The Need for a Comprehensive Investment Policy in Zambia

CUTS International

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Any remaining omissions and mistakes in this report remain the responsibility of the research team.

Abbreviations

ARIPO	African Regional Industrial Property Organisation
BITs	Bilateral Investment Treaties
BoZ	Bank of Zambia
CCP	Competition and Consumer Protection
CCPC	Competition and Consumer Protection Commission
CEEC	Citizens Economic Empowerment Commission
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil Society Organisations
EBZ	Export Board of Zambia
ERB	Energy Regulation Board
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICSID	International Centre for Settlement of Investment Disputes

IPPAs	Investment Promotion and Protection Agreements
IPRs	Intellectual Property Rights
M&E	Monitoring & Evaluation
MAL	Ministry of Agriculture and Livestock
MCTI	Ministry of Commerce, Trade & Industry
MFA	Ministry of Foreign Affairs
NAPSA	National Pension Scheme Authority
OECD	Organisation for Economic Cooperation and Development
OSS	One Stop Shop
PACRA	Patents and Companies Registration Agency
PSDA	Private Sector Development Association
PSDPJC	Private Sector Development and Job Creation
SADC	Southern African Development Community
SEDB	Small Enterprises Development Board
SSA	Sub Saharan Africa
UNCITRAL	United Nations Commission of International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organisation

ZAM	Zambia Association of Manufactures
ZDA	Zambia Development Agency
ZEMA	Zambia Environmental Management Agency
ZIC	Zambia Investment Centre
ZICTA	Zambia Information and Communication Technology Authority
ZPA	Zambia Privatisation Agency
ZEPZA	Zambia Export Processing Zones Authority
ZPPA	Zambia Public Procurement Authority
ZRA	Zambia Revenue Authority

Foreword

This study focusses on the investment policy regime in the Zambian economy in general. This was an interesting exercise given that Zambia was looking to investments as a means for growth, job creation and poverty reduction. Therefore, any diagnosis that tries to point out where the flaws and strengths in the investment regime, is key in informing any policy decision. Therefore, Oxfam and CUTS should be felicitated for initiating this piece of research which is timely as the Ministry of Commerce, Trade & Industry (MCTI) has taken a board decision to officially develop an investment policy that should take into account the contemporary developments on investment.

The publication, by undertaking a systematic scoping of existing institutional, legal, policy and regulatory framework associated with investment in Zambia, validates old insights on investment, on one hand, and more importantly provides new insights, on the other. For example, the research and analysis in the publication confirms several widely-held views. As contained in other studies, that functions of the Zambia Development Agency (ZDA) were too many for one institution to handle and enforce and this was undermining the efficiency of the institution. In the same thought, the ZDA Act also places too much administrative work on ZDA, which impose time and costs to ZDA and prevent the institution from concentrating on its core responsibilities.

The study also establishes that there are few areas of concern regarding coherence of the investment framework and regulatory regime. Specific reference is made with respect to competition, agriculture, intellectual property rights, tax and the trade policy.

The publication also offers some provocative elements. For example, Zambia, like many countries, has signed various bilateral investment treaties (BITs) and double taxation treaties (DTTs) in the anticipation of an improved economy. Regarding these, the study establishes that although there are these attempts and others by ZDA to make investors liable to pledges through which their investment licences are given, the monitoring is not undertaken systematically, as there are no established procedures for reviewing the investment licences based on pledges.

More interestingly, the study reveals that sources of FDI to Zambia are not among the countries Zambia has signed BITs with. Such ambiguities between sources of investments and the signed treaties point to the need to have well-developed and well-framed agreements. Further, these ambiguities rests the debate on whether BITs are FDI-enhancing or not; and whether these provide the right environment for balancing rights and obligations of Zambia as a host country and those of FDI providers.

I must congratulate the research team for this valuable contribution to the literature on the status of Zambia's investment framework. It is hoped that observations and recommendations in this report will positively inform the investment policy development processes and other related processes on the subject.

Dailes Judge

Country Director
Oxfam in Zambia

Preface

This report reflects the findings of the review of the current investment framework in Zambia, with a particular focus on on the investment policy regime in the Zambian economy.

Investment in Zambia is governed by the Zambia Development Agency (ZDA) Act of 2006 alongside other provisions of legislation including, the Company Act, Competition Act, Lands Act etc. The Constitution of Zambia also includes provisions that guarantee promotion and protection of investment, and the Commercial, Trade and Industrial Policy of 2010 also has provisions on investment promotion.

Established by the ZDA Act, the ZDA is the key institution for investment in Zambia. It operates under the policy oversight of the Ministry of Commerce Trade & Industry (MCTI) and was established through the merger of five institutions that were separately engaged in investment facilitation and export promotion. There are also a significant number of other institutions that play different roles in investment regulation in Zambia and while the ZDA Act provides that there should be coordination between ZDA and other institutions, the Act does not explain how such coordination should take place. As such, there is a need to develop a coordinated approach for these institutions to work together to avoid unnecessary overlaps in the promotion and protection of investments.

One way of addressing the issue of overlaps by various institutions is by drawing up a codified investment policy however this has not gained much traction at the policy level. Although the MCTI has indicated that there is indeed a need for one there are still some reservations within the Ministry. One such reservation is that if an industrial policy that covers all issues regarding investment in different sectors is established, then an investment policy would not be necessary.

This report speaks to some of the issues that such an approach would have and concludes with suggestions and recommendations on how to improve the investment policy framework in Zambia, primarily by putting in place a codified and comprehensive investment policy. The report, however, leaves the door open on the debate on whether there is need for a standalone investment policy or whether indeed the investment policy should be embedded in the industrial policy.

Chenai Mukumba
Centre Coordinator

Executive Summary

The study conducts a review of the current investment framework, focussing on the investment policy regime in the Zambian economy. Investment, in general, is governed by the Zambia Development Agency Act of 2006 and through provisions of other legislations which include among other the Company Act, Competition Act, Lands Act etc. The Constitution of Zambia has also made express provisions which guarantee promotion and protection of investment.[1]

The Commercial, Trade and Industrial Policy of 2010 also has provisions on investment promotion although it does not go beyond investment promotion to other important areas related to investment, which a comprehensive investment policy would have covered. The key institution for investment in Zambia is the Zambia Development Agency (ZDA), established under the ZDA Act, through a merger of five institutions that were separately engaged in investment facilitation and export promotion. The ZDA operates under the policy oversight of the Ministry of Commerce Trade & Industry (MCTI).

The study establishes that the functions that are given to ZDA under its enabling Act are too many for one institution to handle and enforce. Under the Act, ZDA functions as an advisory body on investment and a regulator which can create

1. See Article: Article 20 and Article 16

potential areas of conflict. There are also other institutions that play different roles in investment regulation in Zambia. Investors need to satisfy these institutions before they are granted permission to invest. While the ZDA Act provides for the coordination between ZDA and other institutions, the Act has not gone much further in explaining how such coordination should take place. The ZDA Act also places too much administrative work on ZDA, which impose time and costs to ZDA. These responsibilities prevent the institution from concentrating on its core responsibilities.

The other institutions that have mandate in the investment framework are generally too many and this conjures the need for their efforts to be harmonised. Thus a coordinated approach among these institutions is required to eschew unnecessary overlaps in the promotion and protection of investments. One remedy towards addressing overlaps is having in place a codified investment policy. However, not much has been done towards coming up with an investment policy. The MCTI has indicated that despite having intentions to come up with an investment policy, there were still reservations within the Ministry. An exploration is still being made on whether the Industrial Policy that is being developed at the Ministry could cover investment-related exigencies. There is a feeling that if an industrial policy which covers all issues regarding investment in different sectors is established, then the investment policy would not be necessary. As this is being explored, there are key important issues that need to be underlined.

Firstly, Zambia requires investments that should leverage industrialisation which will grow the economy further. Investment is a means to industrialisation although it can also be affected by other factors. Therefore, combining investment and industrial dynamics need to be cautiously pursued as these are two broad concepts and combining them in one streamlined document provides a fertile ground to omit substantive issues.

The study also establishes that there are some few areas of concern regarding coherence of the investment framework and regulatory regime. Specific reference is made to respect to competition, agriculture, intellectual property right (IPR), tax and trade policy. Coherence with the tax policy is affected by the myriad of players with a role to play in tax incentives. This also calls for coordination among such agencies to ensure that tax incentives across sectors have common elements. There is also no direct communication between the Zambia Revenue Authority (ZRA) and ZDA as these two agencies communicate to each other through their respective ministries, which causes delays through government bureaucracy. Challenges with respect to coherence with the competition policy may only crop up with respect to the limited coordination between competition authorities, the ZDA and other institutions that promote investment. Given that both the competition policy and investment responsibilities are currently under the oversight of the MCTI, one would naturally expect the CCP Policy to also recognize the ZDA and how the institutions would coordinate their regulatory roles.

Under Section 6.1 of the Competition and Consumer Protection (CCP) policy, the institutions that are identified as important include Competition and Consumer Protection Commission (CCPC), sector regulators and the judiciary. There is no mention of the ZDA, even though the incentive promotion activities might also end up violating some competition principles. Thus, a comprehensive investment policy should try to make up for this omission.

