 Constitutional Provisions on Expropriation in Zambia

At independence, Zambia inherited a constitution from the colonial masters which basically guaranteed protection of private property from possession or compulsory acquisition, except in the public interest accompanied by payment of prompt and adequate compensation in accordance with the law.¹⁰ The 1964 Constitution though it allowed expropriation to be done in public interest, the law tried to limit the public

³ Roy Subrata Chowdhury, "Permanent Sovereignty over natural Resources," *Submission of the Seoul Declaration in International Law and Development* 59, 61, Paul de Wart Et al.eds.1988.

⁴ Article 2 of the Charter of Economic Rights and Duties of States, GA Res.3281 (XXIX), UN GAOR,29th Session, Supp.No.31 , 50,1974.

⁵M. Sornarajah, "The International Law of Foreign Investment," *Cambridge University Press*, 2004.

⁶ Rudolf Dolzer and Christopher Schreuer, "International Investment Law," *Oxford University Press*. Page 98, 2012.

⁷ Rudolf and Christopher cited above.

⁸ Rudolf and Christopher cited above.

⁹ J.Y.Gotanda, "Damages in lieu of performance because of breach of contract," *Villanova University School of Law working paper series* No.531, 2006.

¹⁰ Section 6(1) of the Northern Rhodesia Constitution,1964,Edition

interest consideration in its definition of what constituted “public interest.” Further it was silent on non-discrimination and therefore fell short of the international requirements for a lawful expropriation.

In 1973, Zambia enacted a newly amended Constitution and Article 18 of that Constitution provided for compulsory acquisition of property in accordance with an act of parliament. Article 18(3) provided that an act of parliament should provide for compensation in money form and state the principles on which compensation was to be determined. It further provided that in the absence of any agreement, the national assembly by resolution could determine the compensation amount. Further Article 18(4) ousted the jurisdiction of the court to question the compensation determined by the national assembly which was clearly against international public policy.

In 1991, the constitution was again amended basically retaining Article 18 of the repealed law, save for the fact that the new Article 16(1) introduced the adequate compensation as a quantum of compensation. Article 16(3) further stipulated that the Act of parliament should further provide, that in default of an agreement, that the amount of compensation be determined by a court of competent jurisdiction. However, it was silent on the public interest and the non-discrimination issues.

Generally, all the three historical constitutional provisions had recognized the duty to pay compensation and to expropriate in line with the due process of the law. Further all the three constitutions did not address the issue of arbitrariness and non-discrimination. It can be said that of course the laws contained some accepted requirements for testing the legality of an expropriation which form part of customary international law.¹¹

In contrast, the South African Constitution,¹² provides with respect to property expropriation, that property may only be expropriated in terms of a law of general application in the public interest,¹³ or for a public purpose, subject to compensation which has been agreed by those affected or which is set by the court.¹⁴

In the context of Muchlinski’s argument (already cited), the South African provision had attempted to balance the right of the protection of the investor’s property and that of the duty for the state to regulate as opposed to the Zambian scenario, which contained contradictions.

In a constitutional and democratic state such as Zambia, it is important that the Constitution expressly provides that property expropriation can only be undertaken, where there is public purpose, in a non-discriminatory manner in line with the due process of the law and accompanied by compensation. It is submitted that the constitutional provisions should be given the purposive interpretation to avoid the absurd consequence that different results may be reached, even on the purported purposive interpretation.

¹¹ See *ADC v Hungary*, Award, 2 October, 2006, para 429-33.

¹² Constitution of South Africa, 1996.

¹³ Section 25 (4) explains public purpose as including the nations commitment land reform and reforms to bring about equitable access to all South African’s natural resources.

¹⁴ Section 25(2)(a) and (b) of the South African Constitution.

4.2.2 Land Acquisition Policy and the Land Acquisition Act, 1970

The Land Acquisition Act, promulgated in 1970, made provision for acquisition of land and other property.¹⁵ Section 3 provided that the President may acquire the property of any description in the public interest where necessary. Section 5 and 6 provided for the procedure for land acquisition. Further, Section 10 provided that compensation should be agreed by Parties and in the absence of an agreement in accordance with the provisions of that Act. The promulgation of this Act showed Zambia's commitments to follow the due process of the law as regards expropriation of land and other properties in line with international policy. This Act was based on the 1964 Constitution and it has not been amended to incorporate the constitutional changes and hence there are clear lapses between this law and the 1973, 1991 Constitutions.

