

MINING RIGHTS

IN

ZAMBIA

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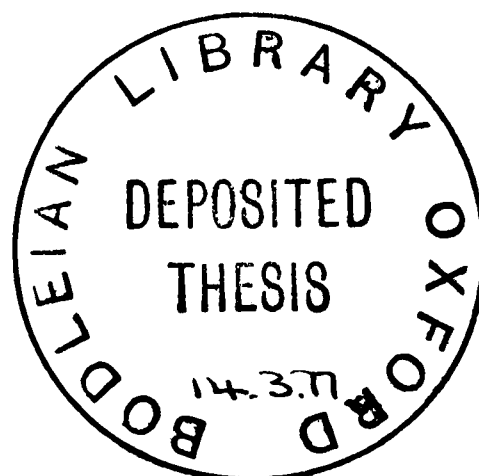
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ABSTRACT

Although hitherto there have been sociological, economic, and historical accounts of the copper mining industry on the Copperbelt of Zambia, this is the first detailed legal study of mining rights in the country. The first half of the study attempts to present the law in historical perspective and the second is essentially an examination of the law as it applies today.

Chapter One is introductory and gives a general political history, and demographic facts about the country; discusses the importance of minerals in the Zambian economy, the nature of the study, the sources of information, and the scope of the study; and attempts to clarify the meaning and purposes of mining law. It shows that Zambia, once a British protectorate, is a sparsely populated country that is heavily dependent on its minerals for economic survival, that the study examines the main legislation relating to mining rights in Zambia, and that the basic role of mining legislation is to ensure the development and discovery of the country's mineral resources.

Chapter Two discusses mineral systems generally, and defines some of the technical terms used - such as "mines", "minerals", and "mining rights"-and the sources of law affecting mining rights. This reveals that mining activities even in their earliest days were the subject of extensive regulation especially on matters of ownership and, that the main sources of the law affecting mineral rights are legislation, customary law, and the common law.

Chapter Three is devoted to a consideration of the basis of the British South Africa Company's Claims to the ownership of mining rights in Zambia which it held from the late 18th century to 1964.

It shows that the history of the Company's involvement can be traced to 1861, to the finding of gold in South Africa in that year. This led to the granting of a charter in 1889 to the Company by the British government, and the subsequent granting of mineral concessions to the agents of the Company. The Chapter also reveals that the mineral concessions were obtained in very dubious circumstances.

Chapter Four discusses the efforts to recover the mining rights from the Company and their eventual recovery by the nationalist government in 1964. It reveals that in the period 1898 to 1958 the Company passed or secured the passing of various enactments recognising, it as, or declaring it, the owner of the mineral rights. These enactments do not agree among themselves as to what these rights were, but because the company knew the precarious nature of its rights it resisted all efforts to have the matter adjudicated on by the Privy Council. It further demonstrates that the Company maintained its ownership of mineral rights through its influence with Colonial officials and sometimes through the active assistance of the Colonial Office. The rights were subject to numerous protests from African chiefs, settlers, and the Legislative Council, and were strongly opposed by one of the Governors of the territory. The Governor's opposition led to the matter being referred to the Law Officers in 1938.

The Law Officers ruled that the Company's claims were well founded. But the Chapter attempts to show that the Law Officers' opinion was erroneous and that it contravened rules of interpretation of statutes, rules of evidence relating to the admissibility of extrinsic matters in the interpretation of contracts, and rules relating to the alteration of contracts. It also shows that the

opinion was not only contrary to the private views of the colonial officials involved in the matter but ~~also~~ that it was contrary to other Law Officers' opinions given on similar matters in other colonies.

Chapter Five is a critical analysis of the legality of the British South Africa Company's claims to mineral rights in Zambia. The analysis reveals that this claim had no legal basis and that the royalties were payable to the government and not to the Company, as the concessions on which the claims were based were void when they were made, and could not be enforced in law. The chiefs had no authority according to customary land-tenure concepts to give away mineral rights; moreover the interests they purported to grant are not known to customary law. Further the concessions in some instances were obtained fraudulently.

It further reveals that the enactments referred to in Chapter Four, although they expressly gave the Company power to exercise mineral rights and assumed that the Company could exercise those powers, did not operate to give it a new root of title. It also shows that by recognising the rights in several agreements and letters the Colonial Office did not grant any title legally and also that even if the concessions were valid they could not cover the whole of Zambia and all the minerals. The Chapter also argues that since the original concessions were of no legal effect the legal title to the minerals remained in the owners of land until the customary rights were extinguished and minerals severed from the land at which time they were vested in the Crown.

Although legally the Company had no rights, it was assumed by the Colonial Office that the Company's claims were valid. This resulted in the Company exercising mineral rights in Zambia for over sixty years.

Chapter Six discusses the mineral tenure system the Company established. It shows that in the system so established the Company ceded not only land, prospecting and mining rights over large areas but a proportion of the mineral rights, and that the majority of these grants were held in perpetuity. The Chapter reveals that although its system in the early stages brought about the development of a healthy mining industry, eventually it became an obstacle to the development of the country's mineral resources. When the nationalist government acquired the mineral rights in 1964, it could not grant mining rights in these areas in which the Company had granted exclusive rights even when no development was taking place. This also in effect prevented the exploitation and development of the mineral resources by any other organisation other than the then holders of the mining rights.

Chapter Seven discusses the legislation introduced in 1969 by the government, to govern all prospecting and mining activities, in an attempt to correct the above situation. This legislation vests all rights of ownership, searching for and disposal of minerals in the state, and creates three types of mining rights - prospecting licence, exploration licence, and mining licence. These are granted for limited periods and do not convey rights of property in minerals. Their holders are subject to certain obligations calculated to influence the rate of development and the method of mining, and to protect the environment and land-owners. The Chapter shows that the new system has eradicated the various anomalies inherited from the past and has minimised the opportunity for their recurrence, and it has also by and large resulted in a wider variety of mining companies being involved in mining activities in Zambia. The

Chapter further suggests improvements that can be made to the legislation.

Chapter Eight discusses the new mining legislation's requirement of domestic participation in all new mining ventures. It is not uncommon for governments to participate directly in mining ventures as part owners of a private corporation or, for that matter, to acquire full ownership of existing operations by expropriation or nationalisation. This Chapter discusses the reasons for this requirement, the objective of the state in insisting on this requirement, and its chances of achieving these objectives. The Chapter reveals that the behaviour of foreign firms in Zambia contributed to the introduction of this policy and that its disincentive effect to mining investors can be limited by fair dealing on the part of the state. It shows, further, that although by the policy the state has given itself the opportunity to participate and thereby directly influence the activities of the country's most important industry, the effectiveness of the resultant participation rests on other considerations such as the calibre of its appointees to boards and top management positions; it also suggests further initiatives to improve control.

Chapter Nine discusses the taxes affecting mining rights. Before 1969, royalty and export tax applied, both of which were based on production and the value of sales. Although they effectively raised revenue for the state they operated unfairly and as disincentives to mining investment. In 1969 the pre-1969 legislation was repealed and a fairer system based on profitability was introduced. The Chapter while admitting that the present tax levels are fairly high contends that low levels of taxation alone do not necessarily encourage mining investment. Instead it suggests that measures

which improve the profitability of an enterprise are much more important, and insists that the country needs to improve its political climate and create confidence in order to encourage mining investment.

Lastly the Conclusion stresses the importance of the need continuously to review the mining legislation in order to meet the ever changing needs of the industry, but at the same time cautions that whatever changes are adopted, they must always ensure operating conditions which guarantee effective exploration and development of mineral projects, and the security of mining rights.

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ABBREVIATIONS

African South	Correspondence of the Colonial Office respecting affairs in Zambia and adjacent territories printed for the use of the Colonial Office.
C.O.	Colonial Office, Public Records Office, London.
F.O.	Foreign Office, Public Records Office, London.

UNITS

During its Colonial Period, Zambia used pounds, shillings, and pence, which were always equal to British Currency. In 1968 Zambia decimalized its currency on the basis of 10 Zambian Shillings = 1 Kwacha = 100 ngwe. When most of this study was completed 1 Kwacha = 2.85. In July, 1976 the Kwacha was devalued by 20%. At current exchange rate 1 Kwacha = 3.68

CHAPTER 1

INTRODUCTION

This study is designed to examine the mining laws of Zambia, with primary attention in the early parts of the study to the history of the laws and in the latter to the current requirements that must be met within the country for the acquisition of tenure to permit the development of its mineral resources.

This chapter attempts to give a general background to the study. It discusses the political history of Zambia, and considers the importance of mining in Zambia by examining the minerals produced and discussing the tonnages and value of the chief minerals at present mined in the country and the extent to which mining dominates the economy in terms of such factors as government revenue, its contribution to such spheres of the Zambian economy as labour and gross national product and the industry's importance in relation to the question of foreign investments in developing countries generally. In the last three sections it discusses the nature of the study, sources of information, and the scope of the study.

(a) The Political History of Zambia

The country has a land area of 291,000 square miles, over four

times the size of Great Britain,¹ yet though vast in area it is very thinly populated, its inhabitants numbering only 4.75 million.²

Unlike the greater 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 1899 the Barotseland and North-Western Rhodesia Order in Council was passed, which defined the boundaries and provided for administration by the Company.

The North-Eastern part of what is now Zambia was acquired through treaties and concessions made by Sharpe and Thomson as agents of the Company with African Chiefs.⁶ In 1900 the North-Eastern Rhodesia Order in Council was enacted, which gave the Company statutory powers of administration.

In the years from 1900-1911 the North-Eastern part of the country

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 Nyasaland 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, 29th October, 1889.

5. See below, p. 52.

6. Ibid.

and the North-Western part were administered separately. But 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 4th May, 1911, the two territories were united by the 1911 Northern Rhodesia Order in Council, revoking the North-Eastern and North-Western Rhodesia Orders in Council. Its provisions were brought into operation by the Northern Rhodesia Proclamation of 1911, on 17th August, 1911.¹ The country remained under the rule of the Company and governing powers were vested in a Company administration, and a Council of Company Officials, subject to ultimate British control.²

The period of Company rule was terminated on 20th February, 1924, by the Northern Rhodesia Order in Council of 1924. The British government assumed responsibility for the administration of the territory. The status of Northern Rhodesia became that of a protectorate. On the 1st of August, 1953, the territory was made part of the ill-fated British Central African Federation by the Federation of Rhodesia and Nyasaland Order in Council of 1953. The Federation was dissolved in 1963,³ and on 24th October, 1964, Northern Rhodesia became the independent state of Zambia.⁴

(b) Minerals Produced

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

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1. Northern Rhodesia Proclamation No.1, of 1911.
 2. Royal Charter of Incorporation of the British South Africa Company, 29th October, 1889.
 3. Federation of Rhodesia and Nyasaland, Dissolution, Order in Council, 1963.
 4. Zambia Independence Order, 1964

TONNAGES OF MINERALS PRODUCED

1974

Mineral	Tonnage	Value in Kwacha
Copper	757,000	886,652,000
Zinc	27,041	5,304,308
Lead	24,596	5,159,700
Cobalt	1,962	10,693,000
Coal	1,094,425	1,246,000
Amethyst	34,356	391,200
Silver	8,938	1,877,100

Source: Zambia Mining Year Book (1974)

The main mineral produced in Zambia, as can be seen from the above table, is copper. The earliest known reference to copper mining in this general portion of Central Africa was made by Fillipo Figafetta in his book, A Report on the Kingdom of Congo.¹ 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.² Africans used iron for their tools, but copper was particularly important for ornaments and as a means of exchange.³ The presence and use of the metal in Central Africa was known to the earliest explorers.⁴ The discovery of the mines by white prospectors was in the majority of

1. Figafetta, A Report on the Kingdom of Congo, 1969. This book was first published in 1591.

2. Hall, Zambia, 1965, p.10.

3. Gann, "Northern Rhodesia Copper Industry and World of Coppers" (1955) 18 Rhodes-Livingstone Journal, pp.1-18.

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

cases made easier by the existence of earlier native workings.¹

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 total known reserves.²

WORLD COPPER STATISTICS

Country	1974	1971
	Production per thousand tons	Reserves per million
United States of America	1,564	77.5
Russia	1,224	34.9
Chile	969	53.8
Canada	868	20.8
Zambia	757	27.2

Source: Zambia Mining Year Book (1974) and
Mining Annual Review (1971)

Most of the copper in Zambia is mined on what has come to be known as the Copperbelt. This is an undulating area, roughly 90 miles in length by 30 miles in width. Nine major mines spread all

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1. 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 the disclosure of any information of a place which showed even minor evidences of copper mining or other metal content, and points out 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.
 2. Mines Industrial Development Corporation, Prospects for Zambia's Mining Industry, 1970, p.20.

over the Copperbelt are in production,¹ and several copper-mining projects are in varying stages of consideration and preparation. Exploratory development at Seberere and Mokambo is being pursued by a Rumanian 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 much lesser extent than copper, as shown above, Zambia produces six 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.² Amethyst is produced at Northern Minerals Ltd. The mine is the largest producer of any semi-precious stone in the world. It at present produces 50% of the world's amethysts and is also the world's largest known amethyst deposit.³

Large nickel deposits have been found and are now being explored in the Munali prospecting licence area. Iron ore occurrences are common and widely distributed throughout Zambia. Only a limited amount of work has been done on the great majority of the deposits. A recent tabulation of deposits showed that there is a minimum of 1,000 million

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1. Chambishi, Chibuluma, Chingola, Kalengwa, Konkola, Luanshya, Mufulira, Rokana, and Bwana Mkubwa. Other possible mines are given in Ministry of Finance, Economic Report, 1972, p.195.
 2. It was developed largely for this purpose after the Southern Rhodesian supplies were threatened.
 3. Mines Industrial Development Corporation, Zambia Mining Industry, 1974, p.5.

tonnes of mineral grading between 50 and 60 per cent.¹

(c) Minerals and the Zambian Economy

The Zambian mining industry is of tremendous importance to the Zambian economy. The capital investment is over K 1,130 million and can fairly be characterised as massive. It is the most important sector of the economy. It is the economic life-blood of the country and its 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 rural villages, are the result of the shared proceeds of the mining operations. As the table below shows, the industry accounts for most of the net domestic product.

CONTRIBUTION OF MINING INDUSTRY
TO DOMESTIC PRODUCT

Year	Gross Domestic Product (Million Kwacha)	Mining industry's Contribution to the net Domestic Product (Million Kwacha)	
1970	1258	457	37%
1971	1778	298	24%
1972	1338	318	24%
1973	1628	562	34%
1974	1820	616	33%

Source: Zambia Mining Year Book (1974)

1. Mines Industrial Development Corporation, Prospects for Zambian Mining Industry, 1970, p.3. Other minerals are also produced in a small way such as cadmium, cement, mica, gold, gypsum, manganese, tin, and feldspar.

Copper and the other minerals are the country's major exports. The table below gives the value of copper exports relative to Zambia's total exports.

CONTRIBUTION OF COPPER TO EXPORTS

Year	Value of Domestic Exports (Million Kwacha)	Value of Copper Exports (Million Kwacha)	
1970	669	634	95%
1971	465	439	94%
1972	527	491	93%
1973	732	696	95%
1974	841	786	93%

Source: Zambia Mining Year Book (1974)

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

CONTRIBUTION OF MINING INDUSTRY TO REVENUE

Year	Government Revenue (Million Kwacha)	Mining industry's Contribution (Million Kwacha)	
1970	432	218	52%
1971	309	114	38%
1972	315	69	22%
1973	386	108	28%
1974	649	337	52%

Source: Zambia Mining Year Book (1974)

The mines are among the leading employers of labour in the country. The industry employs somewhere around 15% of all people who receive cash wages in Zambia.

MINING INDUSTRY LABOUR STRENGTH

Year	Expatriate	Zambian
1970	4375	44,094
1971	4751	44,997
1972	4600	46,245
1973	4505	48,287
1974	4392	51,736

Source: Zambia Mining Year Book (1974)

The preceding tables provide some idea of the overriding importance of the mining industry to the economy of Zambia. As the Prospects for Zambia's Mining Industry notes, there are probably very few countries in the world that are as dependent on the production and price of one commodity produced by one sector of the economy as Zambia is on its copper and its mining industry.¹ To a large extent the country is a house built on its mining industry to quite an extraordinary degree.

The importance of mining in the Zambian society transcends its economic value, it has social and political significance. The process of industrialisation whether generated by political policies or

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

economic innovation, is widely associated with movements from rural areas to urban centres.¹ The attractions of the bright lights and economic pressures combine to bring people out of the rural areas into the towns. About 35% of the Zambian population of 4.75 million live in the urban centres. Most of this urban population is concentrated on the Copperbelt and the Central Province.²

POPULATION DISTRIBUTION
ACCORDING TO PROVINCES

Province	Year	
	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	4,053,000

Source: 1963 and 1969 Census figures.

Most of the people who live in the Copperbelt migrated there in response to mining labour requirements. In the towns an African entered into social intercourse with his fellow Africans of other

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

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

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.

(d) Future of the Industry

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, and trends in supply and processing of competing metals such as aluminium.¹ Technical 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

1. The other possible threat the Nodule Industry has been dismissed. See United States, Department of the Interior Bureau of Mines Mineral Year Book, I 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 accounts for about half of the world's consumption and of the balance the building industry takes a considerable proportion, probably about 10% of total production. See Mining Mirror, 5th December, 1973, p.70; and also 5 No. I Optima, p.26.

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 for the manufacture of artificial teeth. Aluminium is now used extensively in building and bridge work.¹

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)² 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,³ the contrast may be made with 1976 when the industry is going through a very difficult time. The price of copper has fallen steeply in recent months, owing largely to the economic recession. It has collapsed from a peak of £1,400 per tonne on 1st 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 have plummeted.⁴

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1. Brown and Butler, The Production Marketing and Consumption of Copper and Aluminium, The Economist Intelligence Unit, 1968.
 2. 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.
 3. During 1973-1974, Zambia's two mining companies reached a record level of K920 million in profits, Times of Zambia, 31st July, 1975, p.2; and see both Nchanga Consolidated Copper Mines Ltd. and Roan Consolidated Mines Ltd., Annual Reports, 1973.
 4. At the end of its financial year on March 31st, 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, 31st July, 1975, p.2. See also Daniel, "Increasing strain on Zambia's copperbelt" The Guardian, 31st March, 1976, p.20.

The price of copper is likely to remain low until there is a definite sign of industrial upturn.

(e) 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.¹ Foreign investment may also have several other disadvantages. One such major disadvantage is that it ties an under-developed nation's economic cycle to the multinational companies without the country having any control over that cycle.²

In addition, 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 materials, sugar cane, petroleum, and

1. United Nations Report on Multinational Corporations 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.

2. Ibid.

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.¹ 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, complain that they are finally left with "holes" in the ground.² A complementary version of that 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 business ethic, it neglects activities merely of social importance.³ Investors usually aim at maximizing profits while the local society aims at maximizing some broader measure of social welfare.

Foreign investment, however, may have undoubted advantages for the recipient country.⁴ An inflow of private capital contributes

1. Ibid. See also United Nations General Assembly Debates (Provisional) 1972, A/C 2 /SR / 1051, p.5.

2. For a General discussion of this problem, see Bernstein, Foreign Investment in Latin America, 1966, p.13.

3. Ibid.

4. These are discussed at length by several authors, e.g. Fatorous, Government Guarantees to Foreign Investors, 1963. Friedmann, Legal Aspects of Foreign Investments, 1959; and Nwogugu, The Legal Problems of Foreign Investment in Developing Countries, 1965.

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.¹ It can also be argued that as the investment operates, the increase in real income resulting from the act of investment is greater than the resultant increase in the income of the foreign investor.

The presence of foreign capital may allow a large labour force to be employed. It brings physical and financial capital. Direct foreign investment also includes non-monetary transfers of other resources - technological knowledge, market information, material and supervisory personnel, organizational experience and innovations in products and production techniques - all 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. If the foreign capital is used to develop the country's infrastructure, it may directly facilitate more investment, both local and external.

It would be foolish to condemn foreign capital on the basis of its disadvantages. What is needed is a greater awareness among developing countries of the dangers so that they can reject the worst

1. Practically all Zambian foreign exchange comes from its mining industry. Some writer 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 Under-development in Latin America, 1971.

deals and extract much better terms in the future. Many developing countries in recent years have taken measures directed at trying to mitigate the disadvantages of foreign capital particularly in the area of the exploitation of mineral resources.

(f) The Nature of the Study

A legal framework is required for most human endeavours, whether it be to apply justice, to establish codes of public conduct or to provide facilities for the conduct of social or economic life by regulating and enabling them to be carried on in an orderly manner. The number of these activities has proliferated considerably as a result of the extraordinary industrial and social development of the world.

Legislation is required to establish rules and regulations to control mining activities. This study is intended to identify the 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 practices 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, laws relating to the right to mine, conditions governing the issue and holding of mining rights, and the relationship between mineral and surface right holders.

This is in contradistinction 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.¹ Mining activities today present many 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.

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 largely private and foreign in origin and as is known, in general such capital is timid with regard to venturing into most developing countries. Thus this

1. E.g. Lindley, Mines and Minerals, 1914.

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 confidence in the long-term stability of operating conditions. Consequently certain aspects of the mining legislation will be evaluated in terms of how it affects the flow of foreign capital.

(g) Sources of Information

The law relating to mining rights is a strangely neglected topic in Zambia in view of the importance of the subject. The only published book dealing with it is that of Williams, Mining Law of Northern Rhodesia, published on behalf of the British South Africa Company in 1963. Yet it adequately deals with neither the post-independence legislation nor the history of mining law and is simply an uncritical reprint of the provisions of the 1958 Mining Ordinance which has since been repealed.

Most of the sources used in this study are primary. For the historical information Rhodes House Library in Oxford, the Public Records Office Library in London, and the National Archives in Lusaka were relied on. All three places have collections of official documents relating to the colonial period, such as colonial reports, legislative council debates, copies of the concessions, and agreements relating to mining rights and the country generally.

Use has also been made of the available historical books relating

to the general area of Central Africa and the specific area of Zambia which contain useful information relating to mining rights. For the information concerning legislation, the Acts of Parliament and the various Orders in Council and Ordinances relating to mining rights have principally been relied on.

In order to supplement this information and to gather information about the working of the legislation, field work was carried out for seven months in Zambia during 1975. During this time the various Mining Year books, Annual Reports and other official reports were examined. Interviews were undertaken to ascertain the reaction of both government mining officials such as the Chief Mining Engineer, the official charged with the responsibility of administering the mining law of Zambia, and mining right holders, to the legislation in force with a view to ascertaining the problems they have and are encountering. Several aspects of the law and the industry and also the objectives of the government in the mining laws were discussed with the Chief Mining Engineer and at his office, the Commissioner of Mines was interviewed and files examined in detail.

Discussions were held with the technical directors of all the major mining companies and that of Mines Industry Development Corporation Small Mines Ltd., on the operational problems arising from the existing mining legislation. Roan Copper Mines Ltd., arranged a visit to their exploration and mining sites in Kitwe and Kalulushi to observe the actual operations in progress.

Various interviews with both government and private mining company directors were conducted. The method of inquiry found suitable was that of the open-ended personal interview, as the use of a questionnaire

would not have allowed the amplification of various issues raised particularly in view of the technical nature of the subject. Questions relating to the number of directorships they held, how they are informed of government policy on matters before the board, the accountability of the directors, the extent to which they depend on government approval for maintaining their positions and the channels of communications between them and the government, were raised. Various officers in the nationalised industries were also interviewed particularly in relation to factors affecting control. The mineral rights dispute¹ was discussed with some of the officials who were involved such as the Finance Minister of the time who led the Zambian delegations to conferences discussing the issue.

(h) Scope of Study

The object of this study is to give an exposition of the law relating to mining rights in Zambia and to subject it to critical analysis with a view to helping its development.

Knowledge of the problems affecting mining right holders is of importance to several groups of people. Whatever action the government takes concerning mining is invariably expressed in legislation or in the activity of state officials, i.e. in the legal system broadly conceived. Much assistance for the making of these decisions could be derived from a systematic exposition and analysis of the underlying principles of the mining law. To mining investors

1. See below, p.69.

this study may be useful in indicating the conditions of tenure of mining property under the law. It may also be helpful and suggestive to those in whose hands may be placed the task of framing the mining laws of new and unexplored mineral lands or of adopting older laws and usages to more modern requirements.

It is also of benefit to the miner. To him who has to deal with the mines owned and worked under the grants and terms of the laws of Zambia its importance is more than a theoretical one. If he be in conflict with a surface owner, he must thoroughly know and daily appreciate the bearing and practical effect of all the essential and technical provisions of the law affecting the exercise of surface rights; he may well be guilty of disastrous error if he fails to give due consideration to all the legal prescriptions affecting his problem as well as its physical conditions. The study may in addition provide lawyers with information about current laws, decisions and comments on many issues affecting mining rights in Zambia and thereby fill a long standing need. It will also answer unresolved legal problems relating to the British South African Company ownership of mineral rights in Zambia prior to 1964.

The first four chapters deal with the general considerations affecting mining rights, the granting of mining rights to the British South Africa Company and an examination of the validity of the Company's claims to mineral rights. These four chapters attempt to place mining rights in their legal and economic context and also give some of the essential historical background to the modern law.

The next three chapters deal with the pre- and the post - 1969 mining legislation. Such factors as the ownership of minerals, conditions for the acquisition of mining rights, and the types of mining rights

are considered here. And in addition the requirement in the new mining legislation of domestic participation in mining ventures is analysed in some detail.

Chapter Nine deals with taxes affecting mining right holders. While other taxes such as general income tax are important, only those taxes having a direct impact on mining operations are considered - especially in terms of the kind and weight of the taxes, and their impact on mining investment.

Lastly, it should be explained that the study does not purport to deal with the problem of pricing of commodities, partly this is due to a desire to keep the thesis down to a reasonable length and partly because such problems are economic rather than legal. It does not also deal with the partial nationalisation in 1969 of the Anglo-American Corporation Ltd., and Roan Selection Trust Ltd., Copper mines in Zambia, partly for the reasons of space as above but also because this matter was dealt with in an earlier article.¹

1. Ndulo, "The Nationalisation of the Zambian Copper Industry" 1974 Zambia Law Journal, p.51.

CHAPTER 2

GENERAL CONSIDERATIONS CONCERNING MINING RIGHTS

This chapter attempts to examine preliminary matters relating to mining law, in order to assist the reader in his understanding of the study. It discusses the system of mining rights in other parts of the world, the sources of law affecting mining rights, and the legal meaning of the phrase "mining rights" and the words "minerals" and "mine".

(a) Mineral Systems Generally

It is, of course, impossible, within the limits of this study, 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 to basically two primary classes.¹

There is first 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

1. 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 discusses the influence of Roman law on the systems. The classification excludes communists countries where land and mineral resources are nationalised and mining is carried on as a state industry.

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 traced back 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.¹

In feudal times the rights of the Crown were split up, passing to feudal lords, but Kings gradually repossessed themselves of their legal rights in respect of mines.²

This same system is sometimes varied by what is termed the dominal system, under which the minerals belong to the state, with the right of working them itself or of disposing of them to the highest bidder as it thinks proper.

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

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

2. Ibid.

of the world.

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 condition 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.¹ 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 vested in different institutions, ;e.g. the question to whom royalties

1. Alford, supra, p.2.

are payable when minerals are being worked.

In England, 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.

This claim to the so-called royal metals falls under the regalien system of mining tenure. It prevails even today in theory, in the law of England. As there is no gold or silver in commercial quantities found in England, the regalien rights of the Crown are of theoretical rather than practical importance. For other minerals, the owner of the surface, wherever situated, is entitled to 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.¹

This theory of ownership accompanied the common law of England to all those countries in which it has been the basis of the legal system. And in some of these, it has been of some practical importance.

1. 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 for 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.

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.¹

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 them throughout the country by virtue of 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.

(b) Sources of Law Relating to Mining Rights

In order that the reader may comprehend the adverse 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.

1. 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.

The sources of Zambian law in general, and therefore of Zambian mining law, are customary law, the common law of England, and the various laws, both colonial and post-independence, enacted by Parliament to regulate mining and the acquisition of mining rights.

1. 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.¹

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,² but by and large the broad principles in all the various systems are the same.

With regard to mining rights this source of law is not very

1. 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.

2. But such divergences as there are can easily be exaggerated as Kuper had 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 underestimates the tremendous effect of past contact and over emphasizes African conservatism. Moreover, the piling up of ethnographic details produces an impression of chaos where there is in fact only variations on a few themes", See Kuper, "Cultures in Transition" 1952 The Listener, p.212.