Further the study establishes that although there are attempts by ZDA to make investors liable to pledges through which their investment licences are given, the monitoring is not undertaken systematically, as there are no established procedures for reviewing the investment licences based on pledges.

Section 74 of the ZDA Act implies that it relies on investors' good will to self-report the process to hold such an investor accountable if the business project fails to take off in Zambia. Examples in the agriculture sector, however, show that investors generally deviate from the original pledges that they would have made, with no mechanisms to ensure that the pledges that they would have made would be fulfilled. This also shows the need for more concrete and binding mechanisms to be put in place to hold investors accountable to their pledges.

The study also deals with how clear the policy is on the expected returns from foreign direct investment (FDI). The study acknowledges that, attracting FDI, which is the major goal of the current investment framework, is no guarantee for reaping beneficial effects of FDI. It establishes that weak market linkages upstream and downstream typically prevailing in Zambia may seriously constrain the growth enhancing effects FDI. This entails that the source of raw materials and intermediary products to capacitate such industries is non-existent and unpredictable in the domestic market.

Despite the weak market linkages domestically, it is clear that Zambia has been recording increase in FDI. This study makes an attempt to verify on whether the Bilateral Investment Treaties (BITs) Zambia has signed with other countries could be the major driver of FDI. The study reveals to the contrary that sources of FDI to Zambia are not among the countries Zambia has signed BITs with and this rests the debate on whether BITs are FDI enhancing or not.

The report concludes with suggestions and recommendations on how to improve the investment policy framework in Zambia. Having in place a codified and comprehensive investment policy is the main recommendation of this report. The report, however, leaves if open on the debate on whether there is need for a standalone investment policy or the investment policy should be embedded in the industrial policy. It however cautions on both dimensions.

1
Background

FDI has come to be widely considered as an engine of growth. Developing and transition economies have scored varying degrees of success in attracting FDI, largely depending on the extent to which they have set up the requisite 'enabling environment' for investment. Every country is a potential investment destination and actual investment flows have been seen to be dependent, to a large extent, on the country's attractiveness to investors.

This attractiveness is based on key determinants that affect the perceptions of investors as to whether or not they should invest in a country. Largely, it is the quality of a country's investment policies, and their implementation thereof, that directly influences decisions of investors to invest in an economy. This includes both domestic and foreign investors. Additionally, transparency, limited administrative processes, property protection and non-discrimination are core investment policy principles that underpin efforts to create a quality investment environment for all. More importantly, the level of development of the local market and availability of complementary factors of production are also key determinates of foreign investment.

Investment policy frameworks have been changing in response to changing economic realities, with inclusive growth and sustainable development emerging as key policy objectives.

Many studies have shown that greater openness to investment is associated with faster growth in the long run. Investment openness refers to both the extent of investment and the size of barriers to its flows. Generally, countries that increased openness have grown faster than countries that have remained less open to investment.

Zambia seems to be committed to having an investment policy framework that attracts meaningful investments. Besides, the watershed reforms of the 90s which, *inter alia*, saw the country embark on an aggressive privatisation, deregulation, trade liberalisation, removal of exchange control, etc., the government offered several fiscal incentives in the Investment Act of 1993, as amended in 1996 and 1998. The government continued to revise and offer other additional incentives through the Export Processing Zones Authority Act introduced in 2002. Presently, investment issues are governed by the ZDA Act of 2006, which has replaced the Investment Act of 1993. The ZDA Act, which is implemented by the ZDA, was conceived to amalgamate and unify different sets of laws and regulations governing investment and business and to provide a robust set of incentives that would attract meaningful investment.

In addition, when investors come, they make some pledges, some of which become the determining factors in awarding them the licence. However, in some cases, the investors do not fulfil pledges, which might bring the need for holding investors accountable for pledges they make through binding commitments. There is need to understand the current approach as far as holding investors accountable to their pledges is concerned. Despite these efforts, the current investment framework, both in terms of promotion and protection, seems fragmented. The legal and institutional regime is also fragmented, characterised by overlaps and absence of harmony.

In view of the discourse at international level, the need for a clear investment policy is imperative. The purpose of the investment policy is to document the investment plan and provide guidance for consistent, informed decision-making. It should be the central component of all advisory relationships, serving as a roadmap to investment success.

The growing importance of investment and the new opportunities and challenges associated with investment suggest the need for greater analysis of the changing landscape. It is within this context that this study was undertaken. It carries out a review of the current investment framework and based on best practices, it tries to establish whether the exiting policy, legal and institutional framework was robust enough to inform a workable and development-oriented investment policy for Zambia.

Objectives of the Study

The overall objective of the study is to assess the policy, legal and institutional framework for investment, and its potentiality to inform a workable and development-oriented investment policy for Zambia. Specific objectives of the study are to:

- understand the investment-relevant legal, policy and institutional landscape prevailing in Zambia, institutions that execute them and existing gaps as far as having a comprehensive investment framework for Zambia is concerned;
- identify steps which the government has taken to ensure that laws dealing with investments and investors and their implementation and enforcement are clear, coherent and transparent; and

- assess whether the current investment framework and legislation is sufficient enough to attract meaningful and development based investment.

Methodology

The study makes use largely of secondary data sources, although interviews were also held with investors and the government. It relied heavily on the review of previous studies that have been done on investment in Zambia, including the OECD 2012 review. Findings from previous studies also formed the basis of engagement of key informants, which included MCTI, ZDA and business associations [Zambia Association of Manufactures (ZAM) and Private Sector Development Association (PSDA)] and individual investors to understand their sentiments about the investment framework in Zambia. Structured questions were prepared for the purpose of the key informants interviews. Findings from the interviews as well as from secondary sources were then used to draw up this study.[2]

Study Limitations

The study was undertaken in a limited timeframe of one month. This meant that there was very little time to engage various stakeholders to authenticate findings of the desk review. The budgetary allocation was also minimal and could not allow expanding the scope of interviews with primary informants. However, despite these limitations, the report still presents key insights of the state of policy, institutional and legal framework governing investment in Zambia and areas which require attentions.

2. Note. The detailed methodology is annexed to this report

2
Policy and Institutional Framework for Investment in Zambia

Legal and Policy Framework

Although there are many sector-specific regulations and legislations that would govern investment in the respective sectors, investment in general is governed by the ZDA Act of 2006, which replaced the Investment Act, 1994. Investment is also regulated by provisions of the Company Act as well as by the Constitution of the Government of Zambia. While the repealing of the Investment Act was very instrumental in simplifying the legislative framework for investment by unifying different sets of laws and regulations governing investment and business, it has not entirely eliminated such duplication of legislative mandates. This would evidently be addressed by a comprehensive investment policy, through which all laws with a bearing on investment would be aligned.

The Commercial, Trade and Industrial Policy of 2010 also has provisions on investment promotion. Section 4 of the Policy is devoted to investment promotion, where various mechanisms are put in place to attract investors through the ZDA. The policy prescriptions that are provided for under the policy to attract investment include creating an enabling investment climate, reviewing the legal regime for investment promotion, improving infrastructure and conduct of public officers who interact with investors and providing investment incentives. It also provides for identification of investment opportunities in all parts of the country, reducing inconveniences and transactions costs for investors, reviewing relevant characteristics of Zambia as an investment destination. The policy also provides for multi-facility economic zones. However, it does not go beyond investment promotion to other important areas related to investment protection and harmonising associated institutional effort, which a comprehensive investment policy would have done.

This lack of a comprehensive and coherent investment policy can leave legislative loopholes and cause misunderstandings. Addressing this would greatly contribute to improving the regulatory framework for investment, a step Zambia should consider given its laudable private sector development achievements.

Within the context of investment attraction, the ZDA Act provides a wide range of investment incentives in the form of tax allowances, which, as comprehensively captured in OECD (2012), include the following:

- Implements machinery and plant used for farming, manufacturing or tourism qualify for wear and tear allowance of 50 percent of the cost per year in the first two years;
- Building used for manufacturing, mining or hotel qualify for wear and tear allowance of 10 percent of cost in first year and five percent of cost per year in subsequent years;
- Duty free importation of most capital equipment for the mining and agriculture sectors;

- Farm works allowance of 100 percent of expenditure on stumping, clearing, prevention of soil erosion, bore holes, aerial and geophysical surveys and water conservation;
- Development allowance of 10 percent of the cost of capital expenditure on growing of coffee, banana plants, citrus fruits or similar plants;
- Farm improvement allowance – capital expenditure incurred on farm improvement is allowable in the year of incurring the expenditure.
- Initial allowance of 10 percent on capital expenditure incurred on the construction or improvement of an industrial building is deductible;
- Foreign exchange losses of a capital nature incurred on borrowings used for the building and construction of an industrial or commercial building are tax deductible. This is intended to mitigate foreign exchange losses resulting from the volatility of the Zambian Kwacha for investors borrowing from foreign capital markets and earning in the local currency;
- Dividends declared by companies assembling motor vehicles, motor cycles and bicycles are exempt for the first five years of initial declaration of dividends; and
- The carrying forward of losses for tax purposes are restricted to five years, except for hydro and thermal power generation companies that are allowed up to 10 years.