The Act does not state how the compensation amount should be arrived at and the best way to deal with this issue is for the law to expressly state the institution to do the valuation and specify the principles to be taken into account when undertaking the valuation. This could be tested by an independent valuers' report and this should be done after the requisite notice under Section 5 has been served. In the **Chorzow factory case**, the Permanent court of International Justice appointed a committee of experts to value the property after itemizing the heads upon which damages could be awarded for the illegal nationalization that was involved in the dispute. The land acquisition law should therefore be comprehensive enough by bringing out the legal basis on which compensation should be awarded; the standard or the method of valuation should also be stated in the law, as was held in the **Iran Vs United States**.¹⁶

4.2.3 Mine Acquisition Policy and the Mine Acquisition (Special Provisions) Act, 1973

On 11th August, 1969, President Kenneth Kaunda announced the Matero Reforms, that meant that all the rights of ownership of minerals reverted to the state, and that government obtained 51 percent of shares in all existing mine companies.¹⁷

One of the main objectives of this policy was to ensure development of new mines and utilization of resources in the interest of the country.¹⁸ The Government, however, directed that compensation was to be based on a fair value represented by the book value, excluding business goodwill and future profits. Further, it was directed that compensation was to be paid out of future dividends.¹⁹ There was very little external influence or pressure on the Zambian government.²⁰ It was clear that government at the time pursued the Appropriate compensation principle which deals with a case by case basis as opposed to the

¹⁵ Preamble of the Lands Acquisition Act, Chapter 189 of the laws of Zambia

¹⁶ (1988) 13 Iran-US CTR 173,373

¹⁷ Government of the Republic of Zambia (GRZ), Ministry of Development Planning and National Guidance, "Second National Development Plan January 1972 to December, 1976," Lusaka, December, 1971, para 198.

¹⁸ Kenneth Kaunda, *Towards Complete Independence* (Lusaka: Zambia Information Services, 1969) p36

¹⁹ Kenneth Kaunda, *supra* note 21.

²⁰ A. Martin (1975) *Minding their own Business; Zambia's struggle against Western Control*, Harmondsworth, Penguin, p.176.

Hull principle of compensation which prescribes that compensation should be prompt, adequate and effective.

The Mines Acquisition (Special Provisions) Act, 1970²¹ made the key terms of the Master Agreements part of the statutes in Zambia. In Section 4 of the Act, the government unconditionally guaranteed that the Zambia Industrial and Mine Development Corporation Limited (ZIMCO) to discharge its obligations of paying interest and principal on any bond or stock entered into between the ZIMCO and the two mining companies.

The payment of the 51 percent interest in Roan Consolidated Copper Mines limited (RCCM) and Nchanga Consolidated Copper Mines (NCCM) was effected by the issue of ZIMCO bonds and loan stock created by the amount of compensation due to each company plus a 6 percent interest which were payable in instalments.²² Government made several undertakings with respect to terms of the compensation for example, the two mining companies were exempt from all Zambian taxes, stamp duties²³, transfer fees and registration fees to which they would ordinarily be subject to under the Companies Law²⁴ and the stamp duty Act.²⁵

4.2.4 Investment Act

The most significant policy changes after 1991 were enshrined in the 1995 Investment Act and the Mines and Minerals Act (reform of the investment act was part of the condition of the World Bank's 1993 Privatization and Industrial Reform Credit (PIRC II loan).²⁶ The demands for the privatization of the mines were made by both the World Bank and the International Monetary Fund (IMF) who also encouraged Zambia to adopt an investor friendly policy.²⁷

The Investment Act did away with foreign exchange controls, allowing companies to take out of Zambia, without interference, all funds in respect of dividend's, principle and interest on foreign loans, management fees and other charges.²⁸ Clearly this provision favoured foreign investors as opposed to benefiting the ordinary Zambians. This policy pursued the preferential treatment of investors.

Further, Section 35 (1), provided for acquisition or possession of property in public interest and under an Act of parliament. It further gave the duty to pay adequate compensation which was to be made promptly

²¹ Act No.28 of 1970.

²² See Section 4 of the Mines Acquisition (Special Provisions) Act no.28 of 1970.

²³ Section 5 of the Mines Acquisition (Special Provisions) Act no.28 of 1970.

²⁴ See Companies Act, Chapter 216 of the Laws of Zambia, 1965 Edition.

²⁵ See Stamp Duty Act, Chapter 78 of the Laws of Zambia, 1965 Edition.

²⁶ John Lungu and Silengo supra.

²⁷ Lishala Situbeko & Jack Jones Zulu (2004) *Zambia; Condemned to debt: how the IMF and World Bank have undermined development*, WDM, April.