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 5.¹

2. Common law

Like most other former British colonies and protectorates, Zambia is a common law jurisdiction.² This description is supported by the history 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 29th 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 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 peoples or inhabitants thereof. 3

1. See below, p.45.

2. Church, "The Common Law and Zambia" 1974 Zambia Law Journal, p.1. 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. & 4; Allott, New Essays in African Law, 1970, Chapters 1-3; and Park, The Sources of Nigerian Law, 1963, Chapters 2 & 3.

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

In the Barotziland - North Western Rhodesia Order in Council of 1899,¹ 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 1900² made similar provision for the rest of Northern Rhodesia not covered by the Barotziland Order in Council of 1899.

Several other statutes refer to the law of England³, but by far the most important is Chapter 4 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 4 is uncomfortably vague. There is doubt about the significance of the 1911 date, about precisely which pre-1911 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 other common law jurisdictions other than England.⁴ It is possible to

1. Barotziland - North - Western Order in Council, 1889, article 6.

2. North-Eastern Rhodesia Order in Council, 1900, article 4.

3. See also the Subordinate Courts Act, Chapter 45 of the Laws of Zambia, s.14, and The High Court Act, Chapter 50 of the Laws of Zambia, s.9.

4. 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 such as common law as opposed to equity and common law as opposed to custom. See Daniels, *supra*, p.149.

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,¹ 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,² although there is again room for dispute open on this point.

The practice of Zambian courts is to refer to English cases and decisions from other common law jurisdictions where 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.³ Even more important is the readiness with which Zambian judges turn to decisions and reasons of these courts. Such decisions are not technically binding, but in recent years there has been noticeable an increasing respect for them and frequently there seems to be little real difference

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1. 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.
 2. 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.
 3. In Kachasu v. Attorney General Selected Judgements of Zambia, No.10 of 1969, several American cases were cited, e.g. Minersville School District v. Gobits (1950), 310 U.S. 586; Zavilla v. Mass (1944), 112 Colo. 183; West Virginia State Board of Education v. Barnette (1943), 319 U.S. 624. So were several Nigerian cases cited, e.g. Arzika v. Governor 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.

between referring to them and actually following them as authoritative statements of the law.¹

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,² the issue was whether section 203 of the Zambian Criminal Procedure Code³ 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.⁴ Section 200 of the Kenyan Criminal Procedure Code⁵ 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 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, are governed by identical or similar

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1. In Chipango v. Attorney-General, Selected judgements of Zambia No.11 of 1971, several foreign cases were cited, e.g. H. Das v. District Magistrate Cutback A.I.R. (56) 1969 S.C. 43; Mohamend 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.
 2. High Court of Zambia, Judgement No. H.P.A./101 /73.
 3. Criminal Procedure Code, Chapter 160 of the Laws of Zambia.
 4. The East African cases of R. v. Jiwannath and Amuk Singh [1944] E.A. 62; and Musa and Another v. R [1962] E.A.493 were referred to.
 5. Criminal Procedure Code, Chapter 175 of the Law 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.

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 insofar as these are all common law jurisdictions, they fit into the sources of law potentially permitted by a liberal interpretation of Chapter 4 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 occurrences 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 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 study, 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 common law is a very important source of law in this study. The whole of the common law of England both mining and non-mining, as it existed in 1911 as Chapter 4 specifies, is in force in Zambia so far as it can be applied.

3. 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,¹ and this has been followed over the years by repealing, replacing and extending legislation - the 1958 Mining Ordinance,² the 1969 Mines and Minerals Act,³ the Income Tax Act,⁴ the Copper (Export) Tax of 1966,⁵ the Mineral Tax Act of 1970, and numerous Income Tax (Amendment) Acts.⁶ In addition there are several statutes sections of which affect mining rights in fairly significant ways such as the Water Act.⁷

1. Mining Proclamation, No.1 of 1912.

2. Mining Ordinance, No.13 of 1958, s.108.

3. Mines and Minerals Act, Chapter 329 of the Laws of Zambia.

4. Income Tax Act, Chapter 668 of the Laws of Zambia.

5. Copper (Export) Tax Act, Chapter 669 of the Laws of Zambia.

6. 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.

7. Water Act, Chapter 312 of the Laws of Zambia.

(c) Terminology

Since words like "mining rights", "minerals" and "mines" are used throughout this study, it is important to clarify their meanings at the outset.

1. Mining Rights

The phrase "mining rights" means the same thing as the phrase "mineral rights". In its most general sense it means no more than rights pertaining to minerals and mines. It is defined in any standard dictionary as "the ownership of minerals under a given space" or "the right or title to all or to certain specified minerals in a given tract".

The British South Africa Company used the term "mining rights" in contradistinction to "mineral rights" and in the sense of a limited right to mine acquired from itself as owner of "mineral rights", under a tenure by which there was a reversion of those rights to itself in the event of an abandonment of mining rights or the working of a forfeiture.¹

Under the present Zambian mining legislation the expression is a term of art and means simply the lesser and limited right to go on public or someone else's land to prospect for minerals or explore mineral occurrences or where minerals exist to mine them and take them away without ever having any ownership in the ground minerals.²

1. Williams, *supra*, p.5.

2. Mines and Minerals Act, *supra*, s.3.

2. Minerals

Some countries avoid defining the word "mineral" but many produce definitions. The word itself is susceptible to expansion or limitation in meaning according to the intention with which it is used. In some countries statutes referring to "minerals" have an interpretation section which reads: "'minerals' includes...."¹ In others, legislation defines "mineral" or "minerals" by words "'mineral' means" or "'minerals' mean...."² And still others define minerals by the words "'mineral' does not include...."³ But in all these countries the question of what is a mineral has not been resolved by these various methods of defining minerals. The words used turn out to be uncertain and inadequate to meet all circumstances.

The Zambian Mines and Minerals Act does not define minerals but states that:

the word mineral shall be construed in its most general extensive and comprehensive sense and shall include any substance whether in solid, liquid or gaseous form occurring naturally in or on the earth, but excluding public and private water when used for a primary secondary or tertiary use as defined in the (Water Act) ore and mineral products. 4

Although the difficulties which confront a person in deciding

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1. The Ugandan Mining Act, Chapter 248 of the Laws of Uganda in s.2, states "Mineral and Minerals do not include oils but include - (a) metalliferous ores and other substances which are obtainable only by mining or in the course of prospecting operations".
 2. The Botswana, Miners and Minerals Act, Chapter 66.01 of the Laws of Botswana, defines minerals in the following terms: "Minerals means any constituent of the earth or which can be obtained by mining, digging, quarrying or other operations and includes precious stones, clay, gravel or stone of those minerals are required, e.g. agriculture and building", see s.2.
 3. The Kenyan Mining Act, Chapter 306 of the Laws of Kenya, in s.8, states that minerals exclude salt and soda.
 4. Mines and Minerals Act, Chapter 329 of the Laws of Zambia, supra, s.3.

what is a mineral in any particular case in Zambia has been narrowed down by the special provisions regarding the working and use of mineral substances ordinarily used for building, roadmaking and agricultural purposes,¹ the above provision is extremely wide and leaves open the question what substances the term embraces. It includes practically every metalliferous and non-metalliferous inorganic material as opposed to the comparatively limited quantity of things belonging to the vegetable and animal kingdoms. Nearly all the earth's land surface would, in this broad sense, be classified as mineral.

But not every solid or liquid is considered a mineral in Zambia. For instance, some clays are generally found in most parts of Zambia and are not considered as minerals in terms of the mining laws, and people particularly in rural areas make use of them in building houses, without resorting to obtaining permission under the mining laws. The same can be said of some types of gravel and granite substances considered to be minerals in some countries but in others not considered as such. Indeed, the cases are ones just referred to above - clay and gravel.

What then should be understood to be meant by the term "mineral" in Zambia? Should it be a substance considered by the great mass of the people as mineral, or is it necessary for a substance to contain a metal to be embraced within the term "mineral"?

The term "mineral" is of course, a word in common usage and the

1. Building minerals are defined as "minerals and rocks commonly used for building, road making or agricultural purposes and includes, sand, clay, gravel, laterite, limestone, granite, phyllite and many other rocks when so used". See Mines and Minerals Act, supra, s.2. It makes the task easier by naming some of the minerals.

ordinary meaning of the word can be found in any standard dictionary.

This meaning ranges from the general one of inorganic substances found in the ordinary rock or as deposits in or forming part of inorganic substances found in the ordinary rock, or as deposits in a substance forming part of the earth's crust usually extracted by mining or quarrying, to the more particular meaning of the processed and refined products of that extraction in the shape of elements or compounds or classified species or inorganic substances belonging to the mineral kingdom.

From the scientific standpoint, a mineral may be defined as an inorganic, homogeneous substance of a definite or approximately definite chemical composition found in nature and having certain distinguishing physical characteristics. If formed under suitable conditions, it also has a definite molecular structure which is exhibited externally in its crystalline form and internally in its cleavage, and its behaviour with respect to light. It also possesses certain other distinctive properties such as specific gravity, hardness, fracture, tenacity, etc. The scientific definition is useful in the identification of rocks or mineral bodies as well as a guide in mineral development.

But both the dictionary and scientific meaning of the term "mineral" are inadequate for the purposes of this study. The word is used in the Mines and Minerals Act with a legal significance and in a commercial manner with legal consequences to both the miner and the ordinary person, in the sense that whatever is regarded as a mineral falls under the mining law and cannot be disposed of outside the provisions of the Mines and Minerals Act.¹ And the legal conception

1. Disputes can arise. For instance in 1929 there was a dispute between a Lusaka farmer and the British South Africa Company on whether limestone was a mineral. It was resolved by an amendment to the 1912 Mining Proclamation to include limestone in the definition of mineral. See Northern Rhodesia Legislative Council Debates, 1929, p.76.

or definition of the word is one which in the case of conflict has to prevail over the purely scientific or dictionary meaning.

In a test of what is a mineral, whether or not the substance in question grows in a mine and is metalliferous is irrelevant.¹ For although mining is to a great extent prosecuted for the purpose of obtaining metalliferous substances, such a test would exclude a number of mineral substances of heterogeneous composition that are now subject to the mining laws in Zambia, for example, valuable coals. So also is the question whether the substance in question is worked for purposes of profit.² With this criterion some substances can change status from time to time considering the fact that minerals do cease to be of any profit. There are also, on the public lands, many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection, e.g. sand and some types of clay.

The question of whether a particular substance is or is not a mineral in Zambia is a matter for the state to decide in that it is legally entitled to declare that a particular substance is a mineral for the purposes of the mining laws.³ Since in all cases the meaning of the word "mineral" for the purposes of the mining laws will always yield to the intention of the state, where such intention is reasonably

1. This criterion was suggested in Proud v. Bates (1887), 34 L.J. Ch.D. 411.

2. This test was laid down in Hext v. Gill (1872), 7 Ch. 699; see also Earl of Jersey v. Guardians of the North Poor Law Union (1889), 22 Q.B.D. 555; Lord Provost and Magistrates of Glasgow v. Farie (1888), 13 App. Cas. 657.

3. Mines and Minerals Act, supra, s.2.

made clear; it must not, however, be understood from this that evidence of fact is irrelevant.

The test of intention is completely without value, however, for use in the future in determining the character of substances which remain unknown or are presently considered to have no intrinsic value. In order to include all substances presently valuable in themselves apart from the soil, whether their presence is known or not, and all substances which become valuable through development of the arts and sciences, the intention of the legislature sought should be the general intent. And further, that general intent should be arrived at not by defining and refining the terms used, but by considering the purposes of the mining legislation.

Among the factors to be considered in ascertaining whether any substance is covered by the mining legislation are, (a) the meaning of the substance in question at the material date amongst mining and geological experts and miners, (b) whether any light can be obtained from contemporary legal documents or decisions, (d) whether the substance is exceptional in the country, and (e) whether it is of no value for commercial purposes at the material date.¹

So that the end result should be that a substance, unless it has some unique quantity and is confined to a comparatively limited area, so as to differentiate it from the surrounding country, and unless it can be shown to have some special quality, making it valuable in manufacturing or in some of the arts and sciences, should not generally

1. Some of these considerations are suggested in North British Railway v. Budhill Coal and Sandstone Company [1910] A.C. 118.

be regarded as one that can be obtained only after compliance with provision in the mining legislation.

3. Mines

It is important to be clear about the meaning of the word "mine" since the extraction of minerals takes place around this unit, and many requirements of the mining legislation use it as a unit of calculation. Furthermore, the issue of what a "mine" is has significance in other areas of the law, such as that mine areas are protected places and it is an offence to visit them or take pictures of them.¹

The Mines and Minerals Act defines "mine" when used as a noun as "any place, excavation or working wherein, where or whereby any operation connected with mining is carried on, together with all buildings, premises, erections and appliances belonging or appertaining thereto above and below the ground for the purposes of mining, treating or preparing minerals, obtaining or extracting any mineral or metal by any mode or method or for the purpose of dressing mineral ores".² When the word is used as a verb, "it has the same meaning as to dig, that is to intentionally win minerals and includes any operations directly or indirectly necessary therefore or incidental thereto and 'mining' shall be construed accordingly".³

There have been disagreements as to exactly what is meant by a

1. See Protected Places and Areas Act, Chapter 107 of the Laws of Zambia, ss. 5 and 6.

2. Mines and Minerals Act, *supra*, s.2.

3. *Ibid.*

mine. When, for instance, Nchanga Consolidated Mines Ltd., closed one of its pits, the state argued that the Company had closed a mine without authority from the state. Whereas the Company argued that Fitula was simply a pit and not a mine. With respect it is submitted that Fitula is a mine. It is a place where minerals are extracted.

The question has arisen as to whether exploration and prospecting sites are covered by the prohibition against taking pictures of mining areas imposed by the Protected Place and Areas Act referred to above. The Chief Inspector of Mines¹ contends that they are covered but the Chief Mining Engineer² contends otherwise. It is submitted that the Chief Mining Engineer is correct. Prospecting and exploration areas are not mines in that in the definition of a "mine" the operational words that could possibly affect these areas are "or any places connected with mining" and mining as a noun as pointed out above is defined as winning minerals. In prospecting and exploration areas, the digging done is not to win minerals but to find out about them and in fact digging for winning purposes is expressly forbidden.³

The definition of a "mine" in the Zambian mining legislation is

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1. This is the officer charged with administering safety requirements. See Mines and Minerals Act, supra, s. 6(2). It is important for him because once a place has been designated a mine it has to meet certain safety requirements. See Mining Regulations, Chapter 329 of the Laws of Zambia.
 2. See above, p. 19.
 3. See Mines and Minerals Act, supra, s.40 which provides: "The holder of a prospecting licence shall not (a) remove any mineral from the prospecting area or the exploration area, as the case may be, save for the purpose of having it analysed, determining its value or conducting technological tests including tests on bulk samples".

more or less in agreement with both the ordinary and common law usage of the word.¹ The word "mine" is derived from the Latin word "minare", signifying to lead, and to mine to draw or lead a way or passage underground, course, or passage, whether in search of metals or to destroy fortifications.²

This primary meaning of a "mine" as an underground excavation has by successive transitions in its meaning come first to include the place from which minerals are obtained by such an excavation as well as the excavation itself, and secondly, to mean that place alone without regard to the excavation. The word is used in ordinary language to signify either the mineral substances which are excavated or mined or the excavations from which metallic ores and fossil substances are dug out.

Although the word "mine" generally points to underground working,³ it is not its only or necessary meaning. The word "mine" applies to a place where minerals commonly worked underground are being worked even though in the particular case the working is from the surface. In fact, in modern mining, open cast⁴ mining is as important a method

1. Bell v. Wilson (1866), L.R. 1 Ch. 303. Though sometimes at common law it is much wider as when used in respect of unopened mines, when it means little more than veins or seams or strata of that mineral. See Lord Abinger v. Ashton (1873), L.R. 17 Ex. 358, at p.369; and also Batten v. Kennedy, [1907] 1 Ch. 256.

2. Midland Railway v. Hauchwood Brick and Tile Company, supra. p.560.

3. In fact at common law the noun "mine" in its primary signification meant underground excavations or working. However the word was used there was always some reference more or less direct to underground working. See *ibid.* p.308.

4. In open cast mining, the ore is extracted by electric powered shovels, or more usually by explosives followed by shovelling. It requires efficient overburden stripping. This involves huge "walking draglines" with a very big load capacity and a boom long enough to swing the waste well outside the area to be worked.

of mineral extraction as underground mining.¹ What method one adopts depends on the nature of the ore. Open-cast mining is used where the amount of overburden to be removed is proportionately small compared to the amount of minerals to be removed. A fair number of mines in Zambia are open pit with no underground workings at all. For instance Nchanga mine.²

It is important to remember that the word "mine" as used in mining law includes not merely the actual bed in which the minerals lie, but so much of the adjoining strata as has to be removed for the purpose of working them.³ It therefore includes the roads properly made in the adjoining strata for the purpose of reaching and carrying away the minerals, and all proper alternatives of such roads subsequently made for the purpose.

Also the word "mine" does not necessarily mean a place where minerals are worked so long only as it contains minerals. It is wide enough to include the space which is created according as the minerals are being worked and the space which is left after they have been worked out. In other words a person who has an interest in a "mine" has as such *prima facie* an interest in the chamber which contains the minerals and his interest in that chamber is precisely the same when it is in its natural state filled with minerals or when the natural state is altered by workings and it consists partly or wholly of empty space.⁴

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1. Underground mining involves high development expenditure. The ore must be lifted from the base of the shaft and, as working proceeds, the amount of underground haulage goes up.
 2. The Commonwealth's largest copper producer and one of the largest in the world. Mines Industrial Development Corporation Ltd., Zambia Mining Year Book, 1974, p.2.
 3. Mines and Minerals Act, *supra*, s.2.
 4. Glasgow Corporation v. Farie (1888), 13 App. Cas. 657.

CHAPTER 3

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

The chapter starts with a brief consideration of the background to the concessions and then considers each concession in the order in which they were concluded.

(a) 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.

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

1. The Portuguese had by the 15th 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.

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 Rhodesia, they had traced one gold-bearing lode for eighty miles.¹ These discoveries by Mauch and Hartley made the whole gold hunt seem conceivably worthwhile. The Transvaal miners easily reached Tati and tried to obtain concessions from the local chief but they found them difficult to obtain 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.

In 1868 Mzlikazi died and Lobengula succeeded him; within a few months of his installation he granted two mineral concessions. On the 9th of 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 Rhodesia) and confirmed this in writing the next year.² The concession granted Barnes the right to prospect for gold. He formed no exploration company, however, and never utilised his concession. Then, on the 29th of April, 1870, Lobengula gave another concession to the London and Limpopo Company

1. Hole, The Making of Rhodesia, 1928. p.3. Hole was a British South Africa Company Official in Southern Africa.

2. Ibid., p.5.

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.

(b) Rhodes and Mineral Concessions

In 1871 Rhodes arrived in Kimberley, 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 Kimberley 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 respected this influential group, and knew that without its support the attainment of his dream was not possible.

The unification of South Africa was 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 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 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.¹ The conclusion of the treaty was communicated to Lord Knutsford, the Secretary of State for the colonies who gave authority to Sir Hercules Robinson to ratify it.

In 1888 to maintain the British advantage, 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 the 30th of October, 1888.² 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, Lobengula and his heirs were to get the sum of one hundred thousand rounds of suitable ball 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

1. A fascimile of the treaty is contained in Hole, *supra*, p.54.

2. *Ibid.*, p.5.

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 a 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.¹ 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.

(c) 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

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

petitioners should obtain; and (c) that if the concessions obtained could be carried out, the conditions of the natives could be improved and their civilization advanced.¹

Rhodes' request was opposed by English Liberals who maintained that a Royal Charter would confer a practical monopoly of Southern African 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 the 29th October, 1889,² 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 purposes of the Company the full benefit of the concessions and agreements it had already acquired in so far as they were valid.³ 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

1. Hole, *supra*, pp.107-111.

2. Royal Charter of Incorporation of the British South Africa Company, 29th October, 1889.

3. *Ibid.*, see the preamble.

treaty all or any rights, interests, authorities, 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.¹ 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 3rd February, 1891, which set out the objectives of the Company,² reflecting the powers granted to the Company by the Charter.

Soon after the grant of the Charter, Rhodes occupied the part of Mashonaland around the area now known as Salisbury in Rhodesia. He was also determined to extend the influence of the British South Africa Company, as far north and east as possible. At the Second Meeting of the Company on November 29th, 1892, Rhodes pointed out

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

2. Deed of Settlement, 3rd February, 1891.

that the Rudd concession was obtained with the idea that the north would have to be taken with the hinterland of the country.¹

In 1890 his emissaries Solous 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.² At about this time also Lippert obtained a concession from Lobengula which the British South Africa Company purchased in 1892 from him. It conferred on Lippert more or less the same powers as the Rudd concession did on Rudd earlier on with respect to minerals, but had additional clauses granting all land in Lobengula's Kingdom.³

(d) The Lewanika Concessions

After gaining control of 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 the 8th of January, 1889.⁴ There have been many attempts to explain why

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

2. A copy of the concession is reprinted in Hone, *supra*, p.107.

3. Baxter, 'The Barotse Concessions' (1951) 2 Northern Rhodesia Journal, p.39. See also Letter from Coillard to Hunter, 15th 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".

Lewanika wanted protection. It has been suggested that he thought 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.¹ Alternatively, he might also have hoped that British protection would secure his position as 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 African 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 Kimberley.² He had been sent by the King and Nind consortium with instructions to try to obtain a mineral concession from Lewanika.

1. Hall, 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.

2. Baxter, *supra*, p.39.

In the negotiations 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 the 27th of June, 1889, an agreement was concluded granting Ware the:-

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. 1

The area as described is 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 the 11th of October, 1889, and it was bought by Rhodes for nine thousand 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 -

1. See Baxter, "The Concessions of Northern Rhodesia" (1963) 1 Occasional Papers of the National Archives of Rhodesia and Nyasaland, pp.3-4, for copies of the concessions.

not merely a concession but an alliance between the Barotse nation and the British government.¹ 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 pointed out that the president of the Company was the Duke of Abercorn, 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.² 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.³ 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 22nd June, the Barotse National

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1. 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, 19th Oct. 1891, No.169 in F.O. Con. 6/78.
 2. Johnsons, Reality Versus Romance in Southern Central Africa, 1893, p.145.
 3. Compare the reports in Hall, *supra*, p.68 and those in Hole, *supra*, p.217.

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 come from Khama.¹ 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 Lewanika 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. 2

Mokoatsa went on to tell them that the British South Africa Company 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 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 waggon nothing would please him more. 3

Another influence was the concurrence of the missionaries. This is shown by Coillard's own admission and also the extent to which the

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1. Mokoatsa was well known to Lochner to be a regular messenger of Khama.
 2. See Letter from Lochner to British South Africa Company, 27th November, 1889, African South, 392.
 3. Ibid.

missionaries were blamed when Lewanika later repudiated the concession.¹ 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.² 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.³

The Lochner concession was concluded and signed on the 27th June, 1890. Two versions of the concession are accessible, both in Colonial Office papers. The substance of the two copies of the concessions, however, is the same.⁴ In the concession the Chief gave the British South Africa Company:

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. 5

1. Coillard Journal, 22nd May, 1891, C.O. 51/11.

2. Ibid.

3. See letter from Lochner to Harris, 9th April, 1890, No.320 African South, 392.

4. 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 and propagation of the christian religion and the education and civilisation of the native subjects of the King by the establishment, maintenance and endowment 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, 27th October, 1890, Enclosure in No.158 F.O. 403/157, This of course was never done see letter from Governor Stanley to Colonial Office, 25th September, 1924, C.O.795-99.

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

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. 1

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 he was entering into was with the Queen and Lewanika considered this very important.² This is evidenced by the fact that the Chief gave two magnificent elephant tusks, which are a token of submission in African customs, to the Queen, though they never reached her.³ Coillard too seemed to have believed that the concession was with the Queen, for he was later to write:

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1. 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 extension of the Barotse Kingdom unanswered.
 2. Yeta in a letter to the Colonial Office 22nd March, 1922. "We were assured that whatever dealings 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 Barotseland 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.
 3. 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 100lb, 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. 1

As agreed under the concession the Company sent one Corydon to take up the post of British Resident in Barotseland. He arrived on the 27th of September, 1897 with instructions to obtain a new concession from Lewanika, which would give it 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.²

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 government in 1901.³ 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

1. Letter from Coillard to the British South Africa Company, 5th June, 1891, Coillard Jn. C.O. 51/11.

2. Baxter, *supra*, p.41.

3. This concession was approved on the 23rd November, 1901. African South No. 1146.

by the Company without the written consent of the British government.¹

The 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 conveniences 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 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. Otherwise, the Company received all the rights it

1. Ibid.

had gained under the Lochner concession. The 1900 concession stated that it covered all the area 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 or 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 rights throughout Lewanika's territory except in Barotseland proper itself.

(e) 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.¹

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, Kiwende, Katara, Nansala (female Chief), Thitambo, Msiri (not the same as the one referred to above), Kalonga, Simesi, Nguemba, Manyesha, Chamira, Chipepo, Cheria and Mlembwe.²

Most of the concessions contained the same provisions with 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 all such things as are incidental to the exercise, attainment or protection of all or any of the rights, power and concessions granted. The chiefs agreed not to enter into any treaty of alliance with any other person, or company.

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

2. Ibid. The whole operation seems to have been rushed - Thomson signed all these treaties between 10th September and 27th December, 1890.

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.

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 one 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, reads:

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, and on the South by the South Latitude $13^{\circ}40'$ or there about. 1

These documents as exemplified by the one quoted above are fairly technical even by modern standards. It is unlikely that any African chief at the time could comprehend, 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

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

have no counterpart 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.

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 miles apart.¹ 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 Mwambwri 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:

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 was my friend he would do anything for me. I told him that as a Christian I could not do such a thing. Sharpe agreed to the document being read, I read

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

it to Mushili, the Chief was very angry
and expelled Sharpe from the country. 1

There is also the 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 that:

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. 2

There is reason, therefore, to suspect that many of the concessions were obtained by various deceptive methods. Quite apart from the inadequacy of the money said to have been paid to the various chiefs, nobody knows whether in fact they were ever paid as there is no evidence to substantiate Sharpe's and Thomson's claims that 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.³ Earlier, on 18th July, 1891, Johnson had issued

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1. Northern Rhodesia Government, British South Africa Company's Claims to Mineral Rights in Northern Rhodesia, (White Paper), 1964, p.15.
 2. Evidence deposited by Mwebela, a nephew of Chief Mushili, collected by M.I.O. Faber, 1st September, 1964, Maxwell Stamp Papers, 1964.
 3. African South No. 1146.

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.¹ 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.² 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 then called the British sphere of influence, though the Company could acquire concessions under its Royal Charter subject to the approval of the Secretary of State for the Colonies. One cannot therefore come to an easy conclusion as to the legal effect of these certificates of claim.

In 1893 Johnson issued certificates recognising the Sharpe and Thomson concessions and thereby established the basis of the British

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

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

South Africa Company's claim to mineral rights in all of Zambia east of the Kafue and in what became known as the Katanga pedicle across the Congo border. The claims were recognised by the British government in 1894 on the basis of the certificates issued by Johnson.¹

It is doubtful that Johnson could have subjected the Thomson and Sharpe concessions 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.² 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. 3

It seems most likely that Johnson acted under pressure from the British South Africa Company officials, particularly Rhodes. In

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

2. 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 criticised 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.

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

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. 1

The British South Africa Company, on the basis of the concessions outlined above, asserted a right to the ownership of, or exclusive control over, all the minerals throughout Zambia; a consequent right to alienate these minerals in any way it wished, and a right to levy royalties on all minerals won whoever won them. The Company held the rights for over sixty years.² During this period attempts were made to divest the Company of its claims.

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1. Letter from Rhodes to Johnson, 4th April, 1893. British South Africa Company Papers, Central African Archives, (Microfilm in library of Royal Commonwealth Society, London).
 2. 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.

CHAPTER 4

CHALLENGES TO THE BRITISH SOUTH AFRICA COMPANY
 CLAIMS TO MINERAL RIGHTS IN ZAMBIA AND
 THE EVENTUAL RECOVERY OF THE RIGHTS

The British South Africa Company 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. The Company's enjoyment of the title before 1924 is referable to the administrative position which it held and in later years it seems to its influence with the Colonial Office. Its ownership of mineral rights was subject to frequent protests from local chiefs, colonial officials and local people. The protests ended only with the recovery of the rights. This chapter discusses the extent to which the protests occurred, the reference of the matter to the Law Officers in 1938, and the transfer of the rights to the Zambian government in 1964.