The legal framework for investment also emanates from some international treaties and obligations. Zambia has signed a number of international conventions and treaties that facilitate investment protection. This includes the Avoidance of Double Taxation Treaties which the country has signed with most trading partners and other regional programmes and arrangements of the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) relating to the establishment of a Common Investment Area (OECD, 2012). Zambia's membership to the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission of International Trade Law (UNCITRAL) also implies that if the Zambian High Court fails to settle internal dispute settlement arrangements on investment, international arbitration would be used by the parties.

BITs have also emerged over the years as an alternative mechanism for investment protection to the failed Multilateral Agreement on Investment. BITs are part of the legal framework which set forth actionable standards of conduct that apply to governments in their treatment of investors. Historically, FDI has been a subject to contractual and political hazards (Oh and Fratianni, 2010).

BITs have been conceived to address this challenge and guarantee foreign investments of fair and equitable treatment, most favoured nation, full compensation in times of expropriation etc. Foreign investors are also sceptical towards the quality of domestic institutions and the enforceability of the law in developing countries like Zambia – thus BITs are seen as a guarantee which provides for certain standards of treatment outside the domestic judicial system (Neumayer and Laura, 2005).

This shift to bilateralism saw a surge BITs being signed by countries – a development which has spurred varying debate. Proponents argue that BITs encourage investments and strengthen the rule of law particularly in jurisdictions where court systems are weak or bias against foreigners. Others have contested this argument citing the relationship between BITs and FDI as ambiguous and that BITs are neither necessary nor sufficient to attract BITs (Carim, 2013).

The legal framework for signing of Investment Promotion and Protection Agreements (IPPAs) is Section 17(j) of the ZDA Act. Zambia has today signed 12 BITs with other countries since 1966. Five of the 12 have been ratified and more of these agreements are being negotiated (see Table 1).

Table 1: List of Countries Zambia has Signed and Ratified BITs with

Country	Date of Signing	Date of Ratification
1 Germany	1966	1972
2 Switzerland	1994	1995
3 China	1996	pending
4 Croatia	2000	pending
5 Egypt	2000	pending
6 Cuba	2000	pending
7 Belgo-Luxemburg Economic Union	2001	pending
8 France	2002	2014
9 Netherlands	2003	2014
10 Italy	2003	2014
11 Finland	2003	Pending
12 UK & Northern Ireland	2009	Pending

Source: MCTI 2015

Some of the BITs were signed as far back as the 90s but they have not yet been ratified. This entails that there is high level of caution employed in the negotiation process. Scrutiny ought to be a determining factor in order to harmonise the legislations of countries involved whilst still working within the confines of international law as well as the individual country's economic, social and political interests.

Some of the BITs are being renegotiated to align them to the contemporary investments needs and legislation in Zambia. The country has continued to engage in discussions with other countries for possibilities of entering into more BITs, and the country is at various stages with these negotiations (Table 2).

Table 2: List of Countries Zambia is Negotiating BITs with Zambia

No.	Country	Current Status
1	Mauritius	Negotiations successfully concluded, awaiting confirmation on proposed dates to sign the Agreement
2	Canada	80 percent of the text has been agreed upon by both parties; however a few issues are still pending
3	India	Comments on the Indian Template were sent to India through MFA. Zambia was still awaiting response
4	Russia	Comments on the Russian Template were sent through by Zambia through MFA. Still awaiting response
5	Burundi	Comments on the Burundi Template were sent through by Zambia through MFA. Still awaiting response
6	Turkey	Comments on the Burundi Template were sent through by Zambia through MFA. Still awaiting response

BITs continue to form part of the domestic legal architecture. The more BITs signed, the more investment protection framework is enhanced from investment-exporting countries' point of view. However, multiplicity of legal instruments exerts administrative pressure on the host country, which mostly occurs if there are incoherent provisions in the treaties. Discussing the extent to which BITs that have been signed or ratified have coherent provisions was outside the scope of the paper. However, this could be an important dimension for consideration in the subsequent research studies.

Specific emphasis could be paid on how the principles *(i.e. Most Favoured Nation, Fair and Equitable Treatment, Expropriation, Full Security and Protection, Dispute Settlement etc.)* are coherent from BIT to BIT and whether these provisions vertically relate to the supreme laws governing investment. Lack of such linkages would be a recipe to legal incoherence and a fertile ground for interpretation ambiguities.

Besides BITs, there are also other pieces of legislation and policies in Zambia that are instrumental in governing investment into the country. These include the Customs and Excise Act, VAT Act and other statutory instruments on tax, though which tax incentives are conducted. Other national strategic plan documents, such as the Sixth National Development Plan, the Industrialisation and Job Creation Strategy, the National Export Strategy and the Micro, Small and Medium Enterprise Development Policy are also some of the tools used in Zambia to attract investment.

Besides these policy and legal instruments, the arbitration and mediation systems are also providing alternative dispute settlement mechanisms for investment in Zambia. The Arbitration Act of 2000 gives parties to a contract to utilise this mechanism and to recognise and enforce this right. The Zambia Arbitration Act is also based on the UNCITRAL model and infuses international best practices (Mwangala, 1995). This enables foreign investors to utilise arbitration procedures of international standards or internationally recognised.

Further, it is also important to note that the Zambian justice systems provides for mediation under the high court (Amendment Rules of 1997). In this regard, the high court is encouraged to promote mediation where the case does not involve constitutional issues. (OECD, 2012).

Apart from arbitration and mediation, the Zambian justice system also provides mechanism for settling commercial or trade-related disputes. One such example is the Industrial Relations Court which was established to, among other things, addressing disputes arising from out of enforcement of contracts of employment. A lands tribunal also exist to address issues pertaining to land disputes. All these mechanisms allow for legally enforceable awards and appeals to also be lodged with the high court.[3]

In the narrative of these legal instruments, non-discrimination is the general principle underpinning them. The legal instruments and in specific, does not give preferential treatment on the basis of origin of the investor. Local and foreign are treated equally for access to incentives and other facilitation services. However, discrimination comes in in-terms if financial thresholds which have been set to access incentives.

For example, most local investors do not have investment capacity of US$500,000 to benefit from the prescribed incentives prescribed in the ZDA Act. In terms of expropriation, the ZDA Act includes specific clauses for protection of property rights and of investors. Under these provisions, investment can only be expropriated by an Act of

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3. *Ibid*

parliament relating to specific property expropriated. In such a situation, compensation must be made at a fair market value, convertible at the existing exchange rate.

Therefore, it is clear that investment promotion and protection is guaranteed in the existing legal and policy framework of Zambia. However, with the growing and changing investment climate and domestic demand, these legal instruments have proliferated, and this has resulted in fragmentation. Thus, there is need to codify the framework. A properly written investment policy can be critical in addressing this challenge and therefore minimise the legal liability.

Institutional Framework

The ZDA was established under the ZDA Act. It started its operations in 2007. The creation of ZDA went a long way in harmonising the roles of various institutions that have been playing similar roles and thus were duplicating efforts. ZDA is thus a merger of five institutions that were separately engaged in investment facilitation and export promotion: the Zambia Investment Centre (ZIC); the Export Board of Zambia (EBZ); the Zambia Privatisation Agency (ZPA); the Zambia Export Processing Zones Authority (ZEPZA); and the Small Enterprises Development Board (SEDB). The ZDA, which operates under the policy oversight of the MCTI, operates through three divisions: Investment Promotion and Privatisation; Exports Promotion and Market Development; and Micro and Small Enterprises.

ZDA was intended to operate as a one-stop-shop (OSS) and thus ensure that different roles carried out by other regulatory authorities that facilitate investment are harmonised. Section 5 of the ZDA Act gives the functions of the Act, which go well beyond investment promotion or protection. This is understandable, however, given that ZDA is a merger of various institutions whose roles have to be maintained. However, the functions can end up being too many for one institution, and the pursuing of such a myriad of mandates could end up diluting the investment functions from the entity.

Section 5(2) gives 26 functions of the ZDA, for which those related to investment include formulating investment promotion strategies; promoting and coordinating government policies on investment; facilitating investment in Zambia; assisting in securing from any State institution any permission, exemption, authorisation, licence, land and any other requirement for the purposes of establishing or operating a business enterprise in Zambia; and undertaking economic and sector studies and market surveys so as to identify investment opportunities.

The functions given to ZDA by the ZDA Act imply that it has dual functions; being an advisory body as well as also serving as a regulator. This entails that the institution, besides powers, has to approve and reject investment applications, provide advisory services to investors, and also monitor investor performance. This, according to Fumpa-Makano and Imakando, (2015) can create potential areas of conflict because it is not easy to perform both functions without being biased in one way or the other.

While the ZDA Act provides for the coordination between ZDA and other institutions, the Act has not gone much further in explaining how such coordination is to take place. Currently, there is a lot of understanding on the part of other government institutions on the need to involve ZDA, but there does not appear to be some legislation that actually makes such coordination mandatory on the part of other government institutions. This is also worsened by the fact that there is no representative of the Zambia Revenue Authority (ZRA) in the ZDA Board, despite tax incentives being at the core of their investment promotion roles.