²⁸ Section 36 of the repealed Investment Act, Chapter 385 of the Laws of Zambia.

at market value.²⁹ There was a clear lapse between Article 16 of the *Zambian Constitution* as amended and Section 35 of the *Investment Act*. There was need to reconcile the two provisions as it seemed to guarantee something more than what was provided for by the *Zambian Constitution*.

The state has the sovereign right to come up with any law in the public interest³⁰ and therefore it was illegal for the World Bank and the IMF to grant a loan on condition that Zambia enacts the *Investment Act* and the *Mines and Minerals Act* which basically granted preferential treatment to foreign investment and this is contrary to Article 2(2) (a) of the *Charter of Economic Rights and duties of states*. The duty to come up with the laws and regulations over foreign investment is a preserve of a state. This should be done in line with the national objectives as well as priorities and no state shall be compelled to grant preferential treatment.³¹

The move to waive taxes in order to encourage preferential foreign investment resulted in a loss of revenue by government which was against the national objectives and priorities of raising revenue to improve the *Zambian economy*. This was clearly contrary to Article 1 of the *Charter on Economic Rights and Duties of State*. Zambia needed the loan from the World Bank and the IMF which loan would eventually have to be paid off using *Zambian funds*. Zambia did not freely choose its economic system in accordance with the will of its people. It was coerced into passing the *Investment Act* and *Mines and Minerals Act, 1995* by the World Bank and the IMF.³²

4.3.0 Indirect Expropriation Provisions in Historical Policies and Legislative Framework;

The policies and laws that had provisions dealing with historical indirect expropriation were as follows; the 1973 *Mines and Minerals Development Act*, *Mines and Minerals Act, 1995*, *Mines and Minerals Development Act, 2008* and *Environmental Pollution Control Act*, which we discuss further as follows;

4.3.1 Mines and Minerals Development Act, 1973

After the 1969 nationalizations, the government passed legislation exempting from exchange control regulation on all payments made in respect to ZIMCO bonds and loan stock, and any dividends made on the remaining Roan Selection Trust Limited (RST) and Zambia Anglo-American Corporation shares, respectively.³³ The government also changed the tax regime affecting the copper mines in 1970. The mineral royalty and the export tax which were pegged at 13.5 percent and 40 percent, respectively, were replaced by the mineral tax of 51 percent and the corporation tax at 45 percent, respectively.

²⁹ Section 35(2) of the repealed *Investment Act*, Chapter 385 of the *Laws of Zambia*.

³⁰ Article 2(2) (a) of the *Charter of Economic Rights and Duties of States*, GA Res.3281 (XXIX), UN GAOR, 29th Session, Supp.No.31 (1974) 50.

³¹ Article 2(2) (a), *Charter of Economic Rights and Duties of States*, GA Res.3281 (XXIX), UN GAOR, 29th Session, Supp.No.31 (1974) 50.

³² See Article 1 of *Charter of Economic Rights and Duties of States*, GA Res.3281 (XXIX), UN GAOR, 29th Session, Supp.No.31 (1974) 50.

³³ *Mines Acquisition (Special Provisions) Act, 1970 Act No.28, 1972, Section 6*

Government's measures raised the much-needed revenue for the government although the mining companies argued that such high taxes on production and profit discouraged investment and growth of the industry.³⁴ The state has the sovereign right to come up with legislative action in the public interest to raise revenue for the state hence government's action to increase the revenue in the mining sector was justified.

The Tribunal in determining that the investment had been expropriated in Tecmed³⁵ stated that while regulatory measures may cause economic damage without requiring compensation. It could generally be excluded that the regulatory interference amounted to an expropriation. The Tribunal further explained that the principle that the State's sovereign powers within the framework of its police powers may cause economic damage to those subject to its powers or administration entitling them to any compensation whatsoever is undisputable.³⁶

The measures to change the tax regime after nationalization fell within the state's policy powers and this resulted in economic losses to the investors at the time. However, it is highly unlikely that such measures could fall within compensable regulatory measures.

4.3.2 The Mines and Minerals Development Act, 1995

The Mines and Mineral Act, 1995, introduced mineral royalty tax on copper which was charged at 3 percent of the net book value of the minerals produced.³⁷ It also provided relief from paying customs duties on imported machinery and equipment. Further, it allowed government to enter into Development Agreements,³⁸ privatization of the mines³⁹ and stabilization commitments.⁴⁰ These were policy objectives favoring preferential investment climate which were being championed by the IMF and the World Bank which became part of Zambia's policy as a condition set by the two institutions.