1. Williams, *supra*, p.3. But acts 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. See Fairweather v. St. Marylebone Property Co. Ltd. [1963] A.C. 510; Ashton v. Stook (1877), 6 Ch.D. 719; and Wild v. Holt (1842), 11 L.J. Ex. 285.

(a) Early Challenges to the Claims

1. 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.¹ Lewanika himself laid the blame for their conclusion on the missionaries who, as pointed out in chapter 3, acted as his advisers during the negotiations for the concessions.² 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 same thing as the British government and was no more than a mining company, and informed Lewanika about his findings.³

The Chief instructed Middleton to write to the Queen. This letter dated the 27th of October, 1890⁴ denounced the Lochner concession on the grounds that; (a) the objects of the Company were not explained to Lewanika; (b) that Lewanika, being illiterate,

1. Mainga, Bulozi Under the Luyana Kings, 1973, p.182.

2. Cited by Caplin, A Political History of Barotseland 1878-1965, London Univ., Ph.D., thesis, 1968, p.147. The chief denounced Coillard as a liar, secret agent and, thief.

3. Ibid.

4. Letter reprinted in Baxter, "The Barotse Concessions", (1952) 2 Northern Rhodesia Journal, p.44.

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 then 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 stand for and convey. Company officials dismissed this letter as having been the work of Middleton,¹ but

1. Ibid.

later events seem to suggest that Lewanika had something to do with the letter himself. On the 1st of 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 concessions 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. 1

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 the 27th of October was not replied to. But the one of 1st November was replied to 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.² This advice appears to have been given despite the earlier admission by the British government that the situation was

1. Letter from Lewanika to the Queen, 1st November, 1890, in No.119 F.O. con. 6178. Letter also reprinted in Baxter, supra, p.47.

2. Baxter, supra, p.47.

otherwise and that Lochner in his negotiations did use the Queen's name improperly.¹

2. 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.² 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.³ The Colonial Office appears to have wanted to avoid the inclusion of the preamble.⁴ It was, however, finally included in the Proclamation at the insistence of the Company.

Continued protests against the Company's claims led the Secretary of State, in 1920, to ask the Law Officers for an opinion on whether the Company was right in its claims that the mineral rights of the territory belonged to it by virtue of concessions obtained from native chiefs.⁵ They advised on the 19th of June, 1920, that the

1. See above, p. 55.

2. Report of the Commission Appointed to Enquire into the Financial and Economic Position of Northern Rhodesia, 1938 Colonial No.145, p.301. Also see letter from the Company to the Colonial Office, 15th Feb., 1911. It categorically stated that they intended to have a mining law which reinforced its claims, C.C. 417-506.

3. The Pim Report, *ibid.*

4. C.O. 417-506.

5. Letter from the Secretary of State for the Colonies to the Law Officers, 6th May, 1920, C.O. 795-95.

Company was right in its contention with regard to mineral rights.¹ 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 land and minerals of Northern Rhodesia belonged to the Crown and should be used for the benefit of the country.² 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.³ They also sent a petition to the Queen asking her to use her influence to restore the mineral rights of Northern Rhodesia to the people of the country.⁴

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.⁵ This it is submitted was wrong in that section

1. Report of the Law Officers, 19th June, 1920, C.O. 795-95.

2. The Pim Report, *supra*.

3. It was passed on the 29th 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, 7th September, 1920, African South No.162.

4. Pim Report, *supra*.

5. Letter from the Company to the Colonial Office, 1st December, 1920 African South No. 164.

40 vested the land and mineral rights in the Company as administrator and clearly this was not enough to sustain its claim that it owned the rights in its private commercial capacity.¹

In response to the settlers' protests, Mr. Winston Churchill, then Colonial Secretary, appointed an advisory committee under Lord Buxton, in 1921, to inquire into the position of the Company in both the Rhodesias.² In its report it 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.³ It emphasized that because (a) of the number of interests involved and (b) 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 Commission 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.⁴

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1. In any case in R.v. McCauley [1920] A.C. 715, it was held that rights can not be separately enjoyed where they are in "addition to".
 2. Report of the Committee Appointed by the Secretary for the Colonies to Consider Certain Questions Relating to Rhodesia, Cmd, 1471, 1921. Throughout this study it is referred to as the Buxton Commission.
 3. Ibid, clause 12.
 4. This is expressly stated in the introductory part of the Report, *ibid.*, p.1.

3. 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 Crown.¹ The basis of this argument was an earlier reference to the Privy Council of a Southern Rhodesian land case.

The long delay which occurred 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. And in any case any settlement on the lines suggested by the Company as the report of the Commission pointed out would have been ignoring vitally interested parties such as the local population which were far much 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 a reference to the Privy Council.² The Company claimed that it owned land in Southern Rhodesia on the basis of a land concession granted to Lippert by Chief Lobengula referred to in Chapter 3.

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

2. In re Southern Rhodesia [1919] A.C. 211.

On the 17th of 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, and that 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 had 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.¹

The Colonial Office by Order in Council dated 16th July, 1914, referred the resolutions to the Privy Council and asked it to ascertain whether the contentions were well founded.² The Privy Council affirmed the first and second resolutions and denied the third. The Company'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

1. Ibid., pp.229-230.

2. Ibid.

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. 1

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.² 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 1918 questions and the ones in issue 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

1. Ibid., per Lord Sumner, p.236 .

2. 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.

the Company owned the whole of the land under the concession from Lobengula, just as it held the minerals¹ - 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 the land 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 urged against the Lippert concessions in Southern Rhodesia since they contained ample provision for the protection and benefit of the subjects of the chiefs, both with regard to land and minerals.

It seems in fact that from 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., a right to authorising the mining and taking away of minerals over the whole territory. In the context of the Southern Rhodesian 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 of 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.²

The recommendation of the Buxton Commission was accepted by the

1. In re Southern Rhodesia, supra, p.236.

2. Williams, supra, p.150.

Colonial Office.¹ And its implementation got as far as the drawing up of the question to be presented to the Privy Council.² The decision by the Colonial Office was strongly opposed by the Company,³ but was welcomed locally and by Yeta, the 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.⁴

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 the Colonial Office which preceded it or the reasons which lead 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.⁵

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1. Letter from the Secretary of State to the High Commissioner, 15th August, 1921, which read, "I 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.
 2. 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.
 3. Letter from the Company, to the Colonial Office, 15th 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.
 4. Letter from Yeta to High Commissioner for South Africa, 22nd March, 1922, African South No.189. See also Yeta's letter to Churchill, Colonial Secretary, 10th October, 1922. African South No.190.
 5. Hall, *supra*, p.49. See also Northern Rhodesia Government, The British South Africa Company's Claims to Mineral Royalties in Northern Rhodesia, (White Paper), 1964, pp. 24-25.

After the 1922 election Churchill left the Colonial Office and was succeeded by Mr. Ormsby-Gore, a friend and relation by marriage of the President of the British South Africa Company of the time, Sir Dougal Malcolm. The new Colonial Secretary closed the matter and dropped the reference to the Privy Council.

One of the other recommendations of the Buxton Commission was that Southern Rhodesia and Northern Rhodesia should be administered directly by the Crown.¹ 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.² In return the Company volunteered to relinquish its powers of government but wanted to be reimbursed for its administrative expenses over the years.³ The Colonial Office accepted the proposals and the Company was paid £3 $\frac{3}{4}$ 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 1923,⁴ which was later put into force by the 1924 Northern Rhodesia Order in Council.⁵

1. Buxton Commission Report, *supra*, clause 12.

2. Letter from Colonial Office to British South Africa Company, Letter No.1, 10th July, 1923, Cmd, 1924.

3. 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.

4. 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, 29th September, 1923, Cmd, 1924, clause (g).

5. Northern Rhodesia Order in Council, 1924.

4. 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 relinquish its claims to mineral rights.¹ 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 to it as a commercial concern, and not as agent for the Crown. 2

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 Lakafuta area of Zambia.³ 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 Mineral 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.

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1. African South No. 183. The protests were written with the help of councillors who were alive when the concessions were drawn up.
 2. Letter from Yeta to Colonel Flair, Resident Commissioner, C.C. 795-95.
 3. The information on this dispute is based on letters in C.O. 795-95.

Later the Company proposed a settlement out of court. This led to the 1938 British South Africa Company and Barotseland Agreement,¹ in which the Company and the Chief agreed that the Company recognise ; (a) the sole and exclusive right to minerals, belonging to the Barotse Chief and Council in two areas of land totalling about 4,000 square miles 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 exclusive 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 Lakafuta 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

1. Agreement between the British South Africa Company and Yeta and Members of the Barotse Council and Others, 12th August, 1938, C.O. 795-95.

Africa Company. As a result of the agreement judgement was entered in the High Court by consent in favour of the Company on the 1st of March, 1938.¹

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 as 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.² 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. 3

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 Mineral Separation Ltd., was re-issued and the royalty payments were payable to him and

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1. It should be noticed that the court in this consent judgement 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.
 2. Letter from Colonial Office to British South Africa Company, C.O. 795-95.
 3. In 1921 Yeta had written to Prince Connaught asking that he be accompanied by legal advisers in such matters. See Letter 30th March 1921, C.O. 417-283 but Governor Stanley replied in the terms mentioned in the text. See Stanley to Yeta, 30th March 1921, C.O. 417-659.

not to the British South Africa Company.

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

1. 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 the 20th of July, 1927, a motion demanding the investigation of the matter was introduced.¹ 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.² He believed that they could be challenged only if it appeared that a considerable portion of the territory

1. 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.

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

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 doubts 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 which allowed 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.¹

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.² In 1937 Stephenson, one of the earliest Company administrators, published his autobiography.³ In it he vehemently challenged the Company's claims and was particularly scathing about the concessions obtained by Thomson in 1890 in an area where he had personally run up the Union

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1. 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, Annual Stockholders Meeting, 7th May, 1964.
 2. In 1936 they paid £13,000 and in 1937 £31,000 to the Company in royalties. See Colonial Office Reports for 1936 and 1937.
 3. Stephenson, Chimpulas Tale, 1937, p.30.

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 at 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.¹ During this period also, attacks on the Company and demands for a judicial inquiry continued in the legislative council.²

2. 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 by acquiescing in the existing position.³ 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

1. The Pim Report, *supra*, p.135.

2. On 14th October, 1936, Mr. Moore complained that it was unjustifiable that the country should 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.

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

Northern Rhodesia.

This led him in August of 1937 to send a dispatch to the Colonial Secretary, Ormsby-Gore.¹ In it he argued that the concessions did not 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 not 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 concession 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; 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 to extend Lewanika's suzerainty over areas in which he did not then exercise and had never previously exercised suzerainty;

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

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 he 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 up its title to the mineral rights over areas not in reality covered by the concessions. He also suggested that the true facts were never known by the Colonial Office and that the 1923 negotiations were not therefore fully informed of the position.

3. The Colonial Office's reaction

In reply to Sir Hubert Young, the Colonial Secretary¹ stated that he was not prepared to re-open the question of the title of the British South 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,

1. Ormsby-Gore to Young, 28th January, 1938, C.O. 795-95, File No. 45105.

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 of 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 Colonial 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 it is submitted that it is unlikely that it was the intention of the British government to recognise the Company's rights despite the actual legal position. 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. 1

And 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 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 the Barotse Province in 1900 were for recognition of the Lewanika concession,² and the approval letter of 23rd November, 1901³ was directed at the concession. The same situation prevailed in the North-Eastern part of the country, in the letter from the

1. See The Devonshire agreement, *supra*, clause (h).

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

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

Company, dated the 11th of April, 1894, applying for the recognition of its North Eastern concessions. Although in the Company's letter of 9th June, 1910, and that of the 30th of 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,¹ in the agreement of 24th November, 1924 it is the concessions which were confirmed.

With regard to his argument concerning the Johnson certificates, it is unlikely that these certificates in themselves could be regarded as the source of title since even on their face there are many contradictions. 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",² but certificate of claim A itself, under which these treaties were confirmed, described the Company as claiming to have obtained inter alia the exclusive mineral rights under these and the remaining treaties and recognised by it.³ 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.⁴ In some only

1. See letters in African South No. 948.

2. Devonshire agreement, *supra*, clause (g).

3. E.g., concession granted by Chief Ntara.

4. See certificate of claim A.

5. See ZA1/9 File No. 35 (National Archives), Lusaka.

tribes are mentioned with no reference to areas.¹ It seems unlikely that the certificates can be a source of what is not granted in the documents they purport to approve. To assume that is to state 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 the 23 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 question is one strictly controlled by the customary law of the area.²

A chief could only act as an agent of his tribe. At common law in cases 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 and 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

1. Concession granted by Katara, *ibid.*

2. See Goldin and Gelfand, African Law and Custom in Rhodesia, 1975. Chapter 3 and 5 discuss chiefs and traditional government.

has clothed the agent with such authority.¹ And the principal has to act in such a way that a reasonable man would take the representation to be true and believe that he was intended to act on it.² Where no such authority could be implied the contract is not binding on the principal.³

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% royalty 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.⁴

At common law a contract in writing cannot be altered by one party without the consent of the other. It can only be modified with the consent of both parties.⁵ Where a variation which is inconsistent

1. Fuller v. Glyn Mills Currie and Company [1914] 2 K.B. 211. See also Spiro v. Lintern [1975] 3 All E.R. 319.

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

3. Lloyds Bank v. Chartered Bank of India, Australia and China [1929] 1 K.B. 40.

4. C.O. 795. 99.

5. Rudd v. Bowles [1912] 2 Ch. 60.

with the terms of the contracts is made by consent, this amounts to a new agreement which supersedes the original contract,¹ Any contract subsequently varied against these rules remains unaltered.² Thus the changes seem to have violated the original concessions.

Sir Hubert 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 was not relevant to the issue.³ He pointed out that knowledge that the Company had been recognised as owner of the rights 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 any how 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, rights acquired by virtue of concessions or treaties, while they can be de facto exercised, cannot be de facto acquired unless they have been acquired de jure.⁴

Sir Hubert Young suggested that the rights should, in the event that the Colonial Office was unwilling to have a judicial determination of the matter, be purchased.⁵ This was rejected by the Colonial

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

2. Moore v. Campbell (1854), 10 Exch. 323.

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

4. Ibid.

5. C.O. 795-99.

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 the earlier years. 1

Other evidence, however, suggests that there would have been a substantial economic advantage to the country. The Pim Commission's Report referred to earlier in this chapter 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. 2

But perhaps the Colonial Secretary's insistence that nothing should be 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 a personal breach of faith on my part to authorise such action. 3

During all this time the British South Africa Company's attitude was simply that there was nothing in the questions raised by Sir Hubert Young which was not considered and disposed of before the 1923

1. C.O. 795-99, File No. 45105.

2. Letter from Sir Alan Pim to Mr. Boyd at Colonial Office, 18th September, 1937, C.O. 795-99.

3. Note by Colonial Secretary dated 28th January, 1938, C.O. 795-90.

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,¹ 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.²

The real problem was that attempts to have the matter settled by a judicial inquiry were opposed by both the Company and the Colonial Office. The Colonial Office seemed inclined to the Company. This can easily be gathered from the preceding discussion, and colonial 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 matter before it, concerning mineral rights, before even the government of the territory was advised of it.³ 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. 3

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1. Letter from Sir Dougal Malcolm President of the Company to Sir Malcom MacDonald, Colonial Secretary, 19th October, 1928, C.O. 795-99.
 2. Summary of Proceedings of Conference on the Mining Law in relation to Forestry, 18th March, 1937 C.O. 795-88, File 45040.
 3. Note signed by Mr. Ormsby-Gore in C.O. 795-95, File No. 45105.

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:

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. 1

(c) The 1938 Reference to the Law Officers

1. 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 shown above,² 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.³ Settlers threatened to raise

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1. Note by Sir Andrew Cohen, dated 26th October, 1938, in one of the files in C.O. 795-95. File No. 45105.
 2. 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.
 3. Rhodesia-Nyasaland Royal Commission, Cmd, 5949; 1939.

the mineral rights question at the public hearings of the Commission. Would-be witnesses publicly challenged the Company's claims.¹ The Company retorted rather surprisingly by asking those opposed to its claims to go to court,² while in private continuing to oppose any suggestion that the matter be referred to the Privy Council.

On the 9th July, 1938, the Colonial Office referred the matter to the Law Officers.³ 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 opinions on the merits of each and every argument. It appears that they by this tactic hoped to influence the outcome of the proceedings. A note by one of the Colonial Officials handling the matter suggests this. He wrote that:

The legal adviser and the department are agreed that this is desirable, since we should hardly be justified in putting Sir Hubert Young's contentions without letting the Law Officers know what we think of them. 4

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

1. 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, 19th July, 1938, p.1.

2. Ibid.

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

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

surprise expressed at the suggestion that certain evidence should be included as indicated by 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. 1

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.² 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.³

2. Opinion of Law Officers

The opinion of the Law Officers was delivered on the 5th October, 1938.⁴ They were of the view that the Barotseland-North Western Rhodesia Order in Council of 1899 was the decisive document in the matter. They took the position that when in 1899 Lewanika sought

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1. Note signed by Mr. Fox, C.O. 795-99, File No. 45105.
 2. Notes by Sir G. Bushe and Sir C. Parkinson, C.O. 795-99, File No. 45105.
 3. Reference to Law Officers, C.O. 795-99, File No. 45105.
 4. Opinion of Law Officers, C.O. 795-99, File No. 45105.

Queen Victoria's protection and the terms of 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 co-terminous with lands over which Lewanika's suzerainty ran, that the King of Italy's Award determined 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 east 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 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.¹

3. Criticism of the Law Officers' opinion

The question before the Law Officers was "whether the British government could challenge?" And as such the point in the opinion was that the recognition in practice of the Company's rights by the Colonial Office over a long period of years, coupled with 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 whether others, such as the natives of the country, could challenge the claims.

The Law Officers' 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 than those which are merely declaratory or 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.²

1. Ibid.

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

Transactions are neither invalidated by reason of their failure to comply with formal requirements subsequently imposed¹, 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.²

The dominant purpose in construing a statute is to ascertain the intention of the legislature. But this is only as so expressed in the statute to be construed.³ 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.⁴ 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.⁵ For upon a finding that the words are precise the words speak the intention of the legislature.⁶ It is for the legislature to amend the statute construed if it finds

1. Hikson v. Darlow (1883), 23 Ch. 690; See also Smith v. Callader [1901] A.C. at p.305.

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

3. Pye v. Minister of Lands for New South Wales [1954] 3 All E.R.514 at p.524; See also R.v. Kuntawala 2 N.R.L.R.79.

4. R.v. Tayengwa 1956 R. & N 364.

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

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

its meaning contrary to its intention.

A court can only abandon 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 be given to it, the provision will produce injustice of a kind that would revolt a reasonable man.¹ In this case the court acts upon the view that the legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words.² 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 the rules referred to above. It is also

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

2. In re Brockel Bank, Export Dunn and Raeburn (1889), 23 Q.B.461, at pp. 462-463; see also Wikes v. Goodman [1927] 2 KB. 86.

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.

This Order in Council was made at the suggestion of the Company and was made solely for administrative and political convenience and did not state that it intended to revise the Barotse boundary. The Order's provisions are all concerned with administrative matters, such as the appointment of administrators, judges, and empowering the High Commissioner to make proclamations for the administration of justice, the raising of revenue and the imposition of taxes and customs duties. While in fixing the boundary between the two territories the British government were under the impression that they were 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 in Chapter 5, and 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 interpretation of the 1889 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 contradict its terms.¹ 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,² 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, in that 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.

The 1899 Order in Council and the 1905 Order in Council were drawn up without the participation of any of the chiefs alleged 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 questions of what the other

1. Henderson v. Aurther [1907] 1 K.B. 10; Angell v. Duke (1875), LR 10 Q.B.174.

2. Thomson (Pvt) Ltd. v. Bennett 1962 R&N 689.

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. 1

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 but 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.

The Law Officers' in effect 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.

4. The Law Officers' opinion compared with other opinions in other British colonies

The Law Officers' opinion seems to be contrary to other Law Officers' opinions in some of the countries in Africa where Britain

1. 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 Forestry 18th March, 1937, C.O. 795-88, File No. 4500.

had jurisdiction and similar situations arose, notably Botswana, South Africa and Ghana.

In the then Bechuanaland Protectorate, the British government appointed a Commission¹ to inquire into and report upon alleged land and 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 latter, and (c) no grant was valid which had been obtained by fraudulent or otherwise improper means or for which valuable consideration has not been given, or of which the conditions have not been fulfilled.²

Several claims were invalidated by the Commission set up to examine the concessions.³ In one case a concession was invalidated on the grounds that the consideration involved was inadequate,⁴ 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,⁵ both grounds advanced

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

2. See Correspondence Relating to Concessions in Bechuanaland Protectorate, 1893-1901, Colonial, March 1903, African South No. 537.

3. The Concession between Chief of the Bangwa Ketsi and the Gasertsire Concessions Syndicate was invalidated on the grounds that the Chief was ignorant of the true intent and purport of the document signed by him, See Report of the Commission, African South No. 537.

4. The Sebele Chief of the Baken and Allaway concession, the Report of the Commission, *ibid.*

5. The claims by Riele and J. Nicholas, Report, *ibid.*

by Sir Hubert Young and other opponents of the Company's claims.¹ And in another the Commission 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 government², a fact alleged in the Zambian case by several independent commissions referred to earlier.³

A similar policy was invoked in South Africa. After the British government annexed the territories and obliterated the sovereignty of the South Africa Republic, it asked the Law Officers to determine in what relation it stood to the concessions granted by the previous government of the state.⁴ The Law Officers 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, the Transvaal Concession Commission invalidated several mining rights claims.⁵

In the then Gold Coast, prospectors and concession hunters obtained concessions from local chiefs in the second half of the 19th

1. See above, p. 87.

2. See concession, granted by Chief Lamber of the Koia to Duncan, see Report, *ibid.*

3. E.g. The Pim Commission, *supra*.

4. The Transvaal Concession Commission, 19th April, 1901, Cmd, 623, 1901.

5. The Dynamite Concession, *ibid.*

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 for 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 to be 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.¹

The 1938 Law Officers' opinion was enthusiastically received by both the Colonial Office and the British South Africa Company.² 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 Rhodesian government a dispatch, conveying the opinion, to the Governor of the territory from the Colonial Secretary.³ 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

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

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

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

the Attorney-General and the Solicitor-General of the United Kingdom were agreed that the claims to the rights were valid.¹

(d) The Period Between 1938 and 1960

1. The Legislative Council

In 1938 before the publication of the dispatch referred to above there were renewed demands for the matter to be referred to the Judicial Committee of the Privy Council. On the 13th December of 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. 2

In support of this notion 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.

On May 17th, 1941 the purchasing of the rights was again suggested.³ The government rejected the suggestion on the grounds

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1. The Solicitor-General was named as Sir Terence O'Connor, *ibid*.
 2. Northern Rhodesia Legislative Council Debates, December, 1938, p.116. The motion was introduced by Captain Smith.
 3. Northern Rhodesia Legislative Council Debates, May, 1941. p.113. This was suggested by Captain Smith.

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 1933.¹

After four years of little or no significant activity, the matter was raised again by Sir Roy Welensky. On 11th December, 1945, he introduced 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 31st 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. 2

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 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".³ The motion was carried on 12th December, 1945.

In 1946 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

1. The rights were purchased in Southern Rhodesia for £2 million. See Sklar, Corporate Power in an African State; 1975, p.35.

2. Northern Rhodesia Legislative Council Debates, December, 1945, p.160.

3. Ibid.

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.¹

As a result of the 1945 resolution, there was to be an inquiry but nothing materialised. This led to complaints in the Legislative Council which in turn led to the passing of another resolution on the 22nd of March of 1948, phrased in similar language to its predecessor.² It also led to general attacks and denunciations of the British government by members of the Legislative Council, such as when Sir Roy stated:

I find it difficult to express in decent English my views of the actions of a government of that nature that they should sell, give, barter - or whatever you are to call it - the mineral wealth of a country for which they were the trustees. 3

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 24th, Sir Roy introduced a motion in the Council proposing the imposition of a special tax on mineral royalties,⁴

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

2. 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.

3. Ibid, p.690.

4. 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.

The motion provoked violent exchanges between the chairman of the Company and Sir Roy. The Company eventually made overtures to Sir Roy 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.¹

2. 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 1950.² 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.³

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1. Colonial Report, Northern Rhodesia, Sir Roy was accompanied by Mr. Becket.
 2. Agreement with the British South Africa Company on the Mineral Rights owned by the Company in Northern Rhodesia and for the Eventual Transfer of those Rights to the Northern Rhodesia Government, 1951 Colonial No. 272.
 3. 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.

(e) The Settlement of the Dispute

1. 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 nationalist movement of the African National Congress consulted lawyers in London but owing to lack of funds did not proceed. Later in 1960 the other nationalist movement, the United National Independence Party, made it clear that when it gained power the mineral rights would be taken over.¹

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.² 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 papers attitude as part of the softening-up process in a campaign to deprive it of its legal rights.

1. It stated in one of its policy pamphlets that, "the mineral riches of the country remain... the inalienable possession of the people" - When the United National Independence Party becomes Government, 1962, p.7.

2. See the Author's Account, Hall, High Price of Principles, 1969, p.78.

The reaction of the Company was a tactical error for its defensive tone greatly encouraged its critics. Up to that 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% 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.¹

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 of 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 an agreement before the country obtained independence.

The government's efforts to recover the rights were encouraged

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

by a United Nations report.¹ 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 Company'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 ensuring adequate development of its mineral resources, should pass to the government after independence. 2

In October 1963, negotiations were conducted between the government and the Company. A proposal that it transfer the mineral rights to the government for twenty-two 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.³

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

2. Ibid., p.48.

3. 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.

At the 1964 Constitutional Conference convened to draw the independence constitution, nationalist representatives 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 the provisions of the 1950 agreement.¹ At this point also the Central African Mail published a series of articles. The revelations about the frail foundations upon which the mineral rights were founded had significant effect, in that it led the government to commission an investigation into the validity of the Company's claims and to jettison the idea of paying compensation. The Company, however, insisted that if the rights were to be taken proper compensation should be paid. The government issued a white paper after its research referred to above was finished.² 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 1950 agreement. Rather it believed that it was the

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1. 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 by means of which "all rights, liabilities, and obligations" of Her Majesty in respect of the territory became those of the President of Zambia.
 2. Northern Rhodesia Government, The British South Africa Company claims to Mineral Rights in Northern Rhodesia, supra, 1964.

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... 1

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 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 agreements to add to

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

those rights and thus 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 of 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 it 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.

2. 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.¹

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,² ordinarily both international³ and domestic⁴ 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

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

2. Transvaal Commission Report, supra.

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

4. At common law a party is entitled to repudiate a contract, such repudiation gives the injured party only a right of action for damages, see Haynes v. Dixon [1900] 2 Ch. 561.

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.¹ In fact several countries ranging from the relatively conservative industrial states of Europe to under-developed 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.²

Internationally, expropriation of property rights and, domestically, repudiation of contracts are, however, only justified when they are accompanied by a recognition of the equities involved.³ What is protected is the value of the property right which is assessable in the usual 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.⁴

1. E.g. Company General of Orinoco v. Venezuela Opinion of Umpire Plumley, 31st July 1905, Raltons Report, French-Venezuela Mixed Claims Commission 1902, p.244; Delagoa Bay Case, II Moore Int. Arbitrations, p.1191 and also Nissan v. Attorney-General [1970] A.C. 179.

2. Katzarov, Theory of Nationalisations, 1964. discusses incidents of nationalisation throughout the world, p.425. See also United Nations Resolutions, 14th December, 1962 G.A. Res. 1803, 17 U. N. 9. A/R. supp. 17A/50/7.

3. Norwegian Shipowners Claim, 1 Rep. Int. Arbitration Awards 309, (1948); Lena Gold Fields, Ltd. v. U.S.S.R. Award of 3rd September, 1930; and also Heyman v. Darwins [1942] A.C. 356.

4. Transvaal Commission Report, supra, p.117.

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 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.¹ 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 investment portfolio.²

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 benefit of the local people on the grounds that in return for its vast mineral resources, it was making purely nominal payments.³ The Company's rejoinder

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1. 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 a similar distinction, its chairman in a speech distinguished productive capital from non productive capital, Chairmans Remarks, Annual stock holders meeting, 7th May, 1964.
 2. Northern Rhodesia Government, British South Africa Company claims to Mineral Rights in Northern Rhodesia, (White paper), supra, p.15.
 3. C.O. 795-99.