The ZDA Act also places too much administrative work on ZDA, which include assisting an investor to access land for investment, immigration services, utilities such as electricity power, transport and communication services, services which investors do not pay for to the ZDA. This time and costs incurred by ZDA prevents it from concentrating on its core responsibilities, such as providing guidance to the investors, research on investor behaviour and preferences or monitoring investor performance (Fumpa-Makano and Imakando, 2015).

There are also other institutions that play different roles in investment regulation in Zambia. Thus, other institutions which investors need to satisfy before they are allowed to invest include Patents and Companies Registration Agency, National Pensions Scheme Authority and the ZRA. Depending on sector and nature of economic activity, added to these are additional institutions that need to be consulted, and these include the Citizens Economic Empowerment Commission (CEEC); the Immigration Department; and the Zambia Public Procurement Authority (ZPPA), Zambia Environmental Management Agency (ZEMA), the Bank of Zambia (BoZ), Zambia Information and Communication Technology Authority (ZICTA) and the Energy Regulation Board (ERB).

These institutions are generally too many and there is need for their efforts to be harmonised. Improvement in inter-agency coordination is needed and this should be supported by a robust co-ordinating mechanism. If this is absent, the efforts can result in duplication of interventions, for instance, concerning promotional efforts to attract investment and may create a vacuum in terms of private sector feedback mechanisms to the government. In addition, while each institution could be pursuing a mandate that is only unique to it, such that others might not be able to do so, there is need to ensure that there is a coordinated approach to ensure that what each institution does complements the effort of the others when it comes to investment. A comprehensive investment policy could perform the coordination role.

3
Steps to Institute a Comprehensive Investment Policy

Steps that had been undertaken can be linked to the establishment of an investment policy include the establishment of the Private Sector Development and Job Creation (PSDPJC) office under Cabinet Office, which facilitates reform programmes aimed at improving the investment and business climate. Although the government is yet to put in place a comprehensive investment policy, various issues which the policy would have handled have already been put in place.

Prior to the establishment of ZDA, the country was characterised by several challenges, most of which have already been rectified. These include administrative bureaucracy and unnecessary compliance costs that was arising from complex regulations and procedures. Thus, the government has since simplified the investment regime by aligning such regulations and procedures. The government also undertook legislative reforms that were aimed at removing some restrictive or discriminatory provisions that were deemed to be inconsistent with a liberalised market environment as well as simplifying the regime for joint ventures. This was done mostly under the ZDA Act and its amendments, which has helped harmonising regulations across all government ministries and agencies that have a mandate of facilitating investment.

The reforms undertaken over the years were also aimed at removing discretion in the treatment of investors, especially with respect to investment incentives such as tax relief, work permits and access to land. The Zambia investment framework has now removed such discretion by standardising incentives in per investment value as well as per sector. Investments in large-scale projects such as mining, power generation and infrastructure development also have special and negotiated tax incentives. To remove discretion in sector identification, priority sectors have also been identified, which include agriculture, tourism, mineral processing and other value-added manufacturing.

The ZDA Act has also included specific clauses for the protection of property rights of investors as explained above. Under Section 19 of the Act, investments can only be expropriated through an Act of Parliament where full compensation must be made at fair market value, convertible at the ruling exchange rate.

The investment framework in Zambia has also seen the establishment of four OSS for investment facilitation since 2010. The OSS in Lusaka comprises representatives from the Patents and Companies Registration Agency (PACRA), the ZRA, the National Pension Scheme Authority (NAPSA), and the CEEC. The OSS in Livingstone also includes representatives of the Immigration Department, the ZPPA and the Ministry of Tourism. The OSS in Chipata currently comprises PACRA and the CCPC. The OSS in Kitwe has also been made operational and currently consists PACRA

(UNCTAD, 2014). This has also made it faster for investors to access various regulatory approvals which are necessary for them to start their businesses.

The government's efforts aimed at reducing delays and attracting investment are also evident from some of the indicators in the country's ranking on doing business (Table 3). It takes five processes to register property, which is more efficient than the Sub-Saharan Africa (SSA) average of 6.3. It also takes an average of 45 days to complete the procedures for registering property, which is below the SSA average of 57.2 days.

Starting a business takes about five days when the average for SSA is 7.8 days. The strength of minority investors' protection index for Zambia is currently at 5.4, ahead of the SSA average of 4.6. Dealing with construction permits takes about 10 days when the SSA average is about 13.5 days. About seven and eight documents are required to export and import respectively when on average it takes about eight and nine documents respectively for the same documents in the SSA region.

However, there are also other areas which call for attention, especially due to the fact that Zambia is performing worse than the rest of the SSA region. It takes about 208 days, for example before one can finish dealing with construction permits in Zambia, when the Sub-Saharan, average is 155.7. Trading across borders is still a challenge, as it takes 51 days to export from Zambia when the general average time in SSA is 30.5 days. It also takes about 53 days to import into Zambia when the SSA average is 37.6.

Table 3: Zambia Investment-related Rankings from the Doing Business Report

	Zambia	Sub-Saharan Africa Average
1. Starting a Business		
Procedures (number)	*5*	*7.8*
Time (days)	*6.5*	*27.3*
2. Registering a Property		
Procedures (number)	*5*	*6.3*
Time (days)	*45*	*57.2*
3. Dealing with Construction permits		
Procedures (number)	*10*	*13.5*
Time (days)	*208*	*155.7*
4. Trading across borders		
Documents to export (number)	*7*	*8*
Documents to import	*8*	*9*
Time to export (days)	*51*	*30.5*
Time to import	*53*	*37.6*

Source: World Bank Doing Business, 2015

Despite these steps, not much has been done towards coming up with an investment policy. Interviews with the MCTI revealed that although government has been planning to come up with an investment policy for Zambia, with the concept papers having been done, the process had to be halted until the finalisation of the industrial policy. There are actually second thoughts regarding the need for an investment policy at policy level, as there is a feeling that if a codified industrial policy which covers all issues regarding investment in different sectors is established, then the investment policy would not be necessary. Currently, industrial policy is part of the Commercial, Trade and Industrial Policy which is under review and the intention is to delink the industrial policy component from the commercial and trade part. Therefore, the opinion to link industrial policy and investment generally hinges in a general belief that an industrial policy is able to capture all issues to do with investment. If investment and industrial policy are to be merged, there are key important issues that need to be underlined.

Firstly, Zambia requires investments that should leverage industrialisation which will grow the economy further. Investment is a means to industrialisation although it can also be affected by other factors. Therefore, combining investment and industrial dynamics need to be cautiously pursued as these are two broad concepts and combining them in one streamlined document provides a fertile ground to omit substantive issues as it was done in the Commercial Trade, and Industrial Policy.

Since the intention to have an industrial policy that covers investment has not been actualised, the policy that has attempted to cover investment elements is the Commercial, Trade and Industrial Policy. However, as already explained, the current Commercial, Trade and Industrial Policy is still far away from serving as an investment policy, given that it only focusses on narrow issues of investment promotion, yet investment policy also should also address protection dynamics of investment. A policy should have a hybrid of promotion and protection statements and a narrative of how these two dimensions should be pursued to contribute towards development.

More importantly, the policy ought to be clear on what benefits should accrue to the country from foreign investment. The current investment framework is more skewed towards increasing investment inflows and but it is important to understand that attracting FDI is no guarantee for reaping beneficial effects of FDI. Weak market linkages upstream and downstream typically prevailing in Zambia may seriously constrain the growth enhancing effects FDI. This entails that the source of raw materials and intermediary products to capacitate such industries is non-existent and unpredictable in the domestic market.

Zambia has reported high level of FDI over the years but the enclave character of FDI renders, it is unlikely that FDI contributes significantly to economic growth and poverty alleviation. It cannot be assumed that FDI will contribute to poverty reduction through fostering growth in the country. It would be folly to expect profit making firms, be it foreign- or locally-owned, to specifically address the development objectives of host country. This should be a mandate of the government. Investors can only contribute to the development objective of the country and a pre-condition for this to happen, the business environment ought to be conducive. These dynamics ought to be clearly covered and appreciated in a policy statement.

4
Transparency and Coherence of Investment Laws in Zambia

An investment regime that is transparent would go a long way in attracting development oriented investment compared to a regime where investment laws leave a lot of discretion on policymakers. Transparency of investment laws generally relates to the adequacy, accuracy, availability, and accessibility of information about the policies and activities of the participants on matters relevant to compliance and effectiveness (Maupin, 2013). This also includes information about the operation of the norms, rules, and procedures underlying the regime.

Thus, according to Maupin (2013), an international investment law can be deemed to be transparent if readily available, accessible, and useful information on the following issues is available to investors:

- information on the architecture of the investment regime;
- the existing stock of bilateral and regional investment treaties and domestic investment statutes;
- the investment treaty-making processes used in the treaties signed with developed and developing countries;

- the content of the laws and regulations imposed; and
- the dispute resolution mechanisms between the state and investors.

Based on the efforts that have been made so far, there is a high level of transparency in the investment regime, especially taking into cognisance these transparency factors. Under Section 73 of the ZDA Act, a register of all investors to whom licences, permits or certificates of registration have been issued and particulars of investors have to be developed. The register, which should also contain the conditions attached to each licence, has to be open for inspection by members of the public at all reasonable times at the ZDA offices (on payment of a fee however). Thus, information on the architecture of the investment regime is generally provided for, which is often one of the stumbling blocks towards transparency of investment.