Further, Section 66(1) of this Act provided in mandatory terms that the holder of a large scale mining licence shall, in accordance with his licence, the Act and the terms of any relevant development agreement, pay to the Republic a royalty on the net book value of minerals produced under his licence at the rate of three per centum.⁴¹ Mining companies paid in accordance with the development agreements (D.A) and not as prescribed under the Act, for example, Mopani Copper Mines D.A specified mineral royalty at the rate of 0.6 per cent.⁴² Section 66(1) allowed mining companies to negotiate their own fiscal regimes. This was negotiated against the background of low copper prices which were predicted to remain low for a long

³⁴Supra 52

³⁵ Tecmed Tecnicas Mediambientales ,S.A. v United Mexican States,(Spain/Mexico BIT),Award,29th May,2003,10 ICSID Reports 134

³⁶ Tecmed supra para 119

³⁷ Mines and minerals Act, 1995.

³⁸ Section 9(1) and 9(2) of the Mines and Minerals Act, 1995.

³⁹ Section 9(2) (d) of the Mines and Minerals Act.

⁴⁰ Section 9(2) (d) cited above under 46.

⁴¹ Section 66(1), Mines and Minerals Act of 1995.

⁴² See paragraph 2(1) of the Mopani Agreement.

period of time. The agreements also contained stabilization clauses of 15 to 20 years in which government could not increase taxes.⁴³

In the context of Muchlinski's argument cited above, this Act did not attempt to balance the right of the protection of the investor's property and that of the duty for the state to regulate as it clearly focused more on attracting foreign investment without taking into consideration the benefits of these investments.

4.3.3 The Environmental and Pollution Control Act, 1990

Environmental laws in Zambia were influenced by the need to conserve the natural resources through control of pollution. Complaints had emerged from pollution sufferers in mining localities and pressure from international aid donor agencies.⁴⁴ The Environmental Protection and Pollution Control Act⁴⁵ in 1990 provided a national legislative and administrative structure for environmental protection. The Act's main objective was to harmonize the needs of human beings and the environment.

The Movement for Multi-Party Democracy's Government formulated a National Environmental Action Plan which was approved by Cabinet in December 1994.⁴⁶ Among the main objectives of this plan was to identify environmental problems and issues, analyzing their causes as well as recommending appropriate action.

The most significant provision of this Act was the requirement to carry out an Environment Impact assessment before any project could be approved. However, this provision falls within reasonable government regulation as propounded in the Feldman matter which ruled that;

*Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation and it is safe to say that customary international law recognizes this.*⁴⁷

⁴³ See the Development Agreement between Government of the Republic of Zambia and Mopani Copper Mines dated 31st March, 2000.

⁴⁴ Bertha. Z. Osie. (1996). Journal of Social Development in Africa: Environmental Protection and Economic Development in Zambia. Pp 57-72

⁴⁵ Act No.12 of 1990

⁴⁶ Ministry of Environment and Natural Resources (December,1994) The national Environmental Action Plan found at www.zema.org

⁴⁷ Feldman V Mexico (NAFTA),Award,16 December,2002,7 ICSID Reports 341 para 103

5.0 CONCLUSION

It can be concluded that the historical investment law and policy on expropriation in Zambia from 1994 to 1996 has mostly been influenced to some extent by some principles under international law and policy. However, there have been inconsistencies in the application of these international principles as regards some provisions of the law. It is important that the Zambian laws and policies on expropriation balances between the right to protect the investors' property and the duty of the state to regulate in the public interest. One of the attributes of a good legislation is comprehensiveness; a law which is silent on many critical issues is defective and likely to create unnecessary interpretation problems, it may be said that the historical policy and legislative framework governing expropriation in Zambia was not comprehensive enough, as it did not fully address the international standards on expropriation. International law as Mannirizzaman observes will apply only to the extent that it is incorporated in the domestic law.⁴⁸

The key issues that come from the historical perspective of the Zambian constitutional provisions is that expropriation can only be justified under the auspices of public purpose and that the duty to pay compensation is the way to go, in line with both international and national policies. The regulatory framework on the compensation to be paid is also a critical factor to take into consideration. Zambia as a country, has always paid compensation as agreed by parties. This compensation should consider the country's economic situation. Therefore, Appropriate compensation policies should be pursued as opposed to the hull principle of compensation.

⁴⁸ A.F.M.Manniruzzaman (2001). "Some Contracts in contemporary international law." Monist versus dualist controversies. European journal of International law.Vol.12.No.2, p.316.

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