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.¹

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.

3. The 1964 agreement

The matter was settled finally a few hours before the independence of Zambia.² The Commonwealth Secretary offered the Company £4 million

1. Ibid.

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

contributed in equal shares by the British government and the
Zambian government which it accepted. And on the 14th of 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 24th October, 1964.

But the Company has maintained that the agreement was forced
on it and that it was deprived of its legally held mining rights
without adequate compensation.¹ 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, and where subsequent
legislation affected them, then the true legal effect of such
legislation as interpreted by generally accepted rules of construc-
tion - a task concentrated on in the next chapter.

1. Its President stated, "I 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.

CHAPTER 5

AN ANALYSIS OF THE CLAIMS OF THE BRITISH
SOUTH AFRICA COMPANY TO THE OWNERSHIP OF
MINERAL RIGHTS IN ZAMBIA

As shown earlier the basis of the British South Africa Company's claims was concessions obtained from various African chiefs. The first thing to be settled therefore is whether in fact the chiefs had power to grant the rights claimed by the Company. If not then it must be asked whether, legislation vested the rights in it. A further question that will have to be settled is what, if anything, was the joint effect of the Devonshire agreement between the Crown and the Company and the 1950 agreement also between the Crown and the Company, in both of which the Crown recognised the Company as the owner of the mineral rights throughout the country. The final question to be answered is whether on their true interpretation the concessions covered all the minerals and the whole country.

The substantial questions, then, though complicated in detail, are in fact simple and can be summarised 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 were discussed in detail in the previous chapters.

(a) 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, in 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.

The proper law to be applied in determining the validity of these transactions being private contracts is that of the conceding kingdoms, being also their place of conclusion.¹ It is this law which should characterize the interest the Company acquired.

1. Massey Harris Co. (SA) Ltd., v. Chio Stores 2 N.R.L.R. 37; see also O'Connell, State Succession and International Law, 1967, p.305; 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 puts aside 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 to which the chief could be made amenable. See In re Southern Rhodesia, supra, p.215; and also Cook v. Spring [1899] A.C. p.752 at p.575.

Two 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.

1. 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.¹

The fundamental answer to the question who is the owner of the land in 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 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 members rights may be broadly stated as rights of possession. The community stated here represents both its dead and living members, so that title is never vested in an individual but remains in 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.²

1. White, Northern Rhodesia Land Tenure Report, No.1, Tonga, Southern Province, 1956, p.2.

2. 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 ideas". See Tijani v. The Secretary, Southern Nigeria, [1921] 2 A.C. 399 at pp.404-405.

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 understanding".¹ The Conference clearly thereby acknowledged the non-individual 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.

2. Position of the chiefs

The chief is everywhere in Zambia regarded as the symbol of the 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.

The significance given to the term "owner of land" is different from the ordinary use of the words and it is important to distinguish

1. Report on African Land Tenure Developments in Kenya and Uganda and their Application to Northern Rhodesia, 1960, pp.6 and 8.

the two senses to avoid confusion. For instance among the Bemba when they say "mwine mpanga" in 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 Courts 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. 1

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 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 a fundamental difference

1. White, "A Survey of African land tenure in Northern Rhodesia" (1959) 4 Journal of African Administration, pp. 6-7.

between him and a trustee strictly so called in that where as a trustee of land has the legal title vested in him and is therefore the legal owner of it, the legal title to communal land is vested in the tribe and not in the chief individually.

3. 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.¹ Every subject has the right to ask for land for building and cultivation from the chief and he may be given certain arable land as he needs 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 to whom he may give or lend the land. No one, can, however, settle on the land within the kingdom unless he becomes subject to the chief and accepts the obligations this entails, failure to carry out which was and is punished.²

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

1. Gluckman, "Essay on Lozi land and Royal Property" (1943) 10 The Rhodes Livingstone Papers, p.14.

2. Ibid.

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.¹ In such a case he is exercising control over the movement of his people and not allocating 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 in a piece of land which another wished to acquire. The situation could be said to be the same as among the other tribes discussed above except for the Lozi with strong central political authority.

The main consequence of the distinction between societies with strong centralised political structure and those without it is that the former have a conception of a tribal area and unit occupying a territory.² Hence the rule that a person seeking to live in such

1. This led Cunnisson to refer to Kazembe as having power of allocating land. See Cunnisson, "Kingship and local organisation on the Luapula River" (1950) 5 Rhodes Livingstone Institute Communication, p.12.

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

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.

4. Inalienability of land

The second main feature of customary land tenure in Zambia is that land is inalienable and always belongs to the tribe. 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.¹ Not one sale of empty land can be found in traditional Zambian society.

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.² Land among the Lozi people cannot be bought or sold, the report emphasises, and it is not even possible to lease or rent it. Yet

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

2. Selwyn, Report on the Economy of Barotseland, 1964, p.30; See also Gluckman, *supra*, at p.33.

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 or 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.¹ Richards further states in reference to sale of land that:

as elsewhere, the concept of land as a saleable commodity will revolutionize native society. In the case of the chief, land ownership will be severed 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. 2

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 land 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 monetary

1. Richards, Land Labour and Diet in Northern Rhodesia, 1939, p. 42.

2. Ibid., at pp. 274-275.

value and inheritance is essentially
the retention of usufructary rights
by kinship groups. 1

The economic situation in traditional society supports the view that land could not be sold. As long as 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 and be bought or sold. 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.²

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.³ 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 Zambia

1. 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 at p.142.

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

3. Ibid.

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 procedures 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 council and the chief should be submitted to a public meeting duly convened, and that it should be approved by that meeting.

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 Chapter 3, 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 concession was not within the

legal powers of the chiefs and consequently without authority.

5. Legal result when tribal property is transferred without authority

What then is the legal result where there is a purported alienation of tribal property without authority? Is the transaction void, as not being an act with authority, or is it merely voidable? 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 submitted 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, in that 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,¹ where the Transvaal Dynamite Company had been granted a concession by the South African government in December of 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

1. Report of the Transvaal Concessions Commission, 19th April, 1901.

because it had been obtained by fraud.

In the case of the concession between Chief of the Bangwaketsi and the Gase-Tsire Concession syndicate,¹ 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,² 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".

An analogy can be drawn with the situation in West Africa where family land has been alienated without authority. In Owiredu v. Morshie,³ 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 as against the other principal members of the family 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

1. Report of the Bechuanaland Concessions Commission, 1901.

2. Ibid.

3. (1952), 14 W.A.C.All. See also Honger v. Bassil (1954), 14 W.A.C. A 569.

cannot make a testamentary gift of family property which is effective.

There are, however, some West African cases¹ 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, 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 purchaser who developed the land over a period of time, believing it to be unquestionably his own.² 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.³

The fundamental issue of justice presented in the cases that

1. E.g. Abey v. Ollennu (1954), 14 W.A.C.A. 567.

2. 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. Spurling (1879), 5 QB 188 and also Re Sugden's Trusts, Sugden v. Walker [1917] 1 Ch. 510.

3. Bentsi-Enchill, Ghana Land Law, 1964, p.44 and also Ollenu, 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.

hold that such a transaction is voidable is one of deciding as to which of 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 reasonably to have known that its rights were precarious and its ownership of the rights did not involve expenditure. In fact as observed in Chapter Four it was the reverse. It involved gaining royalties without any expenditure at all. In Naested v. Kia Ora Syndicate,¹ 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 the use entitled to claim damages from the landlord.

Decisions in cases where natives lacking authority have entered into legal relationships support the above submission. In Massey Harris Co. (SA) Ltd. v. Ohio Stores,² the plaintiff, a white man from Rhodesia, entered into a contract with an African in Zambia which at the time was not allowed by the Credit Sales to Natives Ordinance of 1936. When the white man sued to enforce the contract, the court held that the contract was unenforceable even though legally binding

1. 1935 S.R. 117.

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

in Rhodesia. And in Komo and Leboho v. Holmes,¹ 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.

An analogy can also be drawn with the common law. Contracts at common law are void if against established law² 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.³

(b) The Interests Claimed by the Company are not Known to Customary Law

Apart from the position advanced in the preceding section the concessions could not grant, severed, 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,⁴ it would at most operate as a licence to mine and

1. 1935 S. R. 86.

2. Re Trepca Mines Ltd. 1963 Ch. 199, at p.221. See also Wild v. Simpson [1919] 2 K.B. 544.

3. Sinclair v. Brougham [1914] A.C. 398.

4. Massey Harris Co. (SA) Ltd. v. Ohio Stores, supra.

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 exercise it on any portion of the tribal land, cultivated or uncultivated, but it does not extend over land which has lawfully been enclosed by 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 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 the 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 in this section was upheld in rather

similar circumstances in South Africa in Le Roux and Others v. Loewenthal.¹ 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 and 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...".² Such a transfer was in fact unknown to Roman-Dutch Law, under which ownership of minerals goes with that of the land 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 land could grant permission to win and remove coal, a cession of coal and rights without the transfer of the land in which the coal is situated at most operated to confer upon the concessionary the right to mine and remove the coal.

If the concessions 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 charge upon land, was required to be registered in the deeds registry in order to be binding otherwise than as between parties.³

1. [1905] T.S. 745. See also L.E.D. B.v. Federal Administrator-General, 1960 L.L.R. 276.

2. Ibid.

3. 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 Registry Regulations, 1905.

The same principles seem to have been adopted by the Privy Council in land cases. In Oyekan and others v. Adele,¹ where 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 for ever, 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 his judgment, 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 interests 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. 2

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 local law, several of these cases have reached their Lordships, and

1. [1957] 2 All. E.R. 785. See also Sakanyawo Oshodi v. Moriamo Dakola [1930] A.C. 667; and Sunmonu v. Disu Raphael [1927] A.C. 881.
 2. Oyekan v. Adele, supra, p.789.

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 assignæ 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, therefore, by the local law. 1

The Privy Council in re Southern Rhodesia² 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. 3

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

1. Ibid., p.790.

2. supra.

3. In re Southern Rhodesia, supra, at p.233. In fact the court went further and declared that "the Lippert concession 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 valueless.

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 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. 1

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 to have at one time been implicitly accepted by the Privy Council in an earlier case² but was specifically rejected by the Privy Council in this case. It categorically stated:

Their Lordships cannot 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. 3

(c) 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

1. Ibid., p.237.

2. Cook v. Sprigg, supra, at p.512.

3. In re Southern Rhodesia, supra, at p.236.

recklessly without caring whether it be true or false.¹ A principal is vicariously liable for the fraud of an agent,² so that if an agent in the scope of his authority is himself fraudulent, the fraud is transmitted to the principal.

1. 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 they were liable. For instance, there is the question of the copy of the Lochner concession left behind in Barotseland containing clauses which were not present in the copy retained by the Company. Lewanika himself, as observed earlier, 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, of whose words he and his councillors did not know the meaning, because as he further alleged the verbal explanations did not give the Company the right to sell the land or own the minerals.³

Several other incidents indicate the use of fraud in obtaining the concessions. There is the case of Khama's messenger Mokoatsa referred to earlier, which seems to have been plain deception and

1. Derry v. Peek (1889), 14 App. Cas. 337.

2. Lloyd v. Grace, Smith and Company. [1912] A.C. 716.

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

was admitted to be such by the Company. There is 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 doing and had no right to do. There is evidence of the gifts showered on some of the chiefs. 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, both of whom were present at the conclusion of some of the concessions.

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 and languages.¹

2. Legal result where concessions have been obtained by fraud

A representation is only material if it is one of the causes

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1. For instance they contained such phrases as "I 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, Z.A./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 stated... "but their Lordships are relieved from the duty of inquiring into the 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.

that induces a contract.¹ 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. And the statements were intended to exploit this and cause and in fact appear to have caused the chiefs to make the contracts.

It can, 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 judgment of a reasonable man, the presumption is that the representee was so influenced, and a rebuttal of this is not proved by showing that there were other contributory causes which played a substantial part.² Generally fraud renders a contract voidable at the instance of the party deceived. It remains binding until set aside.³ In any action brought to enforce it the party deceived can assert his right to have it stated as void.⁴ If he elects to disaffirm there are several courses open to him. He may repudiate it without resort to legal proceedings, which repudiation becomes effective as soon as he does all that he can in the circumstances to make it known, the underlying principle being that a purchaser should not be allowed to keep that which he has fraudulently obtained.⁵ Lewanika before he died repudiated

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

2. Edgington v. Fitzmaurice (1885), 29 Ch.D. 459.

3. Ansorn v. Smith (1881), 41 Ch.D. 348, at p.371.

4. 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.

5. Harper v. Webster 1956 R. & N.10.

his concessions with the Company several times as shown in the previous chapter.

As the preceding pages have suggested, the Company did not acquire any mineral rights as a result of the concessions. It remains to be determined whether the Company did acquire them subsequently through a grant or legislation at the instance of the British government or by some authority competent to make it.

(d) A Consideration of the Effect of Legislation on the Company's Position

A consideration of this question involves first a determination of when the mineral rights became the property of the Crown and secondly an examination of the true construction of the legislation concerned.

1. When land was vested in the Crown

At common law, communal title to land by the native inhabitants of a territory acquired by the Crown is recognised as a legally enforceable right. This is probably an instance of the 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.¹ Indian land tenure systems were seen as

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

constituting distinct patterns of rights not derived from the common law but recognised by it. Several judicial decisions give support to this principle.¹

Blackstone's Commentaries state that there is a distinction between settled colonies where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The difference between the laws of the two kinds of colonies is that in those of the former kind all the English laws which are applicable to the Colony are immediately in force thereupon on its foundation, but in those of the latter kind, the colony already having law of its own, that law remains in force until altered. Blackstone's statement of the law has been followed by judicial decisions.²

The 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 cession or conquest of the territory. However the meaning of this Act has been a subject of judicial interpretation which has left Blackstone's 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

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1. 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 Okan v. Adele, supra, at p. 789, for a similar statement of the law.
 2. Campbell v. Hill 98 E.R. 1045, at p.1047.

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. 1

This opinion has been supported by several other cases.²

Applying the law as stated by Blackstone, since Zambia, as observed in Chapter One, was never a conquered territory it falls into the category of countries where the 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.³

For legislation to extinguish customary rights it must be explicit.⁴ That is, that the legislation must reveal a unity of intention to extinguish the rights in question. This can be done by the legislation in question clearly stating its intention to achieve the desired results.

Although the British government did grant the British South Africa Company the right to own land in 1889,⁵ and in 1911 granted⁶

1. 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.

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

3. E.g. Royal Charter of Incorporation of the British South Africa Company, 29th Oct. 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.

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

5. Royal Charter Incorporating the British South Africa Company, 29th October, 1889, s.3.

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

the right to alienate land, which the Crown later revoked; and did in 1924 grant the Governor the right to alienate land in the name of the Crown and on its behalf, which could lawfully be granted or disposed of by the Crown,¹ it was not until 1928 that it extinguished African land rights.² In that year machinery was desired by which African land rights over land granted or available for granting 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 1st April, 1924, or in perpetuity by the government of Northern Rhodesia between 1st April, 1924, and 22nd March 1928, was divided into Crown lands and Native Reserves. All rights of the British Sovereign in or in relation to Crown lands was 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 grants 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.

It is submitted that after the extinguishing of customary land

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1. Northern Rhodesia Order in Council, 1924, s.2; for Governors powers see s.14.
 2. Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928. In its preamble the Order clearly states that its purpose is to declare land within Northern Rhodesia Crown land 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 set forth in the said scheme, are hereby vested in the Secretary of State..." See also ss.3 & 4 dealing with Crown land granted to the Company and land alienated by the Company.

rights by this Order in Council, the minerals were vested in the persons and entities the Order vested land in 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,¹ 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 land, however, may 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.² Where this has happened it has been done by conveyance of minerals excepting the surface³ or by an Act of Parliament as in the *Zambian Mines and Minerals Act*.

The Company claimed title to mineral rights which until severance remained in the owner of the land, and 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

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

2. Cox v. Glue, (1884), 5 C.B. 533.

3. *Ibid.*

(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 if 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 unsevered minerals legally possible and customary land rights still in force, were merely mistaken admissions that the Company had rights which did not and could not actually belong to it, and the legislation entirely nugatory and without any operative effect at all.

2. Whether legislation did vest the rights in the Company

The main argument here is that the legislation passed in relation to mining rights did not suffice to rebut the presumption of the ownership of minerals arising from surface ownership.¹ 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, which it is submitted none of the statutes in question was, before mineral rights could be said to be in the Company.²

As the legislatures that passed most of the enactments in question were all of limited authority and since the laws in question

1. Humphries v. Brogden (1850), 12 O.B. 739.

2. Howley Park Coal and Cannel Co. v. London and North Western Rail Co. [1913] A.C. 11.

are general laws which would not be expected to deal with private rights their terms require to be examined with some strictness.¹ And the same applies to any of their clauses that are claimed to be for the private advantage of the Company.² This consideration is particularly important here where for part of the time the legislature was itself, or was controlled by, the party in whose favour the enactments were passed, and where throughout the period, all legislation relating to minerals had to be approved by the same party. No doubt a person with power to legislate could do so for his own benefit,³ but the courts today might well not follow this reasoning as what is here being dealt with is essentially a privilege and not so to be commended.⁴

i. The 1912 Mining Proclamation

Before dealing with the above 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.

The Company's Charter of 1889 gave no rights of property or

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1. Attorney-General for Ontario v. Reciprocal Insurers [1924] A.C. 337.
 2. Union of South Africa (Minister of Railways) v. Simmer and Jack Proprietary [1918] A.C. 603; See also Commissioner of Public Works (Cape Colony) v. Logan [1903] A.C. 335.
 3. Phillip v. Eyre (1869), 4 Q.B. 225.
 4. R v. Lord Crewe [1910] 2 K.B. 628.

power of administration, but only capacity to acquire them. It recites that certain concessions or agreements had been obtained from native chiefs, and its second clause empowered the Company to hold their full benefit so far as valid for the purposes of the Company.¹ The 1911 Order in Council granted powers to the Company as a government to grant land and mineral rights.² These powers were revoked in 1924 when the Company ceased to be the government.³

The 1912 Mining Proclamation was the first formal mining legislation in its preamble it stated that:

Whereas the right of searching and mining for and disposing of all mineral and mineral oils in Northern Rhodesia notwithstanding the dominion or right which any person, company syndicate or partnership may 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. 4

It is submitted that the above 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 in proof of the facts recited,⁵ 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.⁶

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1. Royal Charter of Incorporation of the British South Africa Company, 29th October, 1889, clause 2.
 2. Northern Rhodesia Order in Council, 1911, s.40.
 3. Northern Rhodesia Order in Council, 1924, s.2.
 4. Mining Proclamation No.1 of 1912.
 5. Sturla v. Freccia (1879), 12 Ch.D 411.
 6. Kent Coast Rail Co. v. London, Chatham and Dover Rail Co. (1868), 3 Ch. 556; and also Houghton v. Fear Brothers Ltd., and Willsher, [1913] 2 K.B. 342.

The recital in the 1912 Mining Proclamation can well be read as meaning that the rights mentioned belong to the British South Africa Company qua 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,¹ or it may be disregarded as a mis-recital.² Such mis-recitals have been held not to be absolutely unknown even in acts which have been framed by skilled and careful draftsmen.³

Further, however that may be, this is also a case where the variation between the recital and the earlier documents make its accuracy suspect and 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.

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 depended solely on their land ownership and did not extend to land in other ownership and that therefore they sought to enlarge their rights if possible by this recital.

ii. The 1958 Mining Ordinance

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

1. Merttens v. Hill [1901] 1 Ch. 842 at p.852.

2. Headland v. Caster [1905] 1 K.B. 231.

3. *Ibid.*, p.231.

Nothing in this section (a) shall operate to vest in Her Majesty any right of ownership in, of searching or mining for, minerals oils or natural gases which is now vested in the Company. 1

It is submitted that this provision did not suffice to grant mineral rights to the British South Africa Company. It makes the statement that certain mining rights are vested in the Company, but it does not purport actually to vest them, or to give any foundation for the statement made. And in fact it is in 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 minerals, 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 are situated.

Until this legislation was passed it is submitted 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 as shown earlier under common law principles of land tenure by reason of the absence of any legal severance of the title to minerals from that to the land before then. 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.

The vesting of mineral rights in the Crown in 1958 constitutes

1.. Mining Ordinance, 1958, s.3 (2).

in itself a positive and practical recognition of the submission above in that it implicitly recognised that until that time 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 rights were not owned by surface owners there would not have been any need for vesting the minerals in the Crown and the severing of ownership of minerals from the ownership of land which this Ordinance effected.

As regards the statement in respect of the Company, if it already owned these rights, what was the need of making this statement? It would seem that the Company knew it had not secured them, and attempted here to strengthen its position by transferring its claims from a mere recital where it was placed in the 1912 Mining Proclamation to a substantive section here.

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 to provide an additional mode of attaining the object previously aimed at. If a statute merely records existing powers, nothing would be gained by its enactment, as nothing would be added to the existing law.¹

It is submitted that this provision did not alter the Company's position at all and the reason for making it was that this was not a true vesting section. It requires very clear and unmistakeable

1. Attorney-General v. De Keyser's Royal Hotel [1920] A.C. 561.

language in a subsequent statute to revive or recreate a void right.¹

In the case of a corresponding section under construction in an Australian case Colonial Sugar Refinery Co. v. Melbourne Harbour Trust Commissioners,² 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. 3

or again 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. 4

Section 3 cannot be construed as intended to be an interpretation of the preamble in the 1912 Mining Proclamation referred to earlier either. For although parliament can by statute declare the meaning of previous Acts, and it is competent for it to do so even though its declaration offended the plain language of the earlier Act,⁵ it would be an unnecessary step to take unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent

1. Lauri v. Read [1892] 3 Ch. 402 at p.420.

2. Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners [1927] A.C. 359.

3. *Ibid.*, p.360.

4. *Ibid.*, p.361 See also Nireaha Tamaki v. Baker [1901] A.C. 567.

5. Ormond Investment Company v. Betts [1928] A.C. 143.

enactment do what was desired. As has been suggested,¹ 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 interpretation section, it would have been easy 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;² instead of making the bare statement that they were vested as was done here.

It is submitted that if the statement be erroneous it can be disregarded, as has been held in some cases,³ which apparently overrule earlier decisions that if the legislature had made a mistake only the legislature could correct it.⁴

This section can, 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.⁵

It was held in Ormond Investment Company v. Betts⁶ that subsequent legislation, if it proceeded upon an erroneous construction of previous

1. Ormond Investment Company v. Betts [1927] 2 K.B. 346.

2. Ibid.

3. Colonial Sugar Company v. Melbourne Harbour Trust Commissioners, supra, p.123.

4. Labrador Company v. R [1892] A.C. 104.

5. Princess Estate Cor. v. Registrar of Titles [1911] T.P.D. 1076.

6. [1927] 2 K.B. 334.

legislation cannot alter that legislation, and 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.¹

The importance of any change of wording has been shown by several cases.² Any change in the words of a statute imports vagueness as to what is really meant.³ Besides, the interpretation of these statutes urged upon them by the Company would be 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. There seems to be nothing in the above legislation indicative of the legislature having intended such a breach of natural justice.

iii. The matter of levying royalties

If the British South Africa Company owned exclusive mineral rights no doubt it could levy royalties by agreement without any statutory authority, 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,⁵ but if the correct view be

1. Ormond Investment Company v. Betts [1928] A.C. 143, at p.155.

2. Eschumault Water Works Company v. City of Victoria Corporation [1907] A.C. 507.

3. Labrador Company v.R., supra, p.120.

4. R v. Visagie 1963-1964 Z. and N.R.L.R. 140.

5. Commissioner for Inland Revenue v.L.P. Syndicate Ltd. [1928] T.P.D. 199, at p. 206.

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, and were not a source of revenue connected with the mineral rights of the Company¹, since one can no more say that they are 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 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 the Company, and that 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 a tax, royalties are really a reservation out of the grant of the right to mine by the owner of minerals² and therefore again presumably due to the government.

If this be not correct, the legislation which granted the royalty to the Company might well be held to be abnoxious on the ground that the one thing that a subordinate legislature, such as passed all the

1. Rocher v. Registrar of Deeds [1911] T.P.D. 996, at p.998.

2. Chappelle v. R. [1904] A.C. 135.

legislation here, has always been, cannot do is to levy a charge for the benefit of a private individual as that would not be a taxing measure, and would be illegal,¹ and in practice such a case would not arise. It seems however, that such a case did arise in the legislative grant of royalties to the British South Africa Company, and that the legislation was therefore illegal.²

Also since the Company claimed mineral rights on the basis of grants it has to prove the legal basis of its claim to the right to charge royalties. A royalty interest could be created in favour of the Company by grant or by reservation or exception just like a mineral interest. This can be done by the landowner conveying a royalty interest in the land. Thus a graver doubt still as to whether the minerals were due to the Company arises from the fact that no instrument exists granting it these rights.

The foregoing discussion leads then to the conclusions that with no separate ownership of minerals and royalty all this legislation whether in connection with vesting or royalties gave the Company nothing beneficially and was entirely nugatory and legally unenforceable.

(e) Recognition by the Crown as a Foundation for the Company's Claims

The question here is whether the Crown did anything that gave the Company a title to any mineral rights. As the Crown had made no grant as shown in the preceding sections, recognition by the Crown

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

2. Mchlarv v. R. [1912] A.D. 199.

as a source of title means nothing unless it means that a grant of exclusive rights by the Crown is to be implied. It is easy to demonstrate that there can be no such implications as there are known foundations for the Company's claims namely, the concessions.

In in re Southern Rhodesia¹ it was stated that "erroneous acquiescence by the first party in the view of his rights asserted by the second neither extinguished title in the one nor creates it in the other,"² and later 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".³

The same thing in substance had been said in Labrador Company v. R.⁴ it was there put that a recognition to be effectual for the purpose of curing a defective title 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.

In this case there is no hint anywhere either in the legislation or anywhere else of any intention to remedy a defective title in 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

1. *supra*.

2. *Ibid.*, p.228.

3. *Ibid.*, p.238.

4. *Supra*, p.122. Also the same principle prevails in mistake in the law of contract, See Blay v. Pollard and Norris [1950] 1 K.B.628.

supposed to proceed from the recognition of the concessions, the Devonshire agreement, the 1950 agreement, and legislation.

1. As regards the concessions

Nothing can be usefully added as to this. 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 character from their recognition and adoption by the Crown¹ and went on to hold that:

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. 2

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

1. supra, p.228. See also Cook v. Sprigg supra, p.572 and Nisson v. Attorney-General [1970] A.C. 179.

2. Ibid., p.229.

2. As regards legislation

This ground of recognition can hardly be seriously maintained. 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, were this legislation held to touch precious minerals or precious stones in cases where these were not expressly provided for.

No better example of this could be had than is afforded by the decision in In re Southern Rhodesia. It appears that the Company had passed regulations, which had been duly approved, claiming land as their own but these the Privy Council disregarded.¹ 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, disregarded also.

3. The Devonshire agreement and the 1950 agreement

This ground is unlikely to succeed either. In a Privy Council decision it was held that a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi could not of itself be sufficient to create a right in anybody cognizable in a court of law.²

i. The Devonshire agreement of 1923

This document stated that:

1. Supra, p.226.

2. Nireaha Tamaki v. Baker, supra, p.567.

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 Lowanika in North-Western Rhodesia and concessions in North-Eastern 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. 1

Here again it appears only any existing rights the Company might have had under the concessions were recognised. The agreement does 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. And 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.²

ii. 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. 3

Here again only mineral rights owned by the Company as of that

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1. The Devonshire agreement, supra, clause (3) (g).
 2. This as observed earlier happened only in 1928.
 3. Agreement with the British South Africa Company on the Mineral Rights Owned by the Company in Northern Rhodesia and for the Eventual Transfer of those Rights to the Government of Northern Rhodesia, Cmd. 1950.

date were guaranteed undisturbed enjoyment to the extent that they already existed. It did not pretend to make a new grant nor add to those rights. The other arguments advanced in connection with the Devonshire agreement are also applicable here, so that even after this agreement the Company's claim to title had to be founded upon the original concessions and treaties and those as shown did not convey any title.

As has been demonstrated, recognition cannot in any way be the foundation of the Company's claims as it still left the question what rights were being recognised unanswered. 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 and 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 any such grant had been made it could well be said of it on the authority of Simpson v. Attorney-General¹ that "no similar patent has ever been upheld in the worst days of the Stuarts".²

(f) A Consideration of whether if the Concessions were Treated as Valid the Company owned all Mineral Rights Throughout the Whole Country

If the concessions are to be treated as valid, the need arises to examine the nature of the rights and the areas they covered. They

1. [1904] A.C. 487.