Some concerns have been raised, however, with respect to transparency, especially regarding the investment incentives and adequate information being availed to investors about how to qualify (OECD, 2012). There are feelings therefore that transparency on the incentive schemes still needs enhancement. For example, while Section 54 of the ZDA Act gives powers to the Minister responsible for finance to make regulations on incentives on priority sectors or products, the ZDA Act does not provide guidance on the criteria used for classifying a sector or product as a priority area, neither does it define the length of time which these sectors and products would remain on the priority list. This creates subjectivity on the part of the Minister, as these could be based on recommendations from industry players (Fumpa-Makano and Imakando, 2015).

An investment regime also needs to be coherent by complimenting other policies that govern conduct and practices that are related to it. Coherence exists when there are no conflicting provisions with respect to other laws, which can lead to problems of fragmentation and forum shopping. Coherence becomes important in Zambia, given than not all foreign investments in Zambia are obliged to proceed through ZDA. Such other platforms thus should still be coherent with the general approach and objectives of ZDA.

As stipulated under the UNCTAD Investment Policy Framework for Sustainable development, coherence should be between investment policies and other policy areas geared towards overall development objectives. This includes other policies for the country's overall economic development and growth strategy – including human resource development, infrastructure, technology, enterprise development. The government should thus ensure that there is coordination at the earliest stages of policy design, as well as the involvement of relevant stakeholders when the investment policies as well as other complementary policies are being designed.

Coherence in investment frameworks is often looked at with respect to the country's competition, agriculture and international trade policy, policies governing IPRs, tax and policies that countries can introduce to empower local citizens. A discussion on each of these thus would be instrumental in revealing coherence.

One of the policies that have a direct bearing on investment is the competition policy. Most of the investors need to get prior approval from the CCPC, as such most investment is done through acquisition of existing companies or merging with local companies. Thus, the extent to which a competition policy of a country is coherent with investment attraction and promotion is also critical.

In Zambia, competition is regulated by the CCP Policy of 2009 and the CCP Act, 2010. The CCP Act is largely shaped by the CCP Policy. In terms of the objectives and approach, the CCP Policy and the CCP Act are both coherent with investment promotion and attraction objectives, as they are based on fair competition through the principle of easy entry into the market by removing structural barriers in all sectors of the economy, which act as impediments to business entry.

Challenges with respect to coherence with the competition policy may only crop up with respect to the limited coordination between competition authorities and the ZDA and other institutions that promote investment. Given that both the competition policy and investment responsibilities are currently under the oversight of the MCTI, one would naturally expect the CCP Policy to also recognise the ZDA and how the institutions would coordinate their regulatory roles.

Under Section 6.1 of the CCP Policy, institutions that are identified as important include CCPC, sector regulators and the judiciary. There is no mention of the ZDA, even though the incentive promotion activities might also end up violating some competition principles. Thus, a comprehensive investment policy should try to make up for this omission.

Issues on coherence with the agriculture policy can largely emanate from the roles of other institutions in the agriculture that have a role to play in agriculture investment. Under the National Agriculture Policy, the Ministry of Agriculture and Livestock (MAL) should lobby the Ministry of Finance and other stakeholders for budgetary provisions of incentives for agriculture investment, such as tax breaks and agricultural import/export incentives. The MAL would also play a role of a marketing agency in linking up potential agricultural investors with the ZDA and help disseminating information on investment opportunities and incentives. In terms of operations, agriculture sector investment that qualifies for incentives are generally coordinated through the ZDA, which shows some level of coherence in operations. This includes investment through the 'farm block' initiative, which was introduced in

2002 to commercialise agricultural land, open up rural areas and attract investors.

However, there are different ways through which investors can acquire land in Zambia, depending on whether the land is state or customary. For state land, they can contact ZDA, which would guide investors by pointing out available land that is ready for investment. In addition, potential investors can also approach existing owners of state land and negotiate on commercial basis for the transfer of the land (Nolte, 2013).

Investors can also end up owning customary land by approaching village headmen and chiefs directly in searching for land. For example, a recent study with the support from Oxfam on Indian investment in the agriculture sector actually establishes that Motherson, an agriculture investor, initially started the cement manufacturing industry before getting into agriculture in 2013 by leasing about 234 hectares of land at US$600 per ha by negotiating with the headman as well as the chief without being aware of any role of ZDA in the process.

As an attempt to ensure that investment in agriculture that is done through chiefs and headman is also regulated, the ZDA negotiates with chiefs for parcels of customary land for the purposes of attracting investment (Chu, 2014). This is also intended to ensure that there is some follow up mechanism by ZDA to ensure that the allocated land is used for its designated purposes. However, there is no stipulated policy to ensure that such a negotiation is always taking place. It is with this respect that the need for a more comprehensive investment policy comes up; activities of other informal institutions such as headman and chiefs that also have a role to play in investment have to be harmonised with those of formal institutions by policy.

There is generally a high level of coherence with the trade policy, especially given that Section 4 of the Commercial, Trade and Industrial Policy, which deals with investment promotion, acknowledges that the ZDA would be the vehicle through which all measures would be implemented. Thus, the policy does not create its own implementation platform which would be incoherent with the ZDA Act. In addition, priority sectors for investment which are given incentives are mostly implemented through the trade policy. A consultative process involving the private sector has been set up under the MCTI to ensure a continuous review of the impact of trade policies, regulations and administrative procedures on the competitiveness of the private sector. This is mostly in line with investment policy objectives.

There are instances, however, where some trade measures end up not being coherent with investment objectives. The engineering sector, for example, is one of the six sectors that have been prioritised and liable to receive incentives under investment promotion. However, when the government increased tariffs for a range of steel products in 2010, this increased the cost of imported steel for other manufacturers, mining and construction companies that depend on the importation of the steel products raw materials. This discouraged investment in the sector because of the higher production costs (OECD, 2012).

On IPRs, Zambia is a signatory to a number of international agreements on patents and intellectual property. These include the World Intellectual Property Organisation (WIPO); Paris Union; Bern Union; African Regional Industrial Property Organisation (ARIPO); and the Universal Copyright Convention of UNESCO. The country has thus put in place local laws which are generally adequate in protecting IPRs. The investment regime is generally coherent with the intellectual property laws. However, there are cases where the intellectual property regime is not fully enforced and end up discouraging investment.

Examples include the existence of cases of trademark infringement, especially for some packaged goods through copied or deceptive packaging in Zambia. In addition, the copyright protection is presently limited and does not cover products such as computer applications. Protection of property rights is also limited by insufficient law enforcement resources. This also discourages investment, especially for products where investors may feel not protected.

The tax policy in Zambia is now also influenced by the investment framework through the use of tax incentives to influence investment. The design and administration of a tax policy has a direct impact on returns on investment, which explains why the tax rate is mostly used as a tool to attract investment. The legislative framework of taxation in Zambia is provided for under the Income Tax Act Chapter 323, Vat Act Chapter 331 and the Customs and Excise Act Chapter 322 of the Laws of Zambia.

Currently, the level of coherence between the tax policy and the investment laws is generally high, since taxes are always adjusted as per specifications in incentives offered under the investment policy. However, taxation is now marked by multiple rates due to investment incentives and favourable treatment accorded to priority sectors. This could also discourage investment in non-prioritised sectors. Thus, while Zambia has undertaken significant efforts in addressing the tax burden for investors, more can still be done to increase its domestic resource mobilisation through simplification and unification of its tax structures (OECD, 2012).

The coherence with respect to tax is also affected by complications arising from the myriad of players with a role to play in tax incentives. Government agencies responsible for priority sectors targeted for investment, which include ministries of Mines, Agriculture, Tourism, Telecommunications, Transport and Health, also provide recommendations on sector-specific incentives for incorporation into the tax regime (Fumpa-Makano and Imakando, 2015).

This also calls for coordination among such agencies to ensure that tax incentives across sectors have common elements. Another area of concern is the weak coordination between ZDA, Ministry of Finance and ZRA. There is no direct communication between ZRA and ZDA as these two agencies communicate to each other through their respective ministries, which causes delays and reinforces red tape associated with government bureaucracy (Fumpa-Makano and Imakando, 2015).

This generally point out to the fact that although much ground has been covered in ensuring that there are tools and systems in place to promote investment, some complementary activities can once in a while be ignored in the process. While amending the primary laws regulating investment, such as the ZDA Act, or by developing an investment code according to international best practices would strengthen the regulatory environment and create more clarity within the legal framework (OECD, 2012), a comprehensive investment policy would be able to address the weaknesses.

A comprehensive investment policy, which harmonises all other allied regulations, seems the best option at the moment. This is especially under the current scenario where investors raised a concern about the investment policy in Zambia changing from government to government.

5
Accountability of Investors to Pledges

As already mentioned, investors with investment certificates issued by the ZDA as well as those with the government enjoy special tax incentives. While most of the incentives are based on sectors and size of the investment, others end up qualifying for incentives based on pledges that investors would have been made, which would be deemed beneficial to the Zambian economy. It is, therefore, important to ensure that there are always mechanisms to follow up on any pledges that investors might have made so as to hold them to account if they are not fulfilling them.