2. Ibid., p.487.

have to be construed strictly against the grantees, both because they were drafted by them as observed earlier and because they alienate public assets to private persons.¹ It is submitted that the Company could never have acquired all the minerals and that the concessions did not cover the whole country.

1. Whether precious stones were covered

The concessions did not expressly give any rights in respect of precious minerals and precious stones. They did not mention either of them; that being so it might well be that they were not included in the rights granted, and the more 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 mineral 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 Attorney-General of Canada,² that 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

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

2. (1889), 14 App. Cas. 295.

Crown.¹ Any document purporting to do that is as was stated in Hudson's Bay Company v. Attorney General for Canada,² to be construed strictly against the Company. In that case the Crown 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 had 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 stations adjoining thereto, and Crown grants of land subsequently claimed by the Company. The Company claimed rights to gold and silver in those areas. The court held that the precious metals in all the lands so vested in the Company belonged to the Crown, 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 include the precious metals and that the right to retain the posts and 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.

2. The question of the areas covered

There is abundant evidence from Colonial Office reports and

1. Wolley v. Attorney-General for Victoria (1876), 2 A.C. 163, "as the two titles are distinct" p.202.

2. [1929] A.C. 285.

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 has been discovered and from which the Company collected its royalty payments, is located.

In considering the question of territory among 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.

Only one of the concessions purports to be with a chief of the Lamba or the Lala, the indigenous tribes of the Copperbelt, the only Lamba chief being Mushili. But according to historical studies¹ 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 Congo Lambaland

1. Doke, The Lambas of Northern Rhodesia, 1931, pp. 35-42.

MAP OF ZAMBIA SHOWING TRIBES, BOUNDARY OF
BAROTSELAND AND THE COPPERBELT

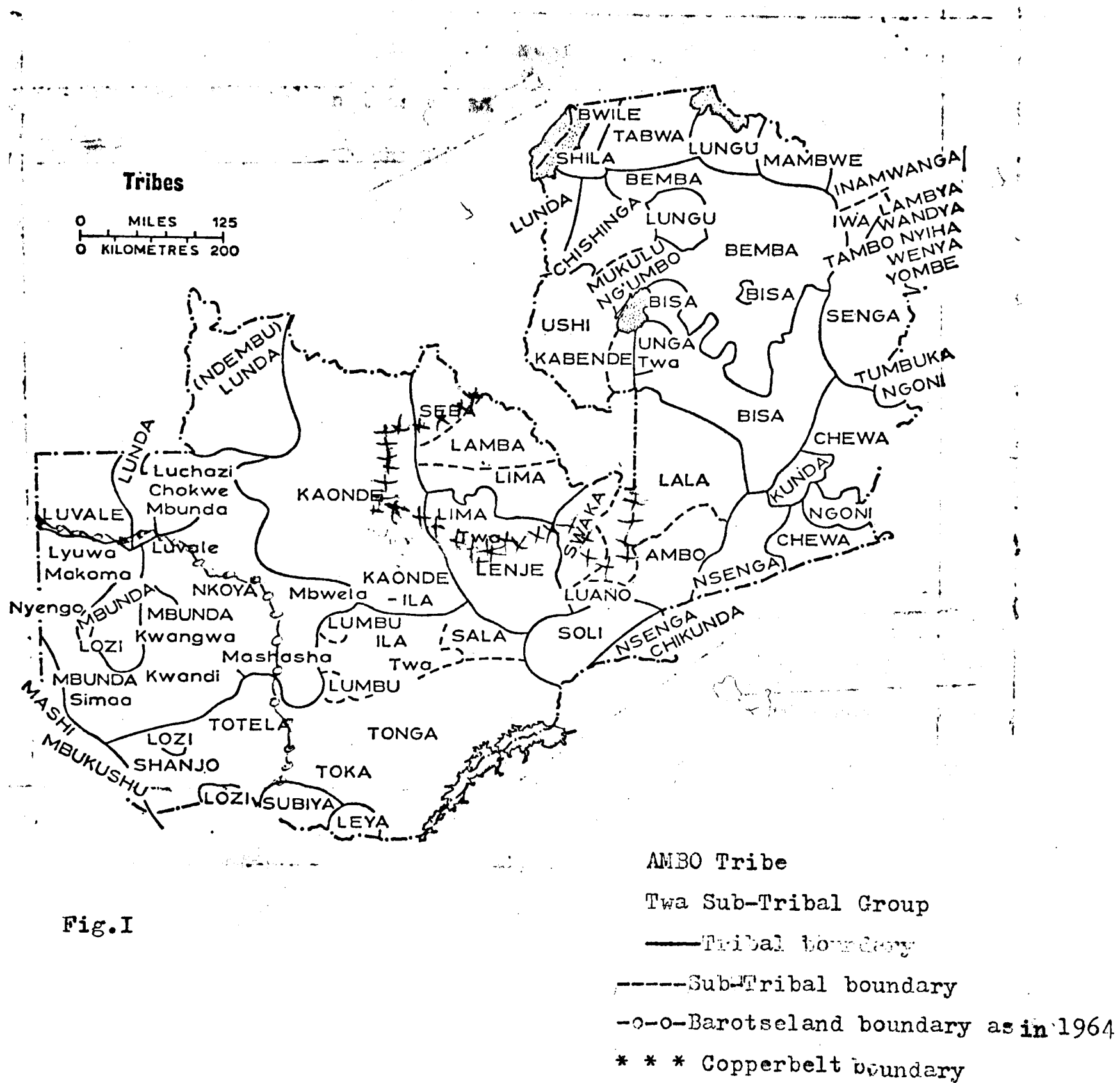


Fig.I

had greater power than his counterpart on the Zambian side. Mushili, from whom Thomson obtained his treaty, was fourth in succession to Mkunine. His original name was Mputo, but he took the name of Nkana when he became chief. However, in 1885 he submitted to Mairi of the Congo and adopted the latter's name as token submission. The Southern boundary of Mushili's chiefdom was roughly fifteen miles 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 of the Swaka which was divided by two chiefs Ikote and Chitire. Consequently, the Company could never have had mineral rights over these areas.

The Company claimed that the Lewanika concessions covered the Copperbelt. But Lewanika himself, when asked to describe the boundary of his kingdom, gave a list of seventeen tribes, none of which was Lamba or Lala.¹ Their absence from the tribes under Lewanika's suzerainty is confirmed by Coillard in his own list of tribes under Lewanika² and by the Barotseland Boundary Arbitration proceedings.³

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

2. 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 larger areas e.g. Report by Major Harding to Colonial Office, 30th April, 1902, C.O. African South 695, and Corydon to Colonial Office, 25th July, 1901, C.O. African South 659. But these were Company commissioned reports. White, 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 ownership of territory. Bulozi under the Luvana Kings, supra, p.165.

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

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.¹

A Colonial memorandum by the Assistant Chief Secretary for Native Affairs on the extent of Lewanika's dominions,² stated that it regarded Lewanika's dominions as that area in which there were indications that the people regularly paid tribute to him about the beginning of the century or regarded him as an overlord. The Lambas and the Lalas are not listed as any of the tribes that paid tribute to Lewanika at any time in history anywhere. 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, pay 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. 3

None of the concessions 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

1. Doke, supra.

2. Letter from Native Affairs Comm. to Chief Secretary, 15th Oct. 1927, ZAI/9, File No. 35, (National Archives), Lusaka.

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

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.¹ 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. 2

Most of Central Province does not appear to have been covered either. Stephenson, who opened the Ndola 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 Mwashhi) 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. 3

Early in 1905 when Colonel Harding, an official of the Company, with

1. Ibid.

2. Letter from Griffin to the Company, March, 1914, *ibid.*

3. Letter from Stephenson to Sir Hubert Young, 10th September, 1925, *ibid.*

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 Northern Eastern Rhodesia, on the ground that this was not Lozi country.¹ 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, Amarkuni and Mbayila. (b) None of these people are 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. 2

Another area not covered is the Koonde 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.³ Melland, a Company official in Kasempa,⁴ wrote that the Lozi had no influence in his area. And in his later book on the Kaonde country there is no mention of the Lozi ever ruling this part of Zambia.⁵ There is on the contrary a statement by one Mutendi, a Lunda headman, on the Kabompo, 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

1. Ibid.

2. C.O. 795. 90.

3. Letter Copeman to Secretary Native Affairs, 25th May, 1905, C.O. 795-99, File No. 45015; also in IN/1/9, (National Archives), Lusaka.

4. Ibid.

5. Melland, In Witch Bound Africa 1923.

to the Boma every year. 1

None of the North-Eastern concessions covered the Copperbelt nor were any of the chiefs alleged to have entered into them of any importance.² They could not cover the whole country unless they were granted by all the native chiefs of the country. But only 24 chiefs were 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.

3. The Company's knowledge that concessions did not cover certain areas

The British South Africa Company knew that its concessions did not cover the whole country and particularly the copperbelt.

In 1917 the Foreign Office sent to the Colonial Office a report by Major Adams on the extent of the Barotse Kingdom.³ This was accompanied by a map on which the boundaries of the Barotse Kingdom 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.⁴ And earlier in 1902, its

1. C.O. 795. 99, File No. 45015. The Lunda elder swore before Bruce Miller, Native Commissioner on 20/1/1916.

2. E.g. Chitimukulu of the Bemba is missed out.

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

4. Letter, British South Africa Company to the Colonial Office, 8th December, 1917, *ibid.*

own official had reported to it that Barotse influence was non-existent in the entire Hook of the Kafue.¹

The awareness of the Company is confirmed by the events leading up to the change of the boundary in 1905. In 1905 the Company suggested that the boundary between North-Eastern and North-Western Rhodesia be altered. They proposed a new boundary which involved adding to North-Western Rhodesia a considerable tract of 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 conterminous with the country over which Lewanika ruled. The Company stated that the change was necessary for administrative reasons.² The proposal was subsequently approved by the Colonial Office.³

Company correspondence reveals that its claims that it wanted the change for administrative reasons was false. 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:

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 somewhat 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. 4

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1. Report of Val Gielgud, 30th October, 1902, to Mr. Mullan, Company Administrator in Salisbury, C.O. 795-99, File No. 45015.
 2. See letter by Jones, Secretary to the Company's London Board to Codrington 13th Feb. 1904, and in Company letter to the C.O. 24th June 1904, African South, 746. Also letter Company to C.O. 21st Oct. 1903, African South No. 717.
 3. Gazette Notices 29th Sept. 1905, of both North-East Rhodesia and North-West Rhodesia, Notice No. 88 C.O. 795-88. The letter approving boundary change is 28th Oct. 1904, African South No. 164.
 4. 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 of Northern Rhodesia, supra, p.23.

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. I think there must be some other reason for your desire to add territory to North-Western Rhodesia. 1

In another letter, after agreeing that the change should go on since it was in the interests of the Company, he discussed and dismissed each and every reason advanced for the change.² And 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 he stated that:

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. 3

There was never any acceptance by the British government that the concessions covered the whole country. This is revealed by Colonial

1. Ibid.

2. Ibid.

3. Letter by Codrington to Colonial Office, 12th November, 1909, African South No. 932.

Office correspondence. 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 concessions 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. 1

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

There has never been 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. 2

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 interests of both 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 affecting such a transfer he proposes to consult the High Commissioner and Consul-General for the British Central African Protectorate. 3

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1. Letter by Malcom, President of the Company, 23rd June, 1937, C.O. 795-88, File No. 45050.
 2. Ibid.
 3. Letter from Colonial Office to the Company, 20th October, 1904, C.O. 795-88, File No. 45050.

Later in the thirties it was more insistent 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. 1

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 boundary that was adopted. 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 Northern 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. 2

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:

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1. Letter from Colonial Office to the Company, June 1937, C.O. 795-88.
 2. Note by Cohen, See Northern Rhodesia Government, British South Africa Company Claims to Mineral Rights in Northern Rhodesia, supra, pp. 29-30.

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.¹

From the available evidence, therefore, there can be no doubt that the concessions did not cover the whole country.

(g) Conclusion

The considerations advanced in the preceding sections lead to a conclusion that there was no legal basis for the British South Africa Company's claims to own mineral rights in Zambia. This analysis has shown 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. Letter from Colonial Office to British South Africa Company, 1938. C.O. 795-88.

CHAPTER 6

MINING RIGHTS UNDER THE PRE-1969 MINING LEGISLATION

The mining legislation introduced by the British South Africa Company during the period it owned the rights remained in force, even after the mineral rights were recovered by the Zambian government. It was not repealed until the end of 1969. This chapter discusses the origin of the legislation employed by the Company the nature of mining rights it created, and the problems inherent in the nature of the mining rights created which directly led to its repeal.

(a) Origins of the Legislation

The Company, as owners of 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, the owner of minerals can grant and dispose of his minerals.¹ The Company did

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

not, however, adopt the common law system of mineral tenure. The country was largely unexplored and under-developed, with few mineral discoveries, whereas the common law conception of tenure had been built around known mineral deposits; the Company could not therefore hope to lease mineral land as it did not know which parts of the country were mineralised and 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 it did not own all the land.

Essentially therefore 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 said factors as 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 private land.

The real property law of South Africa, based as it is upon Roman-Dutch law, differs fundamentally from the common law. Under it the owner of the surface of the land is the owner of the whole of the land and of all minerals in it.¹ But though this is so, the Roman-

1. Rich and Bhyat v. Union Government [1912] A.D. 719 at 734.

Dutch lawyers have not developed the theory of dominium in such a manner as to permit of the severance of holdings horizontally. It follows that it is not possible, under the South African system, for one person to have ownership of the surface and another to have ownership of the subjacent minerals.¹ No one can therefore transfer the dominium in unsevered minerals unless he transfers ownership in the land containing minerals.²

Gold and diamonds had been discovered on the surface in the Transvaal in 1881. 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; the landowner then 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.

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, whether the owner was the state or a private person, reserved to itself (a) the right of mining for and disposing

1. Neebe v. Registrar of Mining Rights [1902] T.S. 65 at 85 per Wessels, J; Rocher v. Registrar of Deeds [1911] T.P.D. at 315, per Masson, J.

2. Le Roux and others v. Loewenthal [1905] T.S. 742 at 745.

3. By this law mining rights could be granted by the state. See Gold Mining Law No. 8 of 1885.

of all precious metals and precious stones and (b) the right to proclaim land a public digging or mine.¹ The significance of this was that the owner of the land remained the owner of all precious metals, but could not mine them, though he could still exercise his Roman-Dutch rights of mining the base minerals on his land.

The Act provided for the granting of mining leases which, in the first instance, were offered to the owner of the land and mineral rights on better terms than when granted to other persons; when they were not so offered, other compensation was provided in addition to the mining lease. It also in addition to the mining lease adopted the claim system and the practice of proclaiming gold fields or public diggings where claims might be pegged by members of the public holding a prospecting licence. The miner gets a licence, which for its validity depends upon the fulfilment of its terms, and in particular upon the punctual payment of the claim licences, or, where ore is 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

1. See Precious Stones and Base Minerals Act, 1908, s. 67.

via Southern Rhodesia, where the claim system had been brought in 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 Rhodesia¹, and later in 1891 the Company applied to the territory the Proclamation by Her Majesty's High Commissioner for South Africa of the 10th of June 1891,² which brought into being rules designed to be the temporary framework within which mining operated, the first regular system of mining in Southern Rhodesia 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.³

(b) Early Mining Law

Prior to the existence of any mining code in Zambia, the British

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1. See Mashonaland Mining Legislation No.1 of 1890.
 2. See Hone, Southern Rhodesia, 1909, at p.239 for a reprint of the regulations.
 3. It was different in one respect. The Ordinance introduced for precious stones a 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.

South Africa Company granted mineral rights to individuals by means of an exchange of letters.¹ 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.² 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 the "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 African 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 royalties to the Company but could trade in mineral rights in his area on his own account.

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1. See e.g. concessions to F.R. Burnharm, Peart Ingram, the Bechuana-land Exploration Company Ltd., and the Chartered Goldfields Ltd., dated 13th February, 1895 and to J.W. Dore, 9th April, 1895, in Company Register of Titles, Geological Survey Dept., Lusaka.
 2. 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 2(a) on the file page 55.

These grants were recognised and continued under the post-1912 Mining Legislation.¹

(c) The 1912-1969 Legislation

Later the Company formulated regulations for the North-Eastern part of the country.² But it was not until 1911 that it applied to the 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 British South Africa Company and submitted to the Colonial Office on the 9th of January 1911 for approval.³ The idea was that it 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 above and the 1906 Precious Stones Mining and Trade Ordinance and the 1903 Mining Ordinance of Southern Rhodesia.

The Company rejected all attempts 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 include a

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1. 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.
 2. See C.O. 417-506, they are contained in a letter from the British South Africa Company to the Colonial Office, 5th November, 1906.
 3. See C.O. 417-506.

provision for the commutation into money of 1% royalty to the native chiefs.

The Company replied that the provision was not one which could properly be included in the mining law.¹ Moreover, it inserted clauses entrenching its ownership of the mineral rights,² 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.³

The draft was accepted by the British government and was promulgated as the Mining Proclamation of 1912 which took effect on the 1st of July, 1912.⁴ In 1934 it was renamed the Mining Ordinance of 1934 and it survived with little substantive amendments in the 1958 Mining Ordinance.

1. 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 Charterland concession,⁵ the Western Province⁶ and excepting that

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

2. See British South Africa Company letter to Colonial Office, 15th February, 1911, in C.O. 417-506.

3. The Company stated this very explicitly in a letter to the Colonial Office 15th February, 1911 in C.O. 417-506.

4. See Mining Proclamation No.1 of 1912.

5. See s.6 of Mining Ordinance, 1958.

6. It was covered by the Northern 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".

special rights in respect of diamonds had been acquired by De Beers Consolidated Mines Ltd., the right to prospect could only be acquired from the British South Africa Company.

The right to prospect was ordinarily conferred by a prospecting licence given by the Company. 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.¹ 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 withhold mining ground from those who could develop it.

A prospecting licence was no more than a contract which was made between the British South Africa Company and the prospector setting 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 left to be written into the licence themselves.

The British South Africa Company thus acquired machinery by which it could control mining without further recourse to legislation and was probably inspired directly by the Company's experience in Southern Rhodesia. In that country the Company had included the terms

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

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 negotiation, 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 expenses before committing large amounts of capital.

The prospecting licence conferred on the holder the right to search for minerals. Prospecting for minerals could not be done by a person other than the holder of a prospecting licence or by someone holding the written authority of the holder. To do so without a licence was prohibited and a criminal offence.¹ It entitled the holder to post one or more prospecting notices on any ground,² which was usually done after the discovery of a vein or lode.

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

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

There was no fixed rule as to the amount of mineral to be discovered in order to make a posting. Such notice had to be in the prescribed form, and had to be displayed in the prescribed manner.¹ A subsequent prospecting notice could not be posted until the earlier discovery notice had been removed and notice of abandonment posted.² 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 from the point where such notice was posted in the case of precious metals or precious stones or 3,000 feet from the point where such notice was posted 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

1. Ibid., s.25 (1).

2. Ibid., see s.22 (4) which provided that "No person shall post a second or subsequent prospecting notice within an area specified in subsection (5) of this section until such time as every such notice previously posted by him in such area and the peg upon which it was carried have been removed".

take place without the consent of the private owner or occupier upon land which was within 200 yards of any occupied or temporarily unoccupied house or building, or within 50 yards of land cleared, ploughed or bona fide prepared for the growing of farm crops or 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.¹

The prospecting licence included the conditions with which the holder had to comply when he acquired a mining location. They 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, also with a view to the profitable working of the location by the extraction and removal of minerals. A prospecting licence carried the right to peg one mining location. In 1936 a revised form of licence was introduced valid for one year only, and in 1948 a further revision permitted the pegging of more than one mining location on the same licence.

2. Exploitation rights

A right to exploit mineral deposits could be acquired in either of two ways: (a) pegging of claims or mining locations on discovery of minerals as a result of a prospecting licence; or (b) the obtaining

1. Ibid., s.20 (1)

of a direct grant of mining rights or special grant.¹

The first step in the acquisition of a mining right via the first method was the posting of a prospecting notice, which was discussed above. The holder of a prospecting licence who had posted a registration notice could then apply for the registration of the area concerned as a mining location.² The law then enabled the holder of a mining location to apply for and obtain a certificate of special registration, which was conclusive evidence that all formalities required for the acquisition of the location had been observed and 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.³ This was welcome in that the special registration 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, recording, and marking the area, on the surface.⁴ 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

1. Ibid., s. 38

2. Ibid., s. 25 (1)

3. Ibid., ss 44 (1) and 47.

4. In fact the same requirements prevailed as in ordinary registration. See ss. 44 (3) and 44 (1), *ibid.*

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, on the other hand, were rights to mine acquired on application from the Company otherwise than by pegging a mining location.¹ 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. Areas covered by special grants were 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 or until surrendered by the holder.

3. Obligations of miners

Provisions in the prospecting licence required the holder to execute 'at least thirty feet of obligatory development work within four months of the registration of the mining location and 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,

1. Ibid., s. 38A (1).

he was required to execute at least sixty feet 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.¹ Failure to obtain 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 footage 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 footage development work amounting in total to not less than sixty multiplied by the number of subdivisions, excluding those being worked for profit, and 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

1. 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".

to observe the development provisions constituted failure to comply with the provisions of the special grant, and made it liable to forfeiture.¹

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 required work was done. Consequently, 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 became necessary. This was also because the mining right holders were not required to follow a specific programme in their operations.

Moreover, with respect to inspection fees, because 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,²

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1. This was authorised by s.64 (1) of the Mining Ordinance, supra, which provided that "Any special grant or prospecting licence may contain provision 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 any circumstances specified there in and at any time, however remote".
 2. 1st certificate - £5, 2nd certificate - £10, 3rd certificate - £20, 4th certificate - £20 and 5th certificate - £30. See Prospecting Licence Condition, 20.

and indeed no inspection fees were payable at all once a claim had been worked for profit and hence many claims surrounding small, old mines could continue to exist virtually in perpetuity. And in any case, with respect to a location if after forfeiture work was resumed and continued before anyone else located the area, this could preserve the original locator's rights, as the person who forfeited the location did not lose his prospecting licence nor was he debarred from locating in the same area.

(d) 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.¹ 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 independence 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 formerly held by the British South Africa Company and the Crown were vested in the President on behalf of the Republic of Zambia and the vesting was implemented by the 1965

1. 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.

Mining Ordinance (Amendment) Act.¹ 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:

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 this Ordinance, under the same conditions as are contained in such prospecting licence, mining location, special grant, mining right or title. 2

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.³ Prospecting licences continued as under the British South Africa Company to be granted outside the Mining Ordinance but their conditions were this 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 concession

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

2. Ibid., s.3 (2).

3. Ibid., s.7 (1).

area¹ and the Western Province² 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 that of 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 Zambian government thus inherited and operated within the legal framework built by the British South Africa Company. It could make grants of prospecting rights only in areas open to prospecting, and this excluded areas already covered by valid and operative grants made by the British South Africa Company. Large areas of the country were held in perpetuity under such grants, in which neither prospecting nor mining was taking place.³ Government had no legal

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1. 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.
 2. 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".
 3. The area covered by special grants totalled 75,000 square miles. See Research Bulletin, Economic Financial and Technical Series 7, February 1970, p.1; and also Copper Services Bureau, Copperbelt 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.

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.¹

The fact that the areas were not being adequately developed was defeating the government's main mineral policy - 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,² though it was realised that for this to have any real effect the government would have had to wait for quite some time.

These practical realities meant that the government's acquisition of mineral rights from the British South Africa 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 determination in mineral development. All it really meant

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1. Fee s.18, Constitution of Zambia, Laws of Zambia, Appendix 3, 1965, ed.
 2. 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".

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 iniquity 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 area, or to bring in new mining partners who might show greater interest in the development of mineral resources. 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 long-term 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 exclusively 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.¹

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

1. 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/EC/FC, 1964 p. 48.

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 necessary to change the mining law of Zambia, eradicate the anomalies inherited from the past, and give the country a new approach to prospecting and mining activity.

CHAPTER 7

MINING RIGHTS UNDER THE POST-1969 LEGISLATION

In 1969 the state introduced a number of far-reaching reforms in order to ameliorate the situation created by the pre-1969 legislation discussed in the previous chapter. The reforms were introduced in the Mines and Minerals Act of 1969,¹ which embodies a whole new approach to mining rights in Zambia. All pre-existing mining rights were extinguished and new ones created.

This chapter discusses the types of mining rights created under this Act, the nature of the interest created by the grant of mining rights, the obligations of the mining right holders, and their surface rights, and finally evaluates the practical results of the new policy in terms of the effect it has had on mining activities and its practical advantages over the pre-1969 legislation in solving the problems the latter created.

(a) Ownership of Minerals

1. Theory of ownership

The property in all minerals within Zambia is vested in the

1. Chapter 329 of the Laws of Zambia.

President on behalf of the people of Zambia,¹ 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 situate.² This enables the state to grant mining rights over private land and saves mining right holders from spending huge sums of money on land purchases which would otherwise be necessary.³

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 companies.⁴ Government control in this area of natural resources is important in view of the exhaustible nature of the country's mineral wealth. The country's minerals, once mined, can never be replenished and stocks of them are fixed even though their extent is not all known. It is recognised the world over, by governments in different ideological blocs and having widely differing views about the role which the state should play in the economy and about the rights and obligations of

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1. Section 3 (1) reads: "All rights of ownership in, of searching for, mining and disposing of, minerals, are hereby vested in the President on behalf 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 the Laws of Kenya, s.4.
 2. S.3 (2) reads: "the provisions of subsection (1) shall have effect 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 situate".
 3. 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.
 4. 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.

private property, that exhaustible resources require special treatment from the government since 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 only incidental to a private company, such as the preservation of a resource for future generations, or their ideas on the rate of development may differ, as shown in the previous chapter.

This ownership by the state, although not specifically provided for, is regarded by the state as inalienable.¹ 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.

2. 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 subsoil is always vested in the state by virtue of the Act, that is,

1. 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".

the owner of land is not the owner of the minerals in it.¹

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 grant, and not the lease of land, that the right to win minerals arises, quite apart from the fact that the two interests will be conferred by two different organs of government pursuant to entirely different statutes.²

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 right holders obtain both surface and mining rights, especially when they have reached the stage when they have to take out a mining licence.³

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1. 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 common law in fee who parts with the land excepting the minerals. See Ramsay v. Blaier (1876), 1 App. Cas. 70.
 2. 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 Simon Jack Proprietary 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".
 3. For instance, Chungola 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.

This distinction is of practical importance, for 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.

3. 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.¹ The exercise of any mining right without its consent is a criminal offence punishable by imprisonment or a fine or both.²

As holder of the title to minerals, it is arguable that the state is also entitled to maintain all legal and equitable actions for actual or threatened injury that are accorded to owners of property at common law, in addition to its power to invoke the criminal sanction mentioned above.³ The state can recover damages for trespassing sustained by

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1. 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 Mining Engineer whose major responsibility is to supervise and regulate the proper and effectual implementation 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 (1).
 2. S.134 (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 s.135 (1) where defendant objects the state can then prosecute the matter before the court.
 3. 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.

reason of an invasion of the mineral stratum by someone without a right, and if the trespasser severs and removes minerals, it may recover possession of the minerals (or their value, where the trespasser has already disposed of them).

4. Damages for wrongful abstraction

The problem then arises of 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 the injury.¹ If the trespass is a continuing one, damage for the use and occupancy of the land are measured by the reasonable rental value of the land.² 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 the actual digging of the minerals and may also actually result in an advantage to the owner of the minerals and save would-be prospecting expenses, if the trespasser were to find a hitherto unknown mineral deposit. 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, they may be assessed according to the value of the

1. Lavender v. Betts [1942] 2 All.E.R. 72.

2. Hiller v. I.C.I. (Alkali) Ltd. [1936] A.C.1.

minerals at the pit's mouth, without making any allowance for mining expenses, or they may be assessed according to the value when severed, 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 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 circumstances, he should be allowed the expenses of extracting the minerals in question. If, on the other hand, the abstraction of the minerals has been wilful and fraudulent and without mitigating circumstances, or has been continued 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,¹ 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 coal, 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 under ground 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. 2

1. (1880), App. Cas. 25. See also Taylor v. Mostyn (1886), 33 Ch. D.226.

2. Ibid., at p.34.

His Lordship went on 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 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. 1

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. Vivian² 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 is directly liable for all consequential injury which may be caused, whether by reason of

1. 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 Jegon 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).

2. (1871), 6 Ch.D. 742. See also Livingstone v. Railway Coal Company, supra.

the rest of the minerals being rendered unworkable or useless. The damages should include the value of the minerals that cannot be mined or the increased cost required to work them. But it should be otherwise, if the state could not have got them or could only have got them at ruinous expense.

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.¹

(b) Categories of Mining Rights

1. Types of mining rights created.

The working of minerals requires large amounts of capital and 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, it has therefore brought about a system in which the development of mineral resources by private individuals and mining companies characteristically takes

1. This is also in line with the practice where abandonment of a mining area takes place. See s.86 (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 movable property, including in the case of an abandoned mining area or part thereof, any mineral product which may have been extracted therefrom".

place under a system of licences, as grants from the state.¹

The licences are designed to 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 their exploitation.

Three categories of mining rights have been granted under the Act.² These are (a) a prospecting licence, (b) an exploration licence, and (c) a mining licence.³ The lowest form of the right is the prospecting licence and the highest form 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 related as though he were the holder of an exploration or prospecting licence.

The gradation of rights represents progressive stages from searching

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1. 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-metallic minerals such as graphite, gypsum, mica 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. Licences in respect of reserved minerals differ only in so far as they include conditions relating to the disposal of any reserved minerals, ultimately mined. See s.60, *ibid.* The licences for building minerals are called permits, see s.64 *ibid.*
 2. 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.
 3. Ss.16, 27 and 44.

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 increase with respect to that required for the preceding stage of mining developments. Each licence constitutes 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.

2. 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.

A mining right cannot be granted to or held by persons who are under the age of eighteen years, 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.¹ 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,

1. 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.

the mining right terminates. The same is true where the holder of a mining rights dies. Any document which purports to grant a mining right to any person not entitled to hold such right is null and void and thus does not operate to pass any mining right.¹

Mining rights' holders are not required to pay any fees or rental and 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.²

3. Prospecting right

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 owner of more than five per cent of the issued capital. Every applicant for a mining 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.³

Prospecting licences are issued for specified minerals. Where there are applications for licences for different minerals in the same

1. 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".

2. 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 development. See s.33 (1) of the Mines and Minerals Act, supra.

3. S.17.

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.¹

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 the approval of the holder of such licence.²

The need to secure the state's approval is based on the assumption that the state owns any minerals which are discovered 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,

1. 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 5th May, 1975. Register of Mining Titles, (Lusaka).

2. S.34 and 24.

in view of the fact that the methods used in prospecting, because of their generalist nature, 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 rights of De Beers Consolidated Mines Ltd. But as noted above, many mining right holders have got round this problem by applying 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. The likelihood of this is made somewhat remote in practice in that the areas a person holding an exploration licence can hold is 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 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 in respect of which it is granted, i.e.,

the state has always the power to grant licences over existing areas. The 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.

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.¹ Once a prospecting licence has been issued, however, the state is committed to issuing subsequent exploration and mining licences. Both sections 30 (1) and section 48 (1) the provisions relating to the grant of these licences state that the state "shall" and not "may" grant the licences, provided 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.²

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

1. Presumably an aggrieved party can challenge the rejection of his licence, should it be based on reasons other than those provided for in the mining laws by applying to the High Court for Certiorari. See generally Patel v. A.G. Selected judgements of Zambia No.1 of 1968; and Sotinadis v. Patel, 1960 R.&N. 280.

2. 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 the Geological Survey.

holder to spend large sums of money which prospecting requires 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.¹ 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 the 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.

4 . 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.² He may, if he wishes, apply directly

1. S.53.

2. S.45.

for a mining licence.¹ The intention is to get the prospecting right holder to the mining stage as soon as possible.

An exploration licence is limited to an area of ten square kilometres in size, ensuring that very large areas cannot be held for long periods with all the work confined to a small area. For 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 the 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.

Exclusiveness is considered essential in exploration activities by mining investors. The holder of such a right needs a lot of time and confidentiality. This is because he needs time to carry out his laboratory tests and make the necessary drilling to enable him to evaluate the ore body and determine the complex factors which will affect his working. This is a very important stage in mineral investigation, which will lead to a decision whether to work a mineral deposit or not. The need for time and exclusiveness is currently getting greater, because of the necessity for large volume operations,

¹. S. 39 (1).

and for the discovery of deep-lying deposits not usually out-cropping at or near the surface since, as pointed out earlier, most such deposits have already been discovered.

As noted earlier, neither exploration nor prospecting licences authorise their holder to exploit minerals, but because they can remove ore for the purposes of having it analysed and determining its value or conducting technological tests including tests on bulk samples,¹ they do accumulate large amounts of core. The mining laws do not, however, provide for what eventually happens to the core 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.

The present situation seems to be unsatisfactory as it causes storage problems for most of the mining rights' holders, who have ended up building huge core sheds because the government does not collect the core. 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, mining rights

1. S.40 (a). In fact it is an offence to do so, see s.133.

may not be transferred without the prior approval of the state.¹ 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 state approval is intended to prevent the augmentation of mining companies by the sale and resale of mining rights. There has not been any resale of mining rights since the introduction of this new legislation. The evidence is also intended to enable the state to ensure that the transferees of the mining rights meet the requirements pertaining to financial and technical ability discussed earlier. If it were otherwise the policy of the state that only people with adequate financial resources should be allowed to mine would definitely be defeated.

5. 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.²

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 the protection of the miner's machinery. Like the exploration

1. S.39 (1)

2. S. 45.

licence, the mining licence is exclusive.

It conveys on the holder the right to mine, that is, a right to carry out the whole coordinated operation to obtain an industrial utilisation of a deposit from the extraction of the useful minerals to the processing that may be necessary, and like both the lesser mining rights and for the same reasons can not be transferred without the approval of the state.

(c) The Nature of Interest Created by a Mining Right

1. 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. 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,¹ but upon the intention of the state as expressed in the mining legislation taken as a whole.

As observed a mining right gives to its holder an exclusive right to prospect, explore, exploit, process, and utilise the minerals within the boundaries of his licence, for a term of years, renewable at the end of such term of years, on condition that the holder observe

1. E.g. they were called permits under the pre-1969 legislation and are called leases under the Botswana legislation.

and fulfil 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 (a) the surface covered by the licence, and (b) the minerals within the bounds of the licence.

The possessory interests in a mining licence do not fall within the standard classification of property interests under the common law. As 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 fee 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 entries or otherwise. They are, however, intruded upon by the government officers for purposes of exercising their regulatory powers¹ 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 severance 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

1. S.59 for instance authorises the Chief Inspector of Mines to inspect a mine under certain circumstances.

the mining licence holder holds his right to mine depends entirely on the statute. There is no consensus between the government and a mining licence holder. The right of mining for and disposal of all minerals is by statute vested in the state. 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. With respect to 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 severance of minerals passes to the holder of the mining licence. All mining rights are subject to the penetration of properly asserted extralateral rights into and within the physical boundaries of the subject matter of the right.

The nature of the relationship created between the state and the mining right holder has not been discussed judicially in Zambia. It has, however, been discussed in a number of South African cases, a jurisdiction which was as shown, largely influential in shaping the Zambian mining laws and where the state both owns the right to mine and uses the practice of awarding mining licences.

The relationship was considered in some detail in Neebe v. Registrar of Mining Rights.¹ Neebe applied for an order compelling

1. [1902] T.S.65.

the Registrar of Mining Rights to pass and register a transfer of certain prospecting claims as property rights. The Court rejected such an interpretation and concluded that the nature of a mining licence holder is one sui generis, specially created by statute, and 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 CapeTown land are property rights. In the matter of the South African Loan and Mortgage Agency v. Cape of Good Hope Bank,¹ 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,² 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 deed of transfer, he refused on the grounds that a separate deed was required

1. 9 S.C. 182.

2. [1911] T.P. 311.

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 quite clear that until the minerals are extracted the owner of the surface remains the owner of the minerals."¹

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,² 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 the same. The Judicial Committee further observed that the document, of itself, creates no interest in any part of the gold either legal or equitable.

1. Ibid. at p.312; see also Lazarus and Jackson v. Wessels and Others 1903 T.F.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 of that nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by commentators" per Wessels, J., at p.510.

2. (1888), 13 App. Cas. 227. See also Burke v. Wright (1882), 3 N.W.W.L.R. 145.

It is easy to confuse the position of the holder of a mining right in Zambia 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 containing them and does not confer any estate or interest in the 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 miner'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. The ownership of minerals and land are distinct.

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. 1

1. (1867) Mac N.Z. 683; See also R. v. Fayle (1872), 27 L.T. 64 and Lowmoor v. Stanley (1875), 33 L.T. 436.

The rights of the holder of a licence in minerals are analogous to those of the purchaser of standing timber, in Zambia, 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 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 that mining investment is unlikely 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 pre-existing 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.

2. 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, such as 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 area. 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. The Chief Mining Engineer in Nkumbula v. Mines Industrial Development Corporation¹ 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.

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,

1. Chief Mining Engineer's file on disputes at Ministry of Mines and Industry, Lusaka.

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 rights 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.¹ In Fitzgerald v. Firbank,² 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 their 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

1. Newby v. Harrison (1861), 4 L.T.397

2. [1897] 2 Ch. 96.

of the rights given to him by the deed was adversely affected. Lord Lindley stated that the action rests absolutely on a man's right not necessarily to property, but to something which is valuable 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.¹ This seems to have been accepted in Nyumbula v. Mining Industrial Development Corporation,² in which the Chief Mining Engineer assessed damages as the actual takings from the minerals, less the costs of extraction, when the case was before him on the preliminary point of damages.

A mining right holder can maintain an action in conversion to recover any minerals actually removed from his mining premises, which are already severed from the ground, since title to minerals removed would have vested in the mining right holder. 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.³ On this principle a mining right holder can also sue

1. Wright v. Pitt (1871), 25 L.T.13.

2. Supra.

3. See Hawkins v. Rutter [1892] 1 Q.B. 668, which supports this view.

for trespass to minerals still unworked, covered by his licence. In that they are in his possession even though still unsevered , as was held in Greenwood Lumber Company v. Phillips,¹ where the plaintiff recovered for trespass to logs of wood whose ownership was in the Crown but whose possession was in him.

(d) Obligations of Holders of Mining Rights

1. 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, thereby preventing others from occupying and developing the minerals, the state has introduced a system of obligations on the mining-right holders. Moreover, the 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

1. [1904] A.C. 405.

on the mining right holders, 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.

2. 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. Another is a stipulation for diligence in the form of stated work requirements, or minimum expenditures. Another is the payment of advance royalties, in fixed amounts to be credited against the state's earned royalties when the mine goes into production. Another is 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.¹ Another is the requirement that fixed percentages of the original area be relinquished on each renewal.² Another is the surface tax, the rate per unit of area

1. This for instance is the position in Paraguay, See Law 16; 066.

2. 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 make available a specified amount of iron ore per year.

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.¹

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 holders 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.

The solution adopted under the Act, as is shown later, 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.² Mining officials suggest that if you can not find minerals in four years then you are not good enough at prospecting. The holder of a licence about to expire may, however,

1. 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".

2. S.18.

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, however, 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 in which 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 the search for orebodies, the areas to be investigated are usually selected and outlined from a study of geological maps, and that a great deal of information can be gathered from a detailed study of these maps.¹

There is also an added problem in this area in 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 covering first

1. 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.

before drilling.

An exploration licence is valid in the first instance 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.¹ The state in fact will almost certainly in special circumstances extend the period of renewal for longer than two years.

A mining licence is granted in the first instance for a maximum period of twenty five years and may be renewed for a similar period,² 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 for which mining rights are granted vary tremendously throughout the world.³ 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 invested 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

1. S.18 and 33.

2. S.51 (1).

3. The most generous seems to be Sierra Leone which grants 99 years. See Minerals Regulations, Chapter 196, s.31.

costs something like K300 per foot for a modest three-compartment shaft, while drilling costs run to the order of K50 per foot. Consequently, any mine layout entails a great deal of expenditure.

Twenty five years is, however, 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 twenty years of operation. The state will also renew a mining licence once it expires, as under the Act it has no choice if the mining right holder has been carrying on his operations in a manner required by the Act.¹ In the final analysis, in practice the life of a mining licence will naturally depend on the size of the orebody and on its physical characteristics such as its quality and will normally continue until such time as the minerals 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, or, where the state is satisfied that an initial period is required to make the necessary preparations to carry on prospecting operations, the date specified in the licence, which in no case can be more than six months after the date of issue of the licence.² He has to carry out prospecting operations in accordance

1. S.51 (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 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.

2. S. 26.

with the programme of prospecting operations. He must expend in direct expenditure not less than the amount which would result if a sum of K25 per square mile, or part thereof, of the prospecting area, were expended annually, during the currency of the licence,¹ and 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.² He is obligated 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 for each square mile, or part thereof, of the exploration area not less than amounts of two thousand Kwacha in the first year, four thousand Kwacha in the second year, and six thousand Kwacha in the third year.

During any period of renewal of the exploration licence, the exploration licence holder is obligated to expend not less than the amount which would result if a sum of ten thousand Kwacha per square mile, or part thereof, of the exploration area were expended annually during the period of renewal.³

The minimum expenditure obligations in both the case of prospecting

1. S. 37.

2. Ibid.

3. Ibid.

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 reconnaissance techniques over extensive areas.

The state at the moment insists that the amounts stipulated above must be spent in the year they are required, so that a prospecting right holder, for instance, who spends K25 per square mile per year in the first year and K60 per square mile 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 is 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 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, as is the case in the West Lungu river licence area.

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. The programmes submitted 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 and which tends to facilitate the extraction or investigation of ores in the licence areas. In the case of labour actually to be performed in mining or improvements in the way of hoisting machinery, there is no difficulty. The relationship of the same to mining activities is direct and apparent. In the case of airborne surveys investigating mineral occurrences there can be no problem. Similarly, in the case of laboratory work directly connected with the mining operations upon the licence area. Such work, however, includes less direct expenses such as that on the construction of roads for access to licence areas, to facilitate mining activities.¹

The chief objection to the requirement of a minimum amount of work, however, raised by some mining 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.

Even if this objection were valid, it would be so only to mining right holders who are actually engaged in mining. It would not, however, be applicable to those persons who acquire mining properties for speculative purposes who are the target of this legislation.

1. Development work is not clearly spelt out in the Mines and Minerals Act.

It is nonetheless important, in view of this possibility, to require levels of 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 Lungula river licence area Roan Consolidated Mines Ltd., mounted helicopter operations, 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 was noted, involves in the first instance, a general reconnaissance which includes a search for previously documented mineral occurrences, the carrying out 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.¹

1. See for instance the estimated expenditure of Mines Industrial Development Corporation Ltd: in one of their licences was 1st year K9,500, 2nd K11,900, 3rd year K23,800, Licence P.L. 67 of 9th August 1972, Registrar of Mining Rights, Lusaka.

An exploration programme of work also requires invariably up to three stages. The first will usually involve detailed geological survey and rock sampling and 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 rock depth of overburden, and other factors, they are on the average in the order of K50 per metre. The second stage would involve exploration core drilling to provide mineralogical parameters of the mineralization, and the last stage would involve an intensification of the first stage. Such a programme will require the same inputs as in the case of prospecting discussed above.¹

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.²

Admittedly as most mining investors justifiably complain, minimum

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1. See Exploration Programme for Baluba Mining Area, 1st year K10,000, 2nd year K20,000 and 3rd year K30,800, Licence E.L. 41, Register of Mining Rights, Lusaka.
 2. 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 the area of 12 square miles in Southern Province. Individually each of these deposits will contain no more than 3-5 tons of tin, worth about K15,000, to justify the present levels of expenditure one would have to spend on 20 deposits.

expenditure obligations are a clumsy way of trying to ensure that prospecting operations proceed at an acceptable level since they entail much paper work, and since expenditure returns can 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 - in effect a date 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. A programme required in terms of section 54 of the Act and acceptable to mining officials is a very detailed plan of the nature of operations intended to be carried on.

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 mines. They range all the way from small prospects which may have only a single level with limited lateral workings, such as Hippo mine in Mumbwa, through to the deep and complex workings of mines that have been in production for many years such as Mufulira.

A mining right holder is obliged to submit reports and information about his activities. The contents of a report submitted by any of the right holders, in pursuance of the above requirement, are confidential so long as the relevant licence remains in force and can be published or communicated only if and to a person consented to by the holder of the licence.¹ 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 is suggested.² It seems, however, that they are resented partly also because of the fact that 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

1. S.54.

2. 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 50% of his time filling in forms.

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 the 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 is submitted that the way out is 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.

3. Obligations relating to manner of operation

i. 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.

A mining licence holder is obligated to work the mineral subject to his licence in accordance with accepted mining standards by avoiding wasteful mining and metallurgical practices.¹ This 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.

Four types of disputes most commonly arise: 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 obsolete methods of mining rather than advanced production techniques.²

This obligation on the miner respecting mining methods is like the common law covenant in mining leases to work minerals in a proper and workmanlike manner.³ That proper mining methods be used is of

1. S.55.

2. The state, for instance, claimed that Roan Consolidated Mines Ltd. had breached this duty when the Company continued to use a method which had been found to cause too much ditution of ores in other mines on the Copperbelt at the Buluba mine. See letter from Chief Mining Engineer to Managing Director of Rlokana Consolidated Mines Ltd., 19th April, 1974, File No. 17.

3. 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. 5C.P. 577.

the utmost importance to the state; the requirement is vigorously enforced by the mining officials as it ensures that minerals are mined economically and at maximum recovery rates and that mine workings are carried on with minimum disruption to the environment and danger to other human activities.

2. 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. This section provides that if after inquiry, the Minister of Mines and Industry 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 licences 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 not be altered without providing for such things as adequate notice, hearing and an opportunity to participate in the planning of the joint operation.¹

There are no concrete examples of the state ordering consolidation,

1. The representations are required to be in writing. See s.87 (2).

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, it 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, and should therefore avoid the conflict which might arise among licence holders sometimes arising out of the failure to develop their area first. 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 holder 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 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 owners.¹ 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,

1. See Land Acquisition Act, Chapter 296 of the Laws of Zambia.

greater recovery, and more efficient use of the State's mineral resources as well as the protection of the correlative rights affected.

4. Standard of compliance of duty to develop and not to use wasteful mining methods

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 a 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 so long as the mining right holder is acting in good faith in his judgment 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 judgment 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 judgment, but fraudulently, 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 or that the use of such practices is justified in the circumstances.¹ 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 circumstances the failure to follow the programme was justified. In the case of Baluba Mining Area,² 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, I 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. 3

It is submitted that the Act and practice of the state officials have taken the best standard in the circumstances. A test of good faith performance, being subjective, has two principal defects in

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1. 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 is 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 his right of appeal under s.122".
 2. The production of recoverable copper was 13748 tonnes in 1972/1973 and in the 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., 14th June 1974.
 3. Ibid.

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 the exploitation of the minerals covered in the licence. That 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. For the realisation of the purposes of the Act require reasonable efforts towards that end.

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 puts property or money and labour exclusively his own, the profits and losses in 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 the 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 rights' 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 has 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.¹ 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 for instance was pointed out by Roan Consolidated Mines Ltd. in 1974, when the state 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

1. Letter of Chief Mining Engineer to Managing Director, Roan Consolidated Mines Ltd., 19th August 1974.

Baluba mine area made it unsafe to work in unsupported slopes.¹

In applying this hypothetical standard neither the interests of the State nor the miner alone is 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 the general conditions prevailing in the mining industry.

5. 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. This is 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 has 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,

1. Letter of Managing Director of Roan Consolidated Mines Ltd. to Chief Mining Engineer, 28th October 1974.

for instance, cuts in production are ordered by the State.¹ The mining officials are against the meeting of bare minimum requirements. What is to be regarded as full development will depend upon 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 exclude negligent performance of mining operations. This embraces within its scope all negligent conduct of mining operations other than negligent failure to follow the programme of operation, 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 judgment 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

1. 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 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 them.

There is the question of the 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. In Lewis v. Fothergill¹ 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 refrain 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.

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 the practice standard is the case of Baluba mine

1. (1877), 5 Ch.D. 108.

referred to above; the state queried the method used by Roan Consolidated Mines Ltd. 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.

It is 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.

6. 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 limited by proper

safeguards against arbitrariness.¹ 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 not severe and the safeguards adequate. Any holder of a mining right who breaches the provision of the Act or any conditions of his mining right is liable to a penalty not exceeding five thousand Kwacha.² The state may recover the difference between the required expenditure and actual expenditure, if any. Breach of the obligations of a mining right holder is a ground for the termination of the mining right.³

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,⁴ since it is thought that the

1. 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 questioned in any court". See s.65.

2. S.88.

3. S.89.

4. S.91. The mining right holder can appeal to the Mining Affairs Tribunal against a termination of his right, see s.124. The decision of the Tribunal is final, see s.126 (2).

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 that the false information was not intended to deceive, or in the case 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 taken all reasonable steps to comply with the direction.¹

The breach of any obligation does not ipso facto terminate the right granted, but merely gives the state the option of terminating the right.² So far no mining right has been terminated as a result of the occurrence of a breach. The cases that have arisen have been resolved without 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.³

1. S.91.

2. S.90.

3. 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 that this is only after the miner has acquired vested interests. This happens 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.

These limitations on the life of a mining right should be distinguished from the general limitations relating to the life span of a mining right. The operative effect of the expiry of the time limit of the right is that the right automatically terminates without the necessity of any affirmative action 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.

In the case of the limitation arising as a result of the breach of obligations, the state may waive its right to terminate the right as it is in its discretion to initiate termination proceedings, but the state cannot waive the termination of a right by operation of the expiration of the 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 can not endure.

(d) 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 of the nature of the interest acquired through a mining right, the division of the use of the 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.¹ 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; and 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, opportunity for dispute increase markedly. The mining right holder may require some of the land for exclusive use; the surface right 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 miners' activities. The miner may use water in such

1. At the outset it is important to point out that an understanding of the position under the common law is not 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 mineral rights from the land by the terms of the mining lease, which expressly or by implication will determine the question of their relative rights.

quantities as may affect other users adversely. 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.

1. Land rights of holders of mining rights

A mining right holder is 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.¹ 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 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, since 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.²

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.³ Where the land owner refuses to

1. Ss. 25 and 35.

2. Ibid.

3. S.79.

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.¹ 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.²

The Act does not provide any guidelines as to how the compensation is to be measured. The High Court in Attorney-General v. Bobat³ has stated that where the power of compulsory acquisition is conferred by statute and the statute is silent as to the basis upon which com-

1. Ibid.

2. S.80.

3. 5 N.R.L.R. 501.

pensation 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 to 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 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; (f) 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 the 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 do 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.¹ The notice is required to state the area in which the rights are to be exercised and the date

1. S.74 (4).

of expiry of the mining right.

The requirement of 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 mining purposes.

The rights of the surface owner are somewhat curtailed, in that 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 use of the surface, e.g. where building structures are placed on the land or the land is cultivated so that the minerals there under cannot be worked or investigated. Most of these rights granted to the mining right holder are necessary for and incidental to successful searching for, producing and disposing of minerals.

2. Water rights of holders of mining rights

Mine workings by their very nature are prone to intercept or

interfere with water resources on a mining site. They may for instance intercept sub terranean waters either as an incident of the mining activities or as an internal dewatering. 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 or quality of the flow of the stream to the injury of any other such owner.

The water rights of the holder of a mining right in Zambia are to be exercised in conformity with the Water Act.¹ 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

1. See S.53 (1); and also Water Act, Chapter 312 of the Laws of Zambia.

regard to other users. The other users of water are entitled to complain against the 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 the Water Act.¹ 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.²

3. 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 in section 74 of the Act

1. Water Act, *ibid*, s.14.

2. S.53 (1) (9).

and is reinforced by the provisions relating to the compulsory acquisition of land for mining purposes where the owner of the surface refuses to have it purchased by the holder of a mining right.¹ 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.

The state and its mining officials clearly regard all mineral development and exploration as having preference over all other uses of the land such as 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 the highest economic use of the land with enormous benefits to the country.

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. Furthermore, 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

1. Ss. 79 and 80.

destroyed as the 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 interest 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.¹

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 denied at times. But it is suggested that before making an order, the Chief Mining Engineer should satisfy

1. If this were otherwise the exercise of mining right for even common minerals like sand would paralyse any other economic use of the land.

himself by way of inquiry that the order is necessary, and if satisfied that it is, 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. 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 recommended to the mining officials whether such 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.

3. Limitation on surface use

The mining rights surface uses are, however, limited by section 73 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 save to the minimum extent necessitated by the reasonable and proper conduct of the operations concerned. 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 have been interpreted in mining activities.

1. Use to bear reasonable relationship to mining

The first limitation section 73 has been interpreted to impose is

that the state or surface owner is enabled to intercede when in its or his judgment 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, he may not let houses to someone 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, usage and prudent operation come into play, they cannot be the determining factor.

It is submitted that it is justifiable that the state take this stand. When it grants a mining right it does not grant an interest in land as well and 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 of 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 anybody could construe a miner's surface rights otherwise.¹

ii. Use not to disturb other land users unreasonably

The second limitation Section 73 of the Act has been interpreted as imposing is that the holder of a mining right in the exercise of his surface rights 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 practices will depend on the facts of each case and any attempt to formulate a general definition here would be unpracticable.

As in any other instance of negligence one must apply the general rules to determine if a duty exists, if there was a breach of duty, and damage which resulted as a proximate result of such breach. It must be noted that whereas 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 the surface negligently

1. In some countries this is expressly provided for in the mining laws e.g. Botswana, see Mines and Minerals Act, supra, s.7 (3).

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 land rights.¹ 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 interests of the surface owner also implies that where there is an existing use by the surface owner of the surface which 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.

It is submitted 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 surface owner against the 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. That is considering the availability of other alternative methods,

1. This happened in the Mumbwa area with a prospecting team from Anglo-American Corporation Ltd. The prospectors removed the beacon cement.

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.¹

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 the enjoyment of his mining right. Though custom 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

1. 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 lessee to use a particular method of exploration, Pennington v. Colonial Pipeline Co. 260 F Supp. 643.

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 is 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 to have 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, although it seems from the case of Steward v. Lusaka Management Board,¹ 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 Pwllbach Colliery Company v. Woodman,² where a butcher sought an injunction in respect of a 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

1. 2 N.R.L.R. 141.

2. 1915 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 support at common law, see Dalton v. Angus (1881), 6 A.C. 791.

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.

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, and on private land the owner of the land may presumably remove excessive structures provided there is no breach of the peace, in the same way that at common law one can abate a nuisance by self-help.

4. Compensation to surface owner for damage to his interests

i. Liability for surface damage

Quite apart from the liability of a mining right holder for negligence, claims in respect of damage caused by his activities can also be based on section 76 of the Act. The relevant part of the 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 damage 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 to deal with as a mining dispute.¹

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 reasonable use of the surface.² But it does not confer on the surface right holder the right to stop the activities involved as is the case where damage is caused by a negligent activity. The liability is not based 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 have compensated the owners of the crops so removed.

ii. Measure of damages

The Act does not, however, give guide lines 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.

It still leaves unresolved the question of how the amount of

1. S.77.

2. Ibid.

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 straightforward 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 - caused by a flood due to mining excavation¹ 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, 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. In such cases the owner is deprived of some interest in the affected land either permanently or for some predetermined term. Its value can be ascertained with some certainty.

The case of a mining right holder causing surface damage is not 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

1. Such as the dispute between Moxon and the City Council of Kitwe 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.98.

time of the taking. On the other hand, in the case of mining rights activities, there is no divesting of the owner of the surface 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.

A claim for compensation by the surface owner does not arise with respect to a transaction whose efforts are completed in the past but on the contrary, does arise with respect to damages whose effect will continue into the future since the principles governing the fixing of compensation in expropriation cases do not apply.

Then 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 cases¹ 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. Marrapodi Trustees² without regard to any improvement or works that could be constructed 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 course of events it might within a reasonable period be applied. But as emphasised in Attorney-General v. Bobat³ the words "within a reasonable period" are important and they

1. E.g. Mordue v. The Dean and Chapter of Durham (1872), L.R. 8 C.P. 336.

2. 5 N.R.L.R. 416.

3. 5 N.R.L.R. 520.

exclude long term potentialities.

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 this 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 is submitted, is simply to make the non-payment of claims a ground for the suspension of the operation of mining rights.¹

(e) 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, that the problems of access to mineral land that arose under the previous mining legislation are unlikely to arise, and that mining areas are not kept with no development work going on and thereby preventing others from taking out the areas

1. 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).

involved, all of which developed under the pre-1969 Mining legislation as discussed in Chapter Six.