Under the current investment regime, registered investors are required to provide the ZDA with information on the implementation of investment projects. Thus, the law provides a platform for monitoring investment projects and assess whether the investment and employment pledges made by the companies are being realised. ZDA also holds formal consultations with investors on matters affecting investments, through meetings and other dialogue mechanisms. The platform also allows for measuring the extent to which the investment projects have impacted the domestic economy through contribution to employment creation, export earnings and Gross Domestic Product (GDP) (OECD, 2012).

Discussions with the MCTI also confirmed the existence of this framework. If an investor promised to provide a certain number of jobs, ZDA will revisit pledges and assess whether these jobs have indeed been created. Some officials from the MCTI are also part of the monitoring and evaluation (M&E) process. In addition, performance-based incentives are also given through monitoring of performance of companies that have signed IPPAs or development agreements with the Zambian government.

In practice, however, if this exercise is indeed undertaken,[4] it is not undertaken systematically, as there are no established procedures for reviewing the investment licenses based on pledges. Section 74 of the ZDA Act places the responsibility on the investor to report to ZDA if it faces any challenges in implementing the investment as stipulated on the license, permit or certificate which the investor obtained. This implies that ZDA relies on investors' good will to self-report the process to hold such an investor accountable if the business project fails to take off in Zambia (Fumpa-Makano and Imakando, 2015).

A good sector which gives an example on how liable investors are to their pledges is the agriculture sector. As reported in Chu (2013) Chayton Africa investment in Zambia in Mkushi was made on the promise that they intended to develop 10,000 ha of farmland, growing 60,000 tonnes of wheat, 45,000 tonnes of maize and 15,000 tonnes of soya per year. This was actually one of the basis on which the investment received buy-in from the Zambian government and the World Bank.

Chayton also promised a 'feed Africa' model, focussing on the ability to provide needed food to Zambian markets.

4. This study could not find any evidence that this has ever been done although ZDA insists that it carries out such monitoring

However, the investor later made a u-turn in terms of focus, changing the priority area into labour provision upon realising that it could not guarantee improved food availability and poverty alleviation (Chu, 2013). There have been no reports about attempts to hold the investor accountable to initial promises.

Although the ZDA indicated that they somehow hold investors accountable to pledges – statistics on pledges, especially with respect to jobs creation are generally self-reported by the investors – and there is no evidence that there is any enforceability with respect to the pledges. As a result, there does not appear to be any correlation in the size and type of investment (as revealed by sub-sector) and the number of jobs pledged, which seems to indicate that the figures are fairly arbitrary (Chu, 2014). It is reported that ZDA has already identified this as an area that requires attention, especially their monitoring framework on investment progress and realisation of pledges (Chu, 2014).

More revealing is a recent study by Caritas Zambia (2015), which was supported by Oxfam. It established a lot of misinformation about pledges that investors make to ZDA as a way of getting investment licences. For example, reports refer to a case in which an investor that was registered at ZDA as having investment in crop farming in Kitwe with an investment of US$12,450,000 and expected to employ 46 people, had turned out to be a construction company.

Some investors had obtained investment licences with employment pledges but have never started operating. A farm that had pledged to employ as many as 200 workers was only found to have employed 46 casual workers who work on contract basis and are currently waiting to sign new contracts. This is despite the fact that the investment displaced a coffee plantation which had about 1000 to 1500 workers working on a part time basis and about 250 permanent workers. The Caritas Zambia (2015) report thus shows that there are serious challenges with the current investment framework when it comes to ensuring that investors fulfill their pledges.

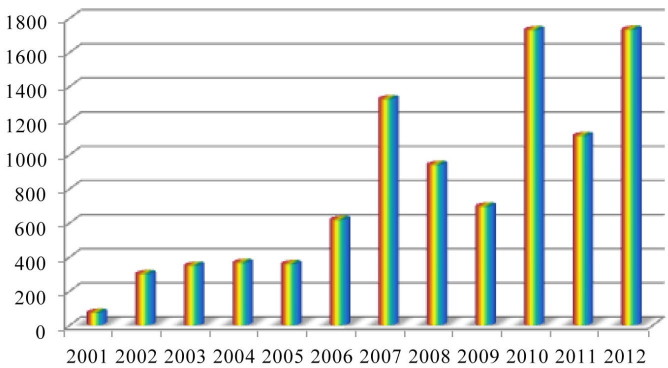
6
Sufficiency of the Current Investment Framework

Given that the primary motivation for the investment framework is to attract investment, the extent to which the framework has helped can be assessed based on the historical trend of FDI inflows into the country.

As has already been mentioned, the current legislation, the ZDA Act was enacted in 2006. Statistics on FDI inflows (Figure 1) actually show that there was an immediate impact of the enactment of the legislation, as FDI inflows increased by about 72.5 percent in 2006 from 2005. ZDA started operating in 2007, and there was an immediate impact as FDI inflows into Zambia increased from US$615.8mn to over US$1.3bn. That shows that the investment regime can actually be credited for positively influencing FDI flows. However, the fact that the rising trend in FDI flows could not be sustained over the years post 2007 is also worrisome, as this could signal that there are some areas which need attention. FDI inflows decreased in 2008 and 2009 before rising significantly in 2010.

However, while a positive trend in the volume of FDI is a good development for any economy, it is the ability to attract FDI in strategic areas of comparative advantage as per national development plans that contribute positive to economic growth and poverty alleviation. Zambia is dominated by FDI attraction in the extractive sector, which points to the need to have more investment in areas that enhance productivity, such as the manufacturing sector and the agriculture sector which would be consistent with sustainable development objectives.

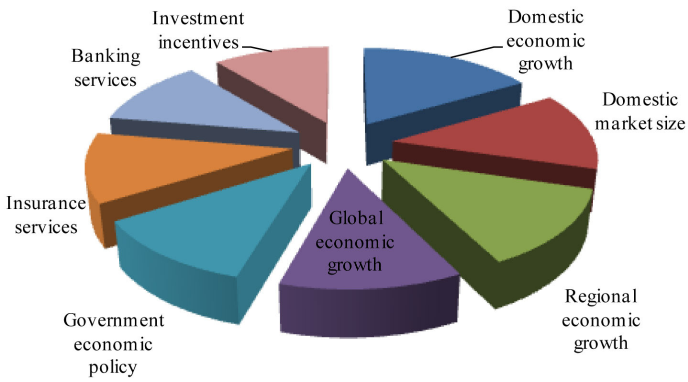
Figure 1: Zambia's FDI Inflows (US$mn), 2001-2012



Source: BoP Statistical Committee, Government of Zambia, 2013

While FDI generally depend on other issues besides incentives, these generally play a huge role in attracting investment. The 2013 Foreign Private Investment and Investor Perception Survey shows that factors such as economic growth, market size, government general economic policy, insurance and banking services actually play a larger role in influencing investors' decision to invest in Zambia (Figure 2). Thus the FDI inflows are also influenced by other factors outside the investment policy, which may be outside the control of ZDA.

Figure 2: Most Important Determinants of Investment Decisions for Zambia



Source: BoP Statistical Committee, Government of Zambia

However, the perception survey also revealed that incentives play a significant role in determining investment in the manufacturing sector (76 percent of the mining sector respondents), energy sector (60 percent) and mining (60 percent). Thus, the fact that these incentives are deemed costly to administer, invite corrupt practices on the part of tax administration officials with power to grant or deny them, with the process of registering with the ZDA to obtain incentives for investment in certain priority sectors being too lengthy at times, is also a cause for concern. Zambian investors also consider the thresholds that have been set for investors to become eligible for investment licenses and the incentives as being beyond the reach of most local investors. This appears to indicate that the whole scheme was designed in such a way that it only favours foreign business at the expense of local enterprises (OECD, 2012).

Given some of the attended challenges on investment attraction that go beyond the control of ZDA, the ZDA Act on its own cannot be regarded as the only tool to provide sufficient direction for ZDA to be the primary authority as Zambia's investment promotion agency. This also again calls in the need for a national investment policy on which ZDA and all institutions could base their mandates. Currently, promotional activities which are also aimed at investment attraction are also being carried out by other agencies whose mandate is not derived from the ZDA Act.

Interviews with the MCTI also confirmed this. The Ministry's view is that although the current legal framework for investment is sufficient to attract investment, there are still many things to be put in place to strengthen it. There are a number of policies that need to be harmonised to avoid inconsistencies such as the Income Tax Act, the Excise Duty Act and the Employment Act which the Ministry believes have provisions that need to be harmonised with the investment framework. Apart from MCTI, there are a number of other line ministries that undertake investment promotion activities, which also calls for harmonisation of such activities under one specific body (ZDA). This might not be achieved through the envisaged industrial policy, which MCTI believes might make the need for an investment policy redundant. Thus, a comprehensive national investment policy would address concerns on such duplication of efforts.

The current countries that Zambia is negotiating BITs or has signed BITs with are not the counties that have been bringing FDI into Zambia. According to ZDA, FDI flows by source country in 2012 indicate that Canada (US$724.3mn), South Africa (US$426.0mn), the Netherlands (US$262.2mn) and the UK (US$227.2mn) were major source countries of Zambia's FDI. This, in total, accounted for 94 percent. These are countries that have not yet been included in the BITs. This points out to the absence of a positive relationship between signing of BITs and attracting FDI.