1. Advantages of the new system

The Act has succeeded to a very large extent in removing most of the anomalies of the previous legal regime and in increasing the state's capacity for preventing their recurrence. It now ensures 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 mineral exploration availability; it may change terms of exploration and other mining rights; it may change the operating requirements and ultimately it may terminate mining rights in circumstances where mining operations are not being carried out in the interests of the country.

On the other hand, it grants the miner the right to prospect over areas of sufficient size to enable him to select the sections of greatest 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 judgment. 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 to 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.

The great advantage to the state 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 middle men to the working mining company, has been completely avoided as the transfer of mining rights can be effected only with the approval of the state.

The system has, however, 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. This, however, had eventually happened even under the pre-1969 mining legislation, and it is an economic fact of life 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.

The geological reality in the country is also 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 overburden or by rock capping which an ordinary individual, from the angles both of technical competence and of 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 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 miners - for although they can get exemptions from expenditure obligations, the fact that it is only after application is cumbersome 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.

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.

2. 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.

Interest, of course, centred on areas on the Copperbelt; Mokambo was regarded by many as the most promising area since economically significant mineralization 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 Semberore. The majority of the inquiries were concerned with the prospects for copper mineralisation, but some also were interested in the potential for other metals.

Soon after the Act was passed, it is reported that Mitsui and Mitsubishi Shafi 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 Luaga 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 Romanian 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 a production of 15,000 tonnes of copper concentrates to be mined annually 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 and Roan Selection Trust Ltd. In the Eastern and Central Provinces, various companies, including Equitex, Petroleum Ltd. and De Beers Consolidated Ltd. have taken up prospecting licences. 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 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.¹

Some indication of the level of prospecting activity can be obtained from the proposed expenditures noted in the applications for prospecting and exploration licences, though there has been a definite slow-down in the past year because of the difficulties of the industry brought about by the current recession.

Largely, therefore, 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

1. The existing mines also continued to increase their production. See Mines Industrial Development Corporation, Zambia Mining Year Book, 1974.

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.

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. It is 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 this policy at all. All mining efforts seem to be geared towards maximum production possible of whatever mineral 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 by the turn of the century,¹ 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.² Quite

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1. The declared ore reserves of the Copperbelt are reported to total 745 million metric tons: 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.
 2. 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 Dualistic Society, 1961.

apart from the possibility of exhaustion, Zambia's folly in depending on its mineral wealth has been exposed over 1976 when low commodity prices have plunged the country into its worst economic crisis ever.¹

1. See Daniel, "Increasing Strain on Zambia's Copperbelt", The Guardian, 31st March, 1976, p.22.

CHAPTER 8

THE REQUIREMENT OF DOMESTIC PARTICIPATION
IN NEW MINING VENTURES

The Mines and Minerals Act¹ 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. This chapter looks at the background to this policy decision, the terms of participation, the objectives of the policy and the state's prospects of realising these objectives in practice.

(a) Background to the Policy

The policy of requiring domestic participation was announced in 1969² 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

1. Mines and Minerals Act, *supra*, s.20.

2. Kaunda, Towards Complete Independence, 1969, p.36.

registered mining location to be held by the registered holders on joint account with it in the proportion of two-thirds to the registered holder, and one-third to the British South Africa Company.¹ It exercised this interest at the time formal permission was requested to work for profit.²

The Zambian government, following the attainment of independence in 1964, virtually confined itself to increasing the tax revenues obtained from the mining companies and demanding that the existing companies Zambianise mining posts at all levels as rapidly as possible.³ 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,⁴ and also despite the fact that in 1964 the existing mining companies had offered the government minority participation in their mining ventures.⁵

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1. 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 percent 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 percent". See Letter from Secretary of the Company to the Colonial Secretary, 5th May, 1911, C.O. 417-507. Later this could be substituted for royalty payments, See Imperial Institute, The Mining Laws of the British Empire and of Foreign Countries, Northern Rhodesia, 1930, p.17.
 2. 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, 5th November, 1906, C.O.417-424.
 3. 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).
 4. U.N.I.E.C.A./F.A.O, Economic Survey Mission of the Economic Development of Zambia, 1964, p.39.
 5. Prain, Address to the National Affairs Association, Lusaka, 1964.

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.¹ And not unnaturally, there was also lack of confidence on the part of government in its own ability to manage such a large enterprise.

This policy change in 1969 was in fact largely due to the behaviour of foreign firms in Zambia, both mining and non-mining. While in 1953-1963 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, whereas the North remained a supplier of revenue from the copper mining industry and a market for manufactured goods.² It was not only the Southern Rhodesia industries which served Northern Rhodesia, but also those of South Africa.³ The major mining companies, for instance, are 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.

Most foreign firms, mining and non-mining, 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

1. 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.

2. The scale on which this was done was massive and it is estimated that Zambia lost well over 84 million Kwacha over the ten year period of federation. See U.N.I.E.C.A/F.A.O., Economic Survey Mission on the Economic Development of Zambia, 1964, p.36.

3. In 1964 Southern Rhodesia supplied 39 percent of all imports and South Africa a further 21 percent. See Central African Research-4, The Significance of Zambia's New Economic Programme, 1968, p.1.

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.¹ She has also been committed to reducing her dependence upon imports from South Africa. But 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; indeed some branches had little more than a nominal existence and were used to order imports from Britain which were off-loaded en route in Rhodesia to circumvent sanctions.²

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.³ Academic limitations were also severe; at the time of independence, Zambia had only 960 Africans with school certificate and less than 100 graduates.⁴ As a result, the mines

1. 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.

2. 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.

3. Central African Research - 4, supra, p.2.

4. U.N.I.E.C.A./F.A.O., Economic Survey Mission on the Economic Development of Zambia, supra, p.34.

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 board of the mining companies, there were two Zambians, one indigenous Zambian and one expatriate who had taken Zambian nationality.¹ Efforts to Zambianise in the five years since independence had been largely unsuccessful.²

EXPATRIATE LABOUR STRENGTH IN MINING INDUSTRY
1965-1969

Year	Average Strength	Engagements	Resignations	Displaced by Zambianisation
1965	7,035	902	1131	247
1966	5,981	1,213	1403	360
1967	5,378	1,011	1058	292
1968	4,845	1,088	1124	178
1969	4,727	947	1127	100

Source: Mining Year Book of Zambia, 1969. Most replacements of expatriates were in the personnel divisions of the mining companies and not 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.

1. 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., Annual Report, 1974. And yet government target was much higher, see Zambianisation Committee, Report Progress of Zambianisation, 1972.
2. An official inquiry in 1966, however, found no reason to doubt the sincerity 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, 11th February, 1974, p.1.

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.¹ 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 any profits while relying extensively on local borrowing. Quite apart from the fact that local borrowing is in conflict with the interests of the host state, it also means there will be 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.² Some resident companies purchasing merchandise from parent organisations abroad added as much as a third on to the cost price when making payments. This allowed them to remove capital at

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1. The contribution of manufacturing to gross 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 limitations imposed by the Rhodesian situation, see Central African Research - 4, supra, p.2.
 2. This led the government to limit the amount of dividends that could be externalialised to 50%, of profits see Kaunda, Zambia's Economic Revolution, 1968, p.7.

a still higher rate while at the same time increasing Zambia's cost of living. This behaviour did much to whip up feeling against foreign companies within the country. The major reason for the introduction of the policy of government participation is therefore to ensure that mining right holders operate within the framework of the overall economic and social goals of the country.

The policy is also borne out of a desire to ensure that the mining industry is not completely foreign owned and controlled - a desire widespread among developing countries, particularly in relation to extractive industries.¹ In 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. 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

1. 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 the 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 Law Journal, p.517.

a few local companies exploiting minerals such as mica and limestone.¹

The policy was first implemented in 1968 with regard to non-mining activities.² Two other precedents could be said to have been drawn on Zaire, a neighbour and a fellow member of the International Copper Organisation had taken similar moves in relation to its mining industry in 1966, as had Chile, another fellow member of the Copper Conference.³

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 is stated to be the creation of a favourable investment climate in order to encourage the private sector to increase its level of interest in exploiting the mineral potential of the country.⁴ It emphasises that legislation must always reflect this objective. There is 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.⁵

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1. United Nations, Report of the Commission of Permanent Sovereignty over Natural Wealth and Resources, 1962, p.170.
 2. Kaunda, Zambia's Economic Revolution, 1968, p.11.
 3. Members of the C.I.P.E.C. have undertaken to keep each other informed of important developments in their own mining industries and to co-operate in matters of mutual interest. For instance, they sometimes co-operate on measures aimed at improving the price of copper e.g. cutback on production, see Chairman's Statement, Nchanga Consolidated Copper Mines Ltd., 1975.
 4. Second National Development Plan, 1972, p.91. See also Kaunda in Industrial and Mining Corporation Ltd., Annual Report, 1974.
 5. 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.

In the early part it was largely British, American and South African capital which put mining on a sound footing and to this day has a significant interest in the existing mines, although now control rests in the state . And even if foreign investment were not to take the form of financial investment, at least in the beginning "know-how" would have to be contracted from abroad and financing arranged by borrowing from abroad if new mining projects were to be generated and successfully realised. Because of these and other benefits discussed later which the country derives from foreign capital it does not wish to nationalise the mines completely.

(b) 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 but instead legislates a government option to participate up to the extent of 51% of the equity shares on terms fixed by it. This option is in practice held by the Mines Industrial 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 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. 1

1. The decision to participate

The state does not have to participate, and has in fact refused participation in one case,² 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 the 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

1. 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.

2. This is the case of Maushi Copper Mines Ltd.

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.¹ 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 fails to act within six months of being required to exercise his option.²

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, as already pointed out, 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

1. See s.46 (1) (b) of Mines and Minerals Act, supra.

2. 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, to that person and where it is held by the state, to the Minister of Mines.

were to take place after the issue of prospecting or exploration licences.

2. 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 para-statal group should only be undertaken when there is no probability of activity by the private sector.¹ 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 right 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 band-wagon of 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.

It is understandable that the state should insist on minimising

1. Government of the Republic of Zambia, Second National Development Plan, supra, p.91.

the use of its funds in the high-risk period, as it would be difficult to justify, in a poor country, the expenditure of much-needed public revenue for what is to the public eye seemingly unproductive activities in the short-term, save in exceptional circumstances where prospecting has virtually dried up; which is not the case in Zambia.¹ Besides if government participates at low levels without technical back-up, it is not very helpful.

Moreover, it is not exactly true to state that when the government does not participate in prospecting directly it contributes nothing, since it 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 infrastructural costs though limited, and 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.²

But perhaps there is a need to re-examine this policy in the light of the need to improve the mining investment climate and in the light of better resource utilisation and the realisation that, with the acquisition by government of the natural resources in its country, the

1. For instance it is expected that the production of copper will increase by 39.5 percent from 645,300 metric tonnes in 1971 to 900,000 tons in 1976, which gives 6.8 percent average annual rate of growth for 1972-1976 as compared with .6 percent for the 1969-1971 period, see Government of the Republic of Zambia, Second National Development Plan, 1972, p.91.

2. See Woakes, Some Personal Notes on the Mining Industry in Zambia, 1972.

long-term goals is now much more significant than the short-term ones. 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 using 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 jointly 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 away from 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 in some cases 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. Mokambo Development Company has been established as a joint venture between Mines Industrial Development Corporation and Geomin of Romania.¹ The Company, incorporated in May 1974, is undertaking geological and mineral investigations into the Mokambo copper orebody situated near

1. Mines Industrial Development Corporation, Zambia Mining Year Book, 1974, p.11.

the Zambia-Zaire border. Secondly, there is Mines Development Corporation - Noranda which has been formed between the state corporation and Noranda Mines Limited of Canada.¹ The Company, incorporated on 29th July, 1974, is undertaking mineral prospecting in five licence areas in Central, Copperbelt, and North-Western provinces. Mines Industrial Development Corporation is carrying out its own prospecting on a small scale through its prospecting wing - Mindex.

3. 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 of 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 the exercise of the option as may be equal to such interest (not exceeding

1. Ibid.

51 per cent thereof) as the state may decide to acquire in the mining company.¹ In the second case the cash paid is to be ascertained by reference to the following formula:

$$x = \frac{y \times z}{100 - z}$$

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, whereupon the accounts are to be produced to the government within three months after the end of such agreed year.

It is important that the government pay 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 prospecting 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.

A problem has arisen at times with regard to exploration expenses.

1. See Annexure attached to prospecting licences.

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 for 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 occurrences generally, whereas at the exploration stage specific orebodies are investigated.

This problem 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 for 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 where as it does not reimburse miners whose prospecting programmes produce 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 as suggested in Chapter 7 a company wishing to utilise data could pay something, and also by the suggestion earlier on in this chapter for the establishment of a mining fund in that some of the money for prospecting might have been obtained at a reasonable rate of interest. Moreover it must be realised that in the end the company recovers the money when it starts to mine for profit as the tax laws allow for such expenditure to be recovered

as is discussed later.

Upon the payment of the government part in the expenses as calculated according to the formula outlined above, the government requires the mining right holder to make available to the government free of all encumbrances such number of the issued ordinary voting shares in the capital of the mining company being formed, as represents the percentage of voting rights in the whole 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.¹ In such cases the state tends to discount the reward due to the investor for originally finding a

1. 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.

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 projects.

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 to a tax on distributable profits. To the mining right holder the financial aspect of participation is more or less just a new form of taxation¹. The investor is interested in his net 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 expenditures on investment once the state has decided to participate.

(c) Objectives of the State and the Reaction of Mining Right Holders

The country aims to derive from this policy the well-known advantages of local equity participation in foreign ventures in

1. 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 deductible. See Nchanga Consolidated Copper Mines Ltd., Annual Report, 1974, p.9.

developing countries as cited by several writers on foreign investment.¹

1. Objectives 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 characterizes 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 company.² 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.³ 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

1. Friedmann and Beguin, Joint International Business Ventures in Developing Countries, 1971; p.2.

2. Ibid.

3. Nwogugu, The Legal Problems of Foreign Investment in Developing Countries, 1965, p.12.

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.

But 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 right 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 state 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 Rhodesian 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. owns 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 right holders tend to insist on the best and cheapest sources of supply. This was the problem over the development and the exploitation 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.

In theory participation of domestic capital in foreign enterprises is acknowledged to have positive advantages in the possibility of fair policy decisions [by] the enterprise, in that government directors sitting on the board are in a better position to scrutinize 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.

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.¹ 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 outflow of dividends. The burden of dividend 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 solo venture would have provided.

State participation also gives 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 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 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 scrutinize 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.

1. In 1974 quite apart from its tax receipts a dividend of K43.2 million was declared by the holding Company to the state. See Zambia Industrial and Mining Corporation Ltd., Directors' Report, 1974.

2. Reaction of miners to government participation

There has been a change in attitudes from ten years ago; so much so that now there is no doubt that the great majority of mining right holders within the country welcome and are prepared to undertake joint ventures with the government,¹ 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 MKushi Copper Mines, which several times invited government to take an interest in it, as a solution to its liquidity problems.²

Also the country presents certain political and economic risks, such as nationalisation, devaluation, foreign exchange blockage, depreciating currency, and excessive taxation, so that some mining right holders are often willing to accept domestic participation in order

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1. Mr. Oppenheimer has recently given some indication of the thinking of his group. In the course of his Statement to Shareholders at the 1974 Annual General Meeting he said: "No government likes its 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 so. The only alternative in such cases to full foreign ownership is for government to take a direct interest. In these circumstances we willingly accept 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".
 2. MKushi Mine has since closed. See Mining Mirror, 3rd October, 1975, p. 7.

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 geophysical 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 follow-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 invested. 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 orebodies 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 infrastructure costs.

Other positive benefits are 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, 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,¹ in that the state will be more reluctant to impose profit restrictions, import controls, or even expropriation

1. Friedman and Beguin, *supra*, p.385.

measures where local investors or itself is involved. And in that participation 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 and successful and still remains completely foreign.

State participation provides a helpful liaison with local government authorities and financial institutions as the local officials, particularly the 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 the function is better performed by local partners than by the investor company 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 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. Which when it is achieved, makes it easier for the local employee to integrate his loyalties, with a consequent reduction in tension and improved work performance.¹

3. 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.² 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. In 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.³

1. Ibid.

2. Carman, "Notes on Impediments to Mining Investment in the Developing World" (1975) 14 Bagauda Paper,

3. Friedman and Beguin, *supra*, p.388.

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.¹ 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 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.² 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 no body big enough to form a mining concern.

Some writers have suggested that the policy of requiring domestic

1. Ibid.

2. Ibid.

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.¹ Further, it has 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 repatriating part of the capital he would otherwise have used.

If this happened it would be unfortunate in that this is capital that would already have been attracted into the country. It is unlikely to happen in Zambia, since section 20 of the Mines and Minerals Act ensures that prospecting licences, the very first mining rights, are granted to those who accept the principle of state participation should minerals be discovered.

It must also be realised, as has been demonstrated by the examples 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 searching for minerals and would prefer to share their risks with the state.

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

1. Nwogugu, *supra*, p.13.

expensive and risky business, this is not always so. It is not necessary to go further than Mkushi Mine, which closed after the government 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 Lumwana licence area for instance, the companies have indicated that they might not have gone ahead without government equity participation. And more recently as pointed out earlier, 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.¹

Where the government indemnifies the company to the total amount spent on prospecting and exploration it still gains, it is submitted. 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 has already been stated, money

1. Bostock and Harvey, *supra*, p.203.

is not readily available once a deposit has been found.

The disincentive impact of government participation is nowadays minimal since direct government participation in mining ventures has spread both among developed¹ and developing mining countries, so that its disincentive impact can no longer be as serious as when its practice was limited. Quite apart from the fact 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.

Its disincentive impact is definitely not placed very high on the list of disincentives by most mining right 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, costs 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

1. Britain is now for instance insisting on participation before issuing on prospecting licences. See The Guardian, 28th May, 1976, p.1. Canada has government participation, see Drolet, Mining Legislation and Responsible Authorities, paper presented at the International Symposium of Technical Research in Mineralogy and Management of Mineral Patrimony, Orleans-Lasource, 1975, p.11.

which has the least prospect of discouraging any amount of much needed capital. In the final analysis, the answer to this problem is a question of balancing two evils. The cost of discouraging some mining investment may not be too high a price to pay for the control of the mining industry the government acquires, the direct government participation in profits which results, and the consequent reaction in the outflow of profits. It is as 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 and could well be greater than the amount of investment discouraged.¹ The key to the government policy should be fair play with the private sector over its terms of participation to minimise the disincentive effects of the policy.

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1. The Organisation of African Unity Conference of Heads of State at its 1973 meeting recognised this problem and resolved among other things to; defend vigorously, continually and jointly the African countries' inalienable sovereign rights and take concrete measures to regulate 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 28th 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 \$121,000 million to \$165,000 million. In that same period net outflow of U.S. direct investment fell short of income by over \$15,000 million. In other words overseas assets rose 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 figures are equally pertinent: In 1967, British private investment in the developing countries was £60 million whereas Britains earnings from past investments 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 Bostock and Harvey, *supra*, p.9.

(d) The Level of Equity Participation

As stated earlier, 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 to take minority or majority shares in a venture must depend on which of the two levels is more likely to reflect effective control.

1. 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 narrower terms can be achieved to some extent by limited participation of, say, 15% 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 in at board meetings receive reports and schedules, but the real decisions continue to be made at the head office of the parent company. Further than that it would only have the advantage that state directors could ensure that a company board was fully apprised of government's policies in respect to matters which came up for discussion.

Majority participation by a foreign company will entitle it to a virtual power of veto in respect of a wide range of actions and decisions of the joint venture, since its equity holding would entitle it to a majority of the seats on the board. Several major 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 of the mining company - the board of directors - and over matters which it is necessary to have a say in if government control of the industry is to be effective.

All decisions relating to finance and including the development of new mines 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 companies is one in which the state must exercise some control or have the opportunity to exercise meaningful control if any appreciable influence is to be exercised over the activities of mining companies in which it participates. For as a United Nations study on multinational companies¹ 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 participated only to the extent of less than 50%, it would also not be in control of the general meeting. Under the Companies Act of Zambia only three resolutions can be passed, a simple resolution, an extraordinary resolution, 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.² 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, in that with their equity participation they too may not be in control of the board of directors when they take less than

1. United Nations, Report on Multinational Corporations in World Development, 1976, p.46.

2. Companies Act, Chapter 686 of the Laws of Zambia, ss.12, 14, 15 and 112.

50% and they cannot change any major areas of policy in general meeting without the consent of the state should it take an amount of shares which makes it impossible to pass a resolution without its co-operation. These limitations, 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.

2. 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 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 indication that it will exercise its option in a mining venture for any share less than this.

A large number of mining right holders hesitate to agree to participation at over 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 demands should be resisted, as they go a long way towards negating government control and influence on mining activities; indeed it has recently terminated its previous management agreements.¹

1. For the announcement cancelling the management agreements, see Times of Zambia, 31st August, 1973, p.1.

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 although foreign investors are not concerned with staffing of the operational levels and encourage it because of the political pressures in favour of localisation and the lower cost of local 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.

It is preferable that the joint ventures should be self managing. The employment of management agreements could only be justified if there were such a thing as the "neutrality" of management, i.e. management systems were 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, and their employees owe their first loyalty to them.¹ It may be argued that their recommendations are

1. Sklar, supra, quoted some mining executives of Anglo-American Corporation as saying, "I feel as though I 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.

not imposed on their principles and that their job is only to offer a possible solution to the organisation. This argument assumes a technocratic board capable of perceiving alternatives, which, as will be pointed out later in this chapter, are 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 those concluded in 1969 between Anglo-American Corporation Ltd., Roan Selection Trust Ltd., on one hand and the government of Zambia on the other.

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
$\frac{3}{4}\%$ 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	2.228	1.960	2.521

This is disregarding the recruitment fee of 15% gross emoluments of a recruit in the first year of duty, if in service not less than six months.

Source: Calculated from figures of gross sales and profits in the Company's Annual Reports.

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 too in the criticism, that most expatriate employees, particularly at the higher levels, tend to be largely concerned with furthering their careers with the foreign company that is employing them.¹

3. Factors affecting control

The distinction between majority and minority participation may of course in certain circumstances be rather artificial as equity alone even when accompanied by joint management can not lead to effective control.

Participation needs to be backed up by government insistence on formalised planning. Only if management techniques such as corporate planning and management by objectives are used will the board be consulted on all major matters. These techniques are designed to see that a company has a policy clearly defined, after careful thought and consultation, for each facet of its operation and that this policy is known throughout the company and related to each employee's job. These techniques are particularly relevant in that they will show up the areas in which there is a conflict of interest between the partners and see that an explicit policy is laid down to cover them. At the moment the existing joint ventures have a very poor

1. For instance, since the termination of the management agreements the mines have experienced loss of senior staff, See Chairman's Report, Nchanga Consolidated Copper Mines Ltd., 1975.

working relationship with government. There are no accepted policy guide lines for state officials who have become board members for instance.

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 and of 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 government's objectives. For some local people, because of their training, are very sympathetic to the point of view of foreign companies.¹

The Zambian government is faring rather badly in this regard. 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 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 is reinforced by the high percentage

1. 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.

of failures in the technical faculties.

But the problem is more complex, board appointments are usually a contentious question, as political and other factors such as ethnic considerations seem to play significant roles.¹ 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 - frequently for political rather than technical reasons. Several cases can be cited of managing directors being moved three times in a year,² with the result that few of them have the opportunity to become familiar with their management tasks or conversant with the industry and its difficulties and consequently are rarely able to make rational judgements based on time tested operations. Their difficulties are increased too, by regular reorganisation of companies.

In one or two cases the government has appointed civil servants to the boards of directors of some mining companies.³ In practice this is unwise, because they 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

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1. Complaints by members of parliament are frequent that appointments are made on political grounds, see Times of Zambia, 28th January, 1976, p.1.
 2. For instance Mines Industrial Development Corporation, Managing Directorship changed hands three times in 1975 alone.
 3. 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.

unable to attend board meetings, being either 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 being a member of several boards, many more than he can cope with. In consequence his supervision and control diminishes considerably and his contribution becomes weak.

The need for directors who have mining experience cannot be over-emphasized. 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. 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.

4. 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.

Although it is the policy of the government to increase local employment, 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 the immigration of expatriates. The Immigration Department will not grant any entry permit to an expatriate unless the Ministry of Labour certifies that there are no local citizens 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.¹

The problem with this provision is that the Labour Ministry acts mostly on the recommendations of senior mining officials who are themselves expatriates, for after all only they are better placed to judge on questions of qualifications and experience as the local people at the Ministry of Labour are unable to grasp fully the scope and extent of the expertise that is required by the people to fill the jobs.

The other check could be the application of the tax on expatriates,² now applied to other categories of industry, to the mining industry. But this may be unsuitable for the reasons discussed in Chapter 9.

It is suggested that a measure additional to the one pertaining

1. Immigration and Deportation Act, Chapter 122 of the Laws of Zambia, ss. 18, 19, and 20.

2. See Selective Employment Tax Act, No.9 of 1975.

to control of immigration, could be taken. This could be done by creating a financial incentive to localisation of a different nature and one which does not create the same problems as the one above, by providing that when a company has been localised 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 and the use of resources that are located in more than one jurisdiction,¹ 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.²

An example of what is 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 outlaws transfer pricing methods and requires multinational companies to give wide ranging information

1. For a detailed discussion of this, see Vernon, Sovereignty at Bay: The Multinational Spread of United States Enterprises, 1971, p.265.

2. Companies Act, supra. All information relates to a company's domestic activities, see ss.120, 29 and 90.

about themselves including annual financial statements of profits and sales, investments, and numbers of employees on a geographical basis and the disclosure of a consolidated profit and loss account.¹ Although this can best be undertaken on an international basis a start can be made with some measures on an individual basis.

In the final analysis, however, the ultimate source of power of foreign companies is in their control over the process of technological change.² Even if Zambia purchased advanced machinery, it may well find itself backward in a space of ten years. This is also the primary vehicle, as observed earlier, for the acquisition of abnormal profits where they exist. They keep this power by keeping research and development at home. Zambian legislation should encourage foreign companies to conduct research in Zambia concerning their projects. This could be done by creating incentives such as exempting profits to be spent on research studies from any form of taxation.³

1. The Guardian, 22nd June, 1976, p.14.

2. The problem of technology is discussed at length in Kapalinsky, "Accumulation and the Transfer of Technology; Issues of Conflict and Mechanisms for the Exercise of Control" (1974) 80 Institute of Development Studies Discussion Paper, Sussex.

3. 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.

CHAPTER 9

MINING RIGHTS AND MINERAL TAXATION

Governments in most mining countries tend to exploit the fiscal capacity of mining right holders to the fullest extent, and this leads to 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

(a) 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

1. For the exploitation of mineral resources massive capital is needed e.g. Rhokana mine is to spend K5 million on the redeeming of Number one shaft from 240M to about 350M level. See Mining Mirror, 3rd October, 1975, p.3. Another good example are the construction costs of Otjase mine in Namibia which are reported to be K423 million, See Mining Mirror, 3rd October, 1975, p.4. In 1970 it was estimated that a minimum of K1,000 was required for every one ton increase in annual production of refined copper. See Bostock, Murray and Harvey, Anatomy of the Zambian Copper Nationalisation, An Occasional Paper by Maxwell Stamp (Africa) Ltd., 1970.

must be reviewed. The basic economic unit of the extractive industry is the mineral reserve. Pre-tax costs of development of a mine orebody include discovery of the orebody, acquisition of the rights to extract the resource, equipment for the mine, and extraction of the resource, and marketing the product. Factors which determine the cost of extracting the resource include the grade, size, shape, continuity, and depth from the surface of the resource, rock conditions and other impediments, and the rate of recovery.

A mining right 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 right 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 extraction profitable.

The break-even point determines the level of recovery. As that break-even point rises, a larger portion of reserves falls into waste, or 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, his present rate of recovery may be increased to allow more production usually. Fixed costs do not vary with the rate of recovery, but recur each year that the mine is operating, with high recurrent 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.

(b) The Basis of Taxation in Zambia

The basis of taxation in Zambia is income having its source in Zambia.¹ 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. It is 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.² It can be said that income is what capital produces e.g. if a mining right holder invests 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.

1. 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.

2. This lack of a definition is true of other countries as well. See, Spiro, "The Receipts or Accrual Basis of the South African Income Tax" (1973) 3 Comparative and International Law Journal of Southern Africa, p.199.

The question of source on the other hand 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 African income tax case of Millin v. C.I.R.¹ 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.² 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.³ This makes it plain that,

1. [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 commodities and its system of capital allowances is different.

2. Income Tax Act, *supra*, s.17.

3. *Ibid*, s.5.

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.¹

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 to tax or, alternatively, charge such income to tax in the charge year in which it may be realised.²

(c) The Pre-1970 Legislation

Before 1969 there were three main taxes on mining right holders in Zambia (a) the royalty, (b) the export tax and (c) the income tax.

1. 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 history. The royalty (regalia) is said to have been charged by Roman Emperors on the produce of all mines.³ In feudal times,

1. Ibid, s.5, uses the word "accrued", for all practical purposes it has the same meaning as "due to" or "entitled to".

2. The taxpayer must apply to the Commissioner of taxes to avail himself of this law. See s.16 of Income Tax Act, supra.

3. Collins, supra, p.A.22.

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. The royalty was generally also modified according to the circumstances of the mine, sometimes being wholly relinquished. The concept as observed in Chapter 5 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.¹

In Zambia until 1964, as explained previously the royalty was fixed by and was payable to the British South Africa Company.² Just before it was repealed the royalty was a levy of 13.5% on the price of copper less K16 per long ton produced.³ 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

1. Websters International Dictionary, 1973.

2. 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.

3. Prospecting Licence Condition No.14.

For some time largely because it proved to be very profitable in terms of actual government revenue. Most mining companies were by 1966 paying an average of £87.86 royalty per short ton and this brought in an appreciable amount of income for the state.¹ 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.²

The figure established by the royalty formula bore little relation to modern costs of production but was established in the 1930³ when costs were low.³ In 1966 the average cost of transport one item of production costs alone—was for instance £50 per ton.⁴ This is the cost from miner to customer. But royalty, being a tax on production, ignored costs. The government always received the same royalty share of each long ton of 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

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1. In 1966 for instance the mines paid a total sum of £37,324,126 in royalty payments alone. See Copper Service Bureau, Copperbelt of Zambia Mining Industry Year Book, 1966.
 2. Kaunda, Towards Complete Independence, Zambia 1969, p.35. The President remarked that "I do not remember any of the chairmen of the mining companies in their annual statements to their shareholders 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 Selection Trust Ltd. stated that it had been opposed to it for years, see Statement by the Chairman, August 22, 1969.
 3. Imperial Institute, Mineral Resources Departments, Mining Royalties & Rents in the British Empire, 1936, p.35.
 4. Mines Industrial Corporation, Mining Year Book of Zambia, 1974, p.35.

from the various mines of course vary tremendously in most aspects of production arising from differences in ores and several technical factors. Bancroft, for instance, has to drain 62.82 million gallons of water per day, whereas Chambishi drains 1.60 million gallons per day. Bancroft needs 1,053 thousand cubic feet of air whereas Chibuluma needs only 491 thousand.¹

The price used in calculating this tax was an average of eight prices on the London Metal Exchange at the time of production, though this frequently bore little relation to the prices reported as actually received by the companies and had risen beyond what it was when the royalty formula was fixed in the 1930s² as a comparison of two periods below shows.

AVERAGE YEAR PRICES PER LONG TON OF
COPPER (London Metal Exchange)

1965-1968		1947 - 1951	
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 Report of the Commission of permanent Sovereignty over natural wealth and Resources, United Nations, 1962, p.165.

1. Ibid, p.26.

2. 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.

The exchange price was very much higher than the actual price at which the mining companies made their sales.

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 K330.¹ 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. To this figure of K330, the Zambian average cost of K320 in the same year was very close. Zambia copper production costs included K46 a long ton in transport costs and they included royalties on the scale which existed in 1963 (averaging K48 per ton of copper making a total in the way of transport and royalties of K94 per ton).²

Furthermore, as an additional cost to 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 high cost mine like Bancroft, which made a loss of K9.18 per long ton in 1967 after paying K102.60 per long ton royalty.³ Any tax reduces the rate of return on an investment,

1. Prain, "Some Thoughts on Copper Production" Selected Papers 1963-1967, Roan Selection Trust, 1968, p.21.

2. Ibid.

3. Copperbelt of Zambia Mining Year Book, 1968, p. A mine could however have royalty remitted as did Broken Hill 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.

but a profit-oriented tax cannot eliminate a profit whereas a royalty could. Royalty also affected the recovery rate of minerals.¹ As an added cost to production it pushed the cost of marginal ores over the cut-off point, marginal ores were 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.

COPPER ROYALTY PAYMENT COMPARED WITH
ORE GRADES 1968

Year	Mine	Copper Subject to Royalty	Ore grade	Average royalty per ton
1968	Bancroft	55,919	3.40	81.84
	Chambishi	21,542	2.70	88.52
	Chibuluma	25,505	2.29	89.00
	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	89.11

Source: Copperbelt of Zambia Mining Year Book, 1969.

The royalty also was inequitable between mines in that it could and did

1. 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.

take a higher proportion of the profits of less profitable mines than it took of the profits of more profitable mines.¹ 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.

The insensitivity 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 K1,000 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 K1000 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.

With the rise in the cost of heavy machinery and other inputs required in the production of minerals, the royalty had the effect that, over a period of time, those mines which were previously profitable and where, because of high copper prices the mines still remained profitable, the royalty would have the effect of reducing their profit margin. The royalty, quite apart from its influence on profitability, also had an influence on other spheres of mining such as exploration since there would have been no point in pursuing any discovery of mineralisation below certain grades as they would be uneconomic to mine.

1. Between the highest and lowest production costs there is a variation of about K3 per long ton.

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. Bancroft is a high cost mine but has the highest grade while Luanshya with one of the lowest 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 production 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.¹

One way out of the dilemma of royalties is to abandon the idea that royalty rates should be uniform for all mines or any group of them, of a particular mineral within a country. But although this is entirely logical in economic terms, there are other reasons of a political and administrative nature, such as the arithmetical complication involved in administering different rates for different ores, 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.

2. Export tax

Another tax imposed was the export tax. This tax was charged,

1. E.g. in 1965 in the United States, mines with less than 1% grade showed an average cost of 17 cents per lb, those with 1-2% showed 22 cents per pound and those over 2% showed 24 cents per pound, Northern Miner Press Ltd., Mining Explained, 1968, p.191.

levied, and collected on every long ton of finished copper exported.¹ 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 wind-fall profits.² It was moderately successful in its main objective.³ 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 too, took no account of cost, so it simply added to the bad effects of the royalty.

3. 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.⁴ Thus the allowances deductible against profits were as for ordinary business. Miners were allowed to claim

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1. 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.
 2. 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 of substitution for copper by lower priced metals. E.g. in 1966 they were selling at £336 ton while the market price was £700 per ton. See Sklar, *supra*, p.53.
 3. In 1968 alone the mines paid £65,185,585, in export tax alone, see Copperbelt of Zambia Mining Year Book, 1969, p.34.
 4. Income Tax Proclamation, 1921.

for reasonable wear and tear of any machinery arising out of its use or employment in the trade.¹ 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.²

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.³ Also allowed were incidental expenditures, provided their sum total did not exceed K200,000 in any one year.⁴

Separate and distinct mining operations in non-contiguous mines were allowed deductions calculated separately according to the approved estimated life of each mine.⁵ But miners could elect to deduct such expenditures on income from a producing mine.⁶ At the cessation of mining operations the miner could deduct his unredeemed capital expenditures.⁷

1. Income Tax Proclamation ,1926, s.5.

2. Income Tax Act, 1966, *supra*, charging schedule.

3. Income Tax (Amendment) Act No.26 of 1970, s.19 (1).

4. *Ibid*, s.2 (1).

5. *Ibid*, s.20 (2).

6. *Ibid*, s.23.

7. *Ibid*, s.21 (1).

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 any of that income from which a deduction similar to a depletion allowance was not made in terms of the tax laws of that country.¹ 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.² The effect, however, of the export and royalty tax system which was discussed earlier, was to render these capital allowances somewhat ineffective and this can partly be seen in the resultant level of mining activity.

During the period 1964-1969 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. The table below shows that among the leading copper exporting countries, Zambia had the lowest projected rate of expansion.

1. Income Tax Act, *supra*, s.33.

2. *Ibid.*

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 Zambian 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.¹ Without denying that this was a major reason, it is important to point out that there are additional reasons. Though denied by the companies in 1968 it had long been their practice, as can be demonstrated, to distribute most of their disposable earnings as dividends abroad. This can be shown by examining the period 1945-1956 before the impact of the royalty system

1. 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., Statement by the Chairman, May 1968, p.4 and Roan Selection Trust Ltd., Statement by the Chairman, November 1968, p.7.

was severe because of the relatively low prices at the London Metal Exchange and before the export tax was ever introduced.

ACCOUNT OF MINING INDUSTRY SHOWING
INVESTMENTS AND DIVIDENDS 1945-1957

(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	14.9	-	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.

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.

(d) Post-1970 Legislation

1. Mineral tax

In 1969 to correspond with changes in the system of mining rights already discussed, the government changed the taxes affecting the mining right holders. Both the royalty and the export tax were abolished and a new tax was introduced - the mineral tax - which replaced them both.¹ 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 right 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.²

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 12% of its average equity in the prescribed period.³ The average equity is the sum total of the equity in each charge year.

Average income means the sum total of assessable income less

1. Mineral Tax Act, 1970.

2. Ibid. This was very nearly the same as the sum total of previous taxes except that the base changed.

3. Mineral Tax Act, supra, s.7.

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% as pointed out above.

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 argue that, since they can earn that level of profit in a bank at no risk, 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 bear income tax at 45% where the whole of the mineral tax is exempted. A mine with this exemption would thus 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 ratio 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 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.¹

1. See Daniel, *supra*, p.21.

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, and the percentage of profits paid in taxation is constant as the metal prices change since marginal and average rates of tax 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.

2. 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 companies are allowed according to the length of time a mine has been in production.¹ 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 started operating 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

1. 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.

which there are four, the expenditure allowed 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 expenditures 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. 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 buildings, works railway lines, equipment or land.¹ It includes shaft sinking, money

1. See Income Tax (Amendment) Act No.10 of 1975, s.19 (a).

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 production or during any period of non-production on preliminary surveys, borehole development or management, including any interest payable on loans used for mining purposes.¹ But 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 , not against royalty or export tax.

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, and in addition the 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, 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.

1. Ibid.

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.¹ 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 who prospect through a prospecting company in several areas at once and decide to form a mining company to exploit a mine in one of the areas, and continue prospecting in other areas through the prospecting company. If other investors are brought into the mining venture, this operation will only be attractive if the new investors compensate the prospecting investors for the tax advantage so conferred on the new mine, on the whole this is acknowledged to be quite an incentive to mining right holders.

The amount of capital effectively paid for by the government is increased if a mine is subsequently opened. Section 22 of the Income Tax (Amendment) Act of 1975 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 unamortized part of any pre-production expenditure and capital expenditure incurred during production would, for tax purposes, be increased by a factor

1. Ibid, s.23.

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.¹ This certainly encourages expansion projects in the industry; if the tax position were otherwise, with respect to contiguous mines, mining right holders would be reluctant to spend money derived from their mining operations to develop new mines. The effect of this provision is to treat non-contiguous mines as though they were part of existing mining operations where there is actual production.

3. 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 for giving no write-off on capital for,

1. Ibid, s.23.

say, manufacturing companies, it cannot be right for mining companies, in that their pattern of expenditure 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 related to expansion or modernization programmes.

Mines on the other hand are wasting assets with limited life spans and to operate them requires the constant outlay of large amounts on what could be termed "recurring capital expenditure". This arises from two main causes, namely (a) mining at constantly increasing depths which are also hotter and wetter and (b) diminishing ore grades which necessitate 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.

The problem the government finds is that capital allowances are likely to be easily inflated, especially if all machinery is imported. Since also 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. Since, however, the 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 and this tends ultimately to be reflected in wages, 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 recently 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.

Another problem is that the writing off of capital encourages capital intensive mines which drain foreign exchange, and also reduce available employment and can provide a way for companies to manipulate their costs to avoid tax. For example, if companies A and B each spend 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 argument encourages inefficiency. But very few mines are going to be efficient just to gain a tax advantage.

It can also be argued that mining technology does not allow much substitution between capital and labour,¹ but a great deal of evidence

1. Bostock and Harvey, Economic Independence and Zambian Copper, 1972, p.142.

has been given to show that the relative cost and efficiency of African labour, expatriate labour, and capital equipment has caused significant changes in their relative utilisation in the past,¹ although at the same time it has been shown that at times of relatively low African wages and high African labour efficiency technical processes in the mines fell behind other copper producers in the sense of not using the latest labour saving technology.²

4. Depletion allowance

Some mining right holders contend that a depletion allowance should be introduced. Such an allowance would have the effect of reducing the mining right income upon which tax is assessed. Conceptually, it is argued that depletion is necessary in view of the fact that minerals are exhaustible resources and that when it is exhausted, the investment in the mine will have next to no residual value.³ It would be a recognition that part of the income from the mine constitutes consumption of capital, and that therefore an allowance, analogous to the depreciation which is allowed against plant and equipment, should be established to reflect the gradual depletion of the orebody.⁴ Other proponents of the depletion allowance

1. Ibid.

2. Baldwin, Economic Development and Export Growth: A Study of Northern Rhodesia, 1920-1960, 1966, Chapter 4.

3. Reasons often advanced for depletion allowance can be found in Lynch v. Alsworth Stephens Company 267 U.S. 364.

4. 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.

take a different approach. They cite the risks attached to mining enterprises, especially in the early stages, and the large outlays that have to be made upon exploration and prospecting, much of which is certain to be abortive, as reasons why income from mining should be effectively taxed, through the depletion allowance, at lower rates than income from other types of endeavour.

It is submitted that under the Zambian system of mining tenure as described before this would be unnecessary. Since the mining right holder does not own the orebody, it is not his capital that is being depleted, it is 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 an 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 be 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 in business.

Moreover, in Zambia, it will have recovered the cost of its own capital by way of capital allowances. The expenditure on exploration, prospecting, and on proving the deposit and the preliminary expenditure undergone in establishing the mine are deductible allowances 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 a revenue allowance and the other a capital allowance - take care of two aspects of a mine's exhaustible nature.

(e) Tax Incentives and the Attraction of Mining Investment

1. The rate of taxation

As the preceding chapters show, the burdensome taxes on production have been abolished and the new mining right system has led to the release of large areas for prospecting that previously were not generally available. The state 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 are still

taking as much money out of the country as they can and are still disinclined to reinvest their profits at least to the extent that the government would like them to and rely instead on external borrowing for their projects.¹

PERFORMANCE OF THE COMPANIES - ROAN
CONSOLIDATED MINES LTD. (1970-1974)

(All figures in Million Kwacha)

	1970	1971	1972	1973	1974
Total Sales	178.0	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 distributions	39%	45%	48%	66%	56%

Source: Roan Consolidated Mines Ltd., Annual Reports

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1. At 31st March long-and short-term loans totalled 68.2 million for Nchanga Consolidated Copper Mines Ltd., 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 from retained profits. You may be interested to know that, right now, my government is being asked to approve external borrowing by the two companies of about K65 million", Times of Zambia, 31st August, 1973. p.1.

NCHANGA CONSOLIDATED MINES LTD
(1971-1974)

(All figures in million Kwacha)

	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 Mines Ltd., Annual Reports.

The mining rights holder cite the rate of taxation as the factor inhibiting development in that it reduces their liquidity.¹ 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.² The

1. Letter from Roan Consolidated Mines Ltd., to Minister of Industry, 5th June, 1974.

2. Oppenheimer has stated, "The change over to a taxation system based entirely on profits is a development which I very much welcome, though the new low grade combined rate of mineral and income tax at 73% is very high indeed; too high I would judge, to give adequate encouragement to the development of new low grade mining projects, Statement by the Chairman, Anglo-American Corporation, 1970."

present rate of tax means that 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 of return 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. Most governments regard mining as a very profitable industry and there is the feeling that minerals because of their exhaustible nature are a special commodity.¹ Most governments are aware that there is a limitation in time to the 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 point out that although the rate of tax is 73%, 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.

1. Papua-New Guinea has a rate of 70%. See Faber, "Boungainville ~~re-negotiated~~ - An analysis of the New Fiscal Terms" (1974) December, Mining Magazine, p.21.

PERCENTAGE OF PROFIT PAID AS TAX BY
MINING COMPANIES (1970-1974)

ROAN CONSOLIDATED MINES LTD.
(Million Kwacha)

Year	Profit before tax	Tax paid	%
1970	108.7	69.9	64.3
1971	84.9	36.1	42.52
1972	53.7	10.7	19.92
1973	75.7	28.5	37.65
1974	222.5	114.0	51.24%

NCHANGA CONSOLIDATED COPPER MINES LTD.

Year	Profit before tax	Tax Paid	%
1970	-	-	-
1971	204	107	52
1972	100	32	32
1973	100	23	23
1974	277	114	41%

Source: Figures calculated from Roan Consolidated Mines Ltd., and
Nchanga Consolidated Copper Mines Ltd., Annual Reports.

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, the government some years ago introduced the Pioneer Industries 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 similarly, 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 develops a new mine to recover not only the capital expenditure on the mine but also the rate of return free of tax.

2.. 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, as pointed out earlier, ignoring income in the case of minerals is more serious

than in the case of other industries because of their exhaustible nature, and in any case unnecessary tax holidays over a fixed period would only encourage earlier extraction of ore than other economic and technical factors dictate.

A high rate of taxation reduces both the 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.¹ From the mining investor's point of view, any increase in taxes corresponds to a charge in the profit rate of his investment - without doubt very important considerations to mining right 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.

The line of reasoning above 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 assuming that the

1. Fatorous, Government Guarantees To Foreign Investors, 1963, p.51.

only motivation of the investor, who is the sole decision-maker, is the maximization of profits, the investment decision becomes a simple mathematical formula: investors should maximize the difference between the discounted (known) stream of earnings and the discounted (known) stream 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 investments in foreign countries will be made when the rate of return abroad is higher than the rate of return in 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 entrepreneur, 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 or any investment at all.¹

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

1. Most studies are agreed that foreign investors say that tax concessions and pioneer status play only an insignificant part in bringing them to a country. See Aharoni, Foreign Investment Decision process, 1966, p.24.

concession is, therefore, 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.

Clearly, if the government spends a large part of its resources ^x 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 in that, owing to their differing initial capital allowances, depletion allowances, tax holiday periods, and, treatment of losses, income or profits taxes may even when the actual rates set in the budgets appear identical,

in reality affect mining rights holders differently. Within Africa, for instance, many governments have, without regard to the policies of other African countries, promulgated investments laws which offer competitive concessions in the hope of attracting investment,¹ thereby cancelling out each other's efforts.

Similar 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.

3 . Investment and cost saving measures

Theoretical calculations based on the traditional economic model point out that 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.

1. For some of the examples, see Akimuni, "A plea for the Harmonization of African Investment Laws" (1975) 19 Journal of African Law, p. 134.

It is submitted that a number of things can be done other than the mere granting of tax concessions. Since 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.¹ More recently, they have escalated in the aftermath of world-wide inflation.² 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 1600 to 2300 kilometres and are to a large extent beyond the capacity of the government to influence.³

But other cost-increasing factors are within the capacity of the government to influence.⁴ One such factor concerns infrastructure

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1. 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.
 2. 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.
 3. See Chairman's Statement, Nchanga Consolidated Copper Mines Ltd, 1975. In fact this problem even affects delivery of supplies to the mines with the result that the completion of capital projects and repairs to existing plants is delayed.
 4. Production costs include all operating costs and other costs, for example, administrative costs, depreciation, export taxes, duties, and interest 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 Lands and Mines, 1968.

costs. The mining right holder is expected to provide houses for employees, roads to areas of mining, his own water systems, and so on. These infra-structural costs are proving to be an increasingly 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.¹ 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.

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 to reduce the costs to the mining right 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

1. The amounts involved often run into millions of Kwacha see Mining Mirror, 3rd 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.

there is no insurance. Measures to offset costs of infrastructure will also encourage the prospecting and exploration of areas far away from the 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 increases costs. This is completely within the power of the government as its imposition is in the discretion of the Minister of Finance.¹ It would be understandable if there were a local source of machinery in that the duty would be aimed at forcing mining right holders to utilise the local source; but there is none.² 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 right holders have to engage in training programmes, which not only add to the cost of the investment but also cause delay in the completion of

1. See Customs and Exercise Act, Chapter 662 of the Laws of Zambia.

2. See Nchanga Consolidated Copper Mines Ltd., Chairman's Statement, 1975.

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 standard 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 1975¹ for such a measure can only not operate as a cost when it is justified by the local educational standards.

Another factor completely out of the control of any one country but which commodity producers can work together with consumers to solve is that severe fluctuations in the prices of minerals are likely to discourage investments in the development of new mines. High prices usually entail higher costs in the form of tax and wage increases that weigh heavily after prices have fallen.

4. 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

1. Selective Employment Tax Act, No.9 of 1975.

is placed very high on the list of disincentives by the majority of mining rights holders.

i. Exchange control

Exchange Control¹ 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. And it also renders difficult the employment of foreign technical or managerial personnel, in view of their limitations on the transfer of their salaries abroad.²

1. It is imposed by the Exchange Control Regulations 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, 1947, p.690. The International Monetary Fund allows member states to "exercise such controls as are 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 XLV, Section 2, Articles of Agreement of the International Monetary Fund.

2. See Fatouras *supra*, p.35 and Nwogugu, *supra*, 19.

Closely associated with this is withholding tax and restrictions on percentage of profits which can be exported.

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 true in mining because of the fact that the risks involved in actually finding a mineral and then profitably mining it are very high.

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 maximum annual limit. This could reduce money available for export while at the same time promoting the development and discovery of mineral resources.

ii. 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 right 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.¹ The 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.² The reaction of the companies affected is justified too in that no government should expect the respect of the industry if it attempts to

1. 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, 29th August, 1975, p.1.

2. The lawful redemption of Bonds and of loan 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.

change agreements unilaterally and overnight. Measures to restore confidence in investment are urgently needed.

The special responsibility of the state in this area is to create a favourable political climate and create and perpetuate an atmosphere of trust between itself and investors. It can only do this by committing itself as to the future, to promise with reasonable credence that arbitrary measures are not going to be taken once an investor has established his operations, that existing measures and agreements will continue to be respected or that should changes be desired, that investors will be compensated for any loss due to changes in such measures.

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, and that consequently they need not fear any major changes in local legal or political conditions that would be unfavourable to their interests. It must also always be borne in mind that Zambian problems are compounded by the fact that Zambia is in Africa. Most investors consider Africa too risky anyway and as a continent ruled by dictators who have no regard for law and do not keep promises. For them an investment in Zambia is fraught with unknown factors and 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 skills.

CONCLUSION

In the preceding chapters both the history of mining rights and the current legislation concerning mining rights in Zambia have been examined. In this legislation the state's objective is to encourage the exploration and development of the country's mineral resources. By doing this it hopes to add wealth to the economy, to generate tax revenues for the state and acquire foreign exchange. The legislation is also designed to encourage the use of methods that will minimise pollution, erosion, and damage to the surface, and encourage the maximum utilisation of the nation's resources through efficient planning and mining methods.

Thus the ultimate test of the effectiveness of these laws is and will continue to be whether or not they bring about the maximum desired recovery of the mineral resources, at a time when it is needed and at costs which the contemporary economy can afford. It will have to be asked, too, whether these laws encourage the discovery of new economic mineral deposits, thereby promoting the maximum addition to the resource base of the country's economy. This, as we have seen, requires the attraction of large amounts of risk capital, most of it from overseas, all of it in competition with the demands for capital for businesses that can assure high profits with less risk, and in competition with other nations which are bidding for the same capital for their own mineral development. The search for capital comes in circumstances in which, due to the general world-wide inflationary situation, it is advisable to take into account the fact that the discovery of new mineral deposits and their development will require considerably greater efforts, necessitate more effective

methods and entail greater financial burdens than hitherto.

From the colonial days the country inherited a system of mining rights and a system of taxation that inhibited the fullest possible exploration and development of the country's mineral resources. This has been corrected by the fairly enlightened and progressive 1969 Mines and Minerals Act. This on the whole gives greater incentive to the development and discovery of minerals, with the exception of certain anomalies indicated in the text, particularly in the area of taxation where there is urgent need to acknowledge the fact that levels of taxation which allow only sufficient profit to prevent the collapse of a mining company will prevent the attainment of the declared government objectives. Furthermore, although their effectiveness will largely depend on the efficiency of Zambian managerial and technical manpower, the provisions relating to domestic participation have laid in law a proper framework within which to secure control of mining activities.

But whether this will continue to be the case will depend on the state's willingness to modernise the legislation as time goes by and deals with the various factors which in changing circumstances will discourage investment in mining. And it will depend on the extent to which the legislation continues to give security as well as incentives to the mining investor. Though the mining companies would be perfectly justified in insisting on the existing legislation, they should be willing to contemplate the revision of the law from time to time so as to keep pace with the changes in the social and political reality underlying the legislation. This is particularly true at a time when the mining industry as a whole is passing through a difficult period due to changes in political attitudes to investment

in raw materials.

However, in devising new forms and new laws, it must be remembered that the optimum mineral development law is one which not only takes into account the interest of the state but also takes into account the interest of the miner. The essential needs of the mining right holders must always be kept in mind. These are simply that at the prospecting stage the mining right holder would like to be assured of the right to explore an area of a size reasonably sufficient for the purposes intended to enable the miner to decide, after prospecting, as to the areas to which he will later apply for some kind of an exclusive right; and the right to bring in freely technicians skilled in prospecting and to import the equipment without undue charges or duties, for such prospecting, and to export it again after it has served its purpose, where local resources are not available.

At the exploration stage, the mining right holder would like the exclusive right to occupy a defined area, and to explore for the minerals that interest him, using his own best business and technical judgment, so long as he conforms with the principles stated in the law, and he would like the assurance that, if he discovers minerals, he will have an exclusive right to develop and produce them, and to do so on terms known in advance of his making his exploration investment. He is entitled to an assurance that such changes as will inevitably occur should be on the basis of reason and fair play rather than caprice, taking into account the basic needs and objectives of both sides.

Lastly, at the production stage, the mining right holder would like security of tenure for a period long enough to recover the

investment plus a profit commensurate with the risk and the magnitude of the investment made in the search for, and development of, the mineral deposit. He wishes to enjoy the right to develop the resources he has discovered in accordance with his best business and technical judgment, the right to sell or dispose of the minerals produced and to retain the proceeds thereof, and the right to repatriate capital, profits, and equipment. He needs, too, guarantees against the abuse of the state's predominant position - such as the right to resort to an impartial tribunal to decide disputes between himself and the state, protection against arbitrary increases in the state's financial exactions and the fair negotiation and payment for the government equity participation when requested.

Otherwise, when the above considerations are ignored, the principal purposes of the mining legislation - the development of the country's mineral resources - can become obscured, and the labours yield only an ingenious piece of legislation that is essentially self defeating. The prime responsibility must lie with government, whose duty it is to maintain general economic stability, for it is only in this overall context that the intrinsic commercial soundness of the investment will not be jeopardised. The government has to avoid the familiar temptation in developing countries of finding a solution to their economic problems by shifting blame on to foreign companies with an eye to the popularity this may gain for the government in power. It is important always in these circumstances to remember that adventures in law breaking, though they may sometimes bring immediate gains, always in the long run work to the detriment of the law breaker.

It must always be borne in mind, no matter how difficult the

circumstances in which the government finds itself, that before a mining company makes an investment in a distant and underdeveloped country, in which that investment will remain for a long time, it requires some reassurance that the investment will enjoy reasonable safety and that the disagreements which will inevitably arise during that protracted period will be fairly resolved by an impartial tribunal and that it will not be subject to arbitrary, onerous, and frequent changes in the terms of its operation.

The mining investor gains some such assurance when there is in existence in the country an established political and judicial system with a reputation for fairness. If this spirit of fairness is present, it can be implemented through any number of legislative mechanisms. If it is absent, the words are hollow, and the law fails the purposes of its sponsors and the hopes of those who rely upon it.

But the existence of an established political and judicial system requires more than the words in the mining legislation or public statements by government officials about them in official pamphlets to investors. In this sensitive area, a good reputation in the area of actual practice is a highly valuable asset, for only this can reasonably indicate the extent of the probability of changes and the situation which will probably exist in the future.

The mining industry will only develop and contribute to achievement of national goals if the government always responds to these general principles of good mining legislation.

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