Other country sources where FDI was received included, China (US$141.9mn), Nigeria (US$94.6mn), Singapore (US$62.0mn), Congo DRC (US$28.6mn) and France[5] (US$20.2mn). Again, these figures also show that there is no correlation between BITs signing and investment flows into Zambia. Efforts can still be made to ensure that the countries which are providing the bulk of FDI be among countries where BITs have been concluded to encourage more investment from such countries.

As already mentioned, the ZDA Act outlines about 26 functions of ZDA, which is just too broad for one entity. The ZDA is burdened with multiple tasks which may end up affecting its capacity to promote and facilitate investment in a focussed manner. A more streamlined mandate, where only issues on investment promotion are the priority, could enhance its monitoring role and efficiency. This also happens at a time when ZDA is not adequately funded. There is general lack of the manpower and financial resources required for the ZDA to perform its duty of effectively promoting investment in the country (OECD, 2012).

Although the one stop shop concept, where the Patents and Companies Registration Agency; the ZRA; the NAPSA; the CEEC; the Immigration Department; and the ZPPA would all operate under the auspices of ZDA on investment matters is noble, there is a general feeling among some investors and business associations that this is not actually operational. Interviews with some investors and business associations under this study revealed that some of them actually discovered that

5. France only concluded a BIT with Zambia recently in 2014

as opposed to the belief that there is now a 'OSS' for investment licence, all stages have to be completed with institutions concerned independently. However, there is a feeling that institutions are efficient and provide the clearance in a short time.

7
BackgroundPrinciples of a Good Investment Framework

Whilst there might be differences in opinion on whether Zambia needs a comprehensive investment policy or not, it is important that the adequacy of the current system be assessed based on the extent to which the current framework contains the basic tenets of a good investment framework. SADC is currently in the process of coming up with a regional investment policy framework and principles, which is now at an advanced stage. These would make a good point of reference in improving Zambia's investment framework.

The Investment Policy Framework for Sustainable Development, which was developed by UNCTAD, outlines 11 core principles for investment policymaking, which can be used in establishing an investment policy. Among 11, principles that can be of interest within the context of the current debate on whether an investment policy is needed include the following:

Table 4: UNCTAD Principles of a Good Investment Framework	
Main provisions of the principle	**Comment with respect to current situation Zambian**
Principle 1: Investment for sustainable development	
This recognise the need to promote investment not only for inclusive economic growth but also calls for the mainstreaming of sustainable development issues in investment policymaking. Thus, investment policies should prioritise investment in development that meets the needs of the present without compromising the ability of future generations to meet theirs	Whilst the current investment framework in Zambia generally promotes inclusive economic growth by giving incentives for investing in priority areas that have been deemed important for investment and job creation (thus helping in poverty eradication), there could also be concerns regarding the mainstreaming on sustainable development issues into the policy framework, especially in the mining sector, where resources are generally finite. The investment policy thus could also have sovereign wealth funding mechanisms, for example, where current investors could contribute for future generations to benefit for it to satisfy this principle fully
Principle 2: Policy coherence	
The ability to attract as well as benefit from investment also depends on the manner in which the investment framework and a host of	Zambia has achieved important progress in terms of strengthening its policy framework for investment over the past few years. But The country lacks a codified comprehensive and coherent policy. This has resulted in overlapping jurisdictions

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investment-related policy areas, ranging from tax to trade to environmental and labour market policies, interact with each other	This policy, therefore, should spell out the role of individual government departments and agencies in attracting investment. The roles should be clearly spelt out so as to bring about a unified approach to the implementation of investment policy. Currently, actions by individual institutions have often been uncoordinated and sometimes counter-productive, thereby reducing the effectiveness of government efforts to attract investment and benefit from it
Principle 3: Public governance and institutions	
The investment framework should also be able to address issues of the efficiency and effectiveness of government services, including accountability, predictability, clarity, transparency, fairness, rule of law, and the absence of corruption in investment transactions	While the current framework has embraced these elements within various pieces of legislation, there is still room for improvements, especially with regards to a participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all. The construction of an investment policy framework thus has to incorporate dialogue between public and private sector stakeholders, including companies, organised labour and non-governmental organisations More importantly, success and robustness of the policy will hinge on the extent to which the policy coordination and monitoring unit at cabinet office is engaged. Therefore, there is need to ensure that the unit participates at every level of formulation and decision making process, which should be fair,

Contd...

	transparent and inclusive. To complement this is the need for inclusive, coherent and comprehensive regulatory reform framework. This regulatory policy should provide strong guidance and benchmarks for action by officials and set out what investors can expect from government regarding regulation. Pursuing a policymaking process that is transparent (steps known and made available) and inclusive of key stakeholder views is also important Further, there is need to tighten roles of the Trade Promotion and Investment Promotion departments. As per general principle and intention of merging these two departments into one institution (the ZDA), it is important that these aim at working coherently as trade and investment belong to one compound
Principle 4: Dynamic policymaking	
Given that the landscape as well as the general investment environment is always changing, there is also need for investment policies to be flexible to adapt to changing circumstances	The ZDA Act, which is the main investment legislation, has undergone some amendments since its establishment in response to emerging issues. In addition, various other pieces of legislation, especially statutory instruments, have also been put in place to factor in different lines of thinking as well as new factors that would be emerging on the domestic and international scene. This shows that there is an element of continuous assessment of the effectiveness of investment instruments; hence the current framework is also dynamic

Contd...

Principle 5: Balanced rights and obligations	
Investment policies have to attract foreign investors even though a country also has to ensure that any negative social or environmental effects from such investments are minimised. There is, therefore, need for a balanced approach regarding the overall treatment of foreign investors. Investment regulations should also not be seen to be tilted in favour of foreign investors	As already explained, there are some aspects of the incentives regime that are seen to favour foreign investors at the expense of local investors in Zambia. However, in general, accountability of the foreign investors, especially with respect to social and environmental issues, is regulated with the general environmental and social protection laws in Zambia
Principle 7: Openness to investment	
This focusses on the extent to which the investment climate welcomes investors, with entry conditions and procedures being transparent and predictable. The principle also recognises that countries have legitimate reasons to limit openness to foreign investment, for instance in the context of their national development strategies or for national security reasons	Zambia is one of the most open investment destinations; hence the principle has generally been fulfilled within the current investment framework

8
Conclusion and Recommendations

Zambia has achieved important progress in terms of strengthening its policy framework for investment over the past few years. Zambia has in place profound institutional, legal and policy frameworks that continue to conjure both local and foreign investments. The existence of such an institutional, regulatory and legislative environment is pivotal for successful investment attraction. Without an enabling environment that allows the private sector to take autonomous business decisions with minimum regulatory or legal checks, the attractiveness of Zambia to investment would remain marginal. It is clear that the existing institutional, policy and regulatory framework is broad enough to inform the contours of a workable investment policy that contributes to the development aspirations of the country. Lack of coherence and coordination mechanism, which result in duplication of interventions, among institutions that work on investment issues could be the major compelling reason on the need for a codified investment policy.

Therefore, it is clear that current system can still do a lot more to facilitate increased investments. Therefore, the current path on economic and legal reforms is necessary. The surge in FDI over the years shows some level of response to the ensuing legal and policy framework. However, if this is to continue with more meaningful impact, there are some issues that still need to be put in place, which include the following:

- If the objective of wooing FDI in Zambia is industrialisation, then this has to be clearly stated by the MCTI. FDI can indeed leverage industrialisation. A coattail of both Industrial and Investment Policy is possible but for this to happen, there are preconditions that have to be addressed.

    - *The investment part in the Industrial Policy should be robust enough and capture contemporary interests and dynamics ensuing in the current investment regime. The investment policy should aim at making the ZDA Act the principle Act on investment and should provide a framework through which all laws with a bearing on investment would be aligned. Further, the Act should be the guiding yardstick on relationships with other Acts and policies and this will provide a coordination mechanism and eschew implementation incoherence and ambiguities*
    - *Investment and Industrial development are two broad concepts. Policies have to be concise and precise. Therefore, developing a coattail policy might mean compressing issues and in the process omitting very important elements. Therefore, the option of developing comprehensive standalone policies should not be overlooked. A link can still be established even in standalone policies*

- There is need to reform the investment policymaking process. The institutions concerned should encourage an inclusive process that takes on board the beneficiaries of investment policies. Yes private sector is considered in most cases through their associations, consumer participation however is not definite. The ultimate driver to businesses growth is level of consumption and therefore participation of consumer organisations and other interest groups is not a matter of choice but a moral obligation. Therefore, in-built inherent mechanism that involve guarantee participation of consumer organisations is required

- Zambia should demonstrate the importance of crafting a unique investment identity devoid of macro-economic uncertainty and this should be driven on the premise of inclusive economic governance where investment holders participate in policy making processes. Crafting a unique investment identity should also entail cataloguing investment potential sectors against their retain rate. Some sector have static and dynamic reaction to investments and there is need to understand these sectors from such a perspective and this will enable government have a well-defined forecast on investment retains.

- Business confidence in Zambia is highly sensitive to opaque regulations with overlapping and uncoordinated interest. Therefore, for Zambia to win the confidence of investors as a viable market to invest in, coherence and predictability in the regulatory environment is required.

- Although Zambia is competitive with regard to a raft of generic host country factors, this has not been sufficient enough to attract investment. Therefore, for Zambia to have any meaningful prospects of attracting foreign investment that positively impact on growth and poverty, deliberate efforts ought to be made to strengthen the upstream and downstream markets of such investments. As already exemplified, investments can only contribute to growth if there are functional domestic markets in place.

- It is evident that Zambia has introduced several incentive schemes for promoting investment. Recent literature questions whether these measures are indeed leveraging investments into the country. It is, therefore, recommended that fiscal incentives should have penalties for closure so that existing conditions are sufficiently stringent to discourage the footloose investors who appear only during the tax holiday and leave once that ends. Further, some concerns have been raised regarding the investment incentives and adequate information being availed to investors about how to qualify. This is despite Zambia being rated to have high level transparency system regarding incentives. Therefore, efforts should be made to improve the packaging and floor of information on incentives.

- It is clear that there is no OSS for investment facilitation despite the fact that this was the original intention in coming up with the ZDA. This is a fundamental issue that needs to be addressed with results. The possible path-way to achieving this is to define key performance parameters within ZDA as well as addressing the existing silent administrative bottlenecks that has halted the existence of the one stop shop.

- More research is required on the actual legal benefits BITs bring to the current investment framework and whether these BITs are coherent in their content. Lack of coherence in the provisions might entail lack of balance in the legal provisions and intern might result in interpretation ambiguities.

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Annexure

Background

FDI has come to be widely considered as an engine of growth. Developing and transition economies have scored varying degrees of success in attracting FDI, largely depending on the extent to which they have set up the requisite ‘enabling environment’ for investment. Every country is a potential investment destination and actual investment flows have been seen to be dependent, to a large extent, on the country’s attractiveness to investors and investor institutions. This attractiveness is based on certain determinants affecting the perceptions of investors as to whether or not they should invest in a country.

Largely, it is the quality of a country’s investment policies, and implementation thereof, that directly influences the decisions of investors to invest in an economy. This includes both domestic and foreign investors. Additionally, transparency, property protection and non-discrimination are core investment policy principles that underpin efforts to create a quality investment environment for all.

Zambia seems to be committed to having an investment policy framework that attracts meaningful investments. Besides watershed reforms of the 90s which, *inter alia,* saw the country embark on an aggressive privatisation, de-regulation, trade liberalisation, removal of exchange control, etc., the government offered several fiscal incentives in the Investment Act of 1993, as amended in 1996 and 1998. The government continued to revise and offer other additional incentives through the Export Processing Zones Authority Act introduced in 2002. Presently, investment issues are governed by the ZDA Act of 2006, which has replaced the Investment Act of 1993. The ZDA Act, which is implemented by the ZDA, was conceived to amalgamate and unify different sets of laws and regulations governing investment and business and to provide a robust set of incentives that would attract meaningful investment.

Similarly, OECD has over the years been conducting investment policy reviews and Zambia has been a country of focus. The last review was conducted in 2012. The review acknowledges some of the achievements in improving the business and investment climate which have been made over the past years. Alas, the report also highlights weaknesses which require attention. Lack of a complete and coherent investment policy is cited as one challenge.

Secondly, the mandate of the ZDA, drawn from the ZDA Act, was seen to be ambitiously broad and was stretching the institution's ability to deliver as the agency was burdened with multiple tasks. The report further gives recommendations to addressing these weaknesses in the regulatory framework. It recommends on the need to continue streamlining the business licensing regime, strengthening the ZDA investment promotion and facilitation mandate to mention but a few. It also recommends the need to develop a harmonised national investment policy.

In view of this, the study will carry out a comprehensive review of the current investment framework. The study is two pronged due to the limited time frame given. It will firstly;

focus on the investment policy regime in the Zambian economy in general in the first phase. The proposed study would assess the extent that the various investment policy review concerns have been taken on board and ascertain the impact, where possible, of the policy changes made pursuant to the review. Based on past experiences as well as best practices, the study would try to establish the form that the contours of a workable and development oriented investment policy for Zambia could take.

And secondly, the second phase of the study will look at how the investment framework relates with other sectors, specifically the agriculture sector. For the agriculture sector, the scoping study would focus on interrogating the policy, legal and overall agriculture investment framework, with a view to gaining insight into the concerns that have already been discussed.

Objectives

The overall objective of the study is to assess the policy, legal and institutional framework for investment, and its potentiality to inform a workable and development oriented investment policy for Zambia. Other intermediate objectives of the study are to:

Specific objectives

- understand the investment-relevant legal, policy and institutional landscape prevailing by identifying their similarities, gaps and institutions that execute them in order to inform the steps for coming up with a consolidated investment policy for Zambia. This will include reviewing the following among others:

  - o Political economy surrounding inter-agency and ministerial coordination with regard to investment promotion and management in Zambia
  - o Policy consistency between ZDA's mandate and other government agencies and ministries in relation to FDI

- identify what steps the government has taken to ensure laws dealing with investments and investors and their implementation and enforcement are clear, coherent and transparent:
  - o understand the level of coherence between the existing supreme investment legal framework and BITs Zambia has signed and whether these BITs form a better source of a strengthen investment legal regime in Zambia
  - o ascertain the extent to which investors are held accountable to their pledges, on which incentives and tax holidays are based

- access whether the current investment framework and legislation is sufficient enough to attract meaningful and development based investment, and if not, what additional measures need to be put in place to ensure that such is attained:
  - o interrogate existing system(s) in place for monitoring companies in relation to incentives provided and licenses acquired by the companies (i.e. as part of assessing contract enforcement and transparency of contracts)

Methodology

The study will make use of both primary and secondary data sources. Primary data will be drawn from the targeted interviews while secondary data from desk research which will involve reviewing documents, studies, policy as well as legal documents obtained from the government institutions. This will provide a solid and credible evidence base that can inform policy, advocacy and or awareness raising actions that maximise the contribution of improving the social and economic landscape of Zambia.

The study will rely heavily on the review of previous studies that have been done on investment in Zambia, including the OECD 2012 review which has already been discussed. Work on investment in general will also include looking at OXAFAM studies that have been done by through Caritas Zambia and independent consultants. These studies would form the background and basis for facts that have already been established, for which analysis and assessment on possible correction measures would be the main focus of this study.

Findings from the previous studies would also form the basis of engagement of key informants, which include government, regulatory institutions and firms that have invested in the sector (including potential investors and those who had registered intent but are yet to invest in the country).

Structured questions would be prepared for the purpose of the key informants interviews. Such key informants would include ZDA, the MCTI, private sector and civil society organisations (CSOs) that have been lobbying for reforms in the sector and the actual and potential investors in the economy.

Given that the study has a myriad of objectives, which might not necessarily be achieved through the same activities, the following is a description of an objective-specific methodology that would be employed to ensure that all objectives are attained in the study.

To understand the investment-relevant legal, policy and institutional landscape prevailing by identifying their similarities, gaps and institutions that execute them in order to inform the steps for coming up with a consolidated investment policy for Zambia

While the need for a consolidated investment policy for Zambia has already been identified, it is important to establish measures that have already been taken to have this done so as to ensure that future activities following this study would leverage on the momentum. This includes steps by both the government and other stakeholders who have an interest in investment issues in Zambia. Although literature review would also provide some insights into steps that have been done, detailed interviews with all key stakeholders (government, ZDA and CSOs who have been lobbying in the area) would be used to identify all the steps.

Assess whether steps are able to address political economy issues surrounding inter-agency and ministerial coordination with regard to investment promotion and management in Zambia

This would generally rely on findings from both interviews and literature review, which would help reveal whether policy consistency between ZDAs mandate and other government agencies and ministries in relation to FDI are being taken cognisance of. Gaps and correction measures would also be suggested, based on best practices as well as views of the institutions and government to ensure that country specific political economy issues are also factored.

Identifying steps the government has taken to ensure the laws dealing with investments and investors and their *implementation and enforcement are clear, coherent and transparent*

This would involve an understanding of the level of coherence between the existing supreme investment legal framework and the BITs Zambia has signed and whether these BITs form a better source of a strengthen investment legal regime in Zambia. A selected number of BITs Zambia has signed with other countries will be analysed for purposes of understanding how coherent and consistency these are.

Secondly, the relationship (if any) of these BITs with the ZDA act will be assessed to understand whether there is any legal relationship. Information for this would be obtained from literature review on previous concerns raised by investors regarding the investment legal framework as well as interviews with legal institutions dealing with investment issues. The Ministry of Justice would also be interviewed to ascertain whether they agree with the issues raised and whether there have been steps to take corrective measures.

Ascertaining the extent to which investors are held accountable to their pledges, on which incentives and tax holidays are based

Most investment licences are given based on pledges and promises that the investor would have made concerning the beneficial effects to the economy. However, most of pledges never materialise. Identify the challenges that have already been reported on why pledges made by investors are not being monitored. The study would explore how such monitoring could have been done and establish, through interviews with firms, why they could not live to pledges they made. Through interviews with ZDA and the responsible government Ministry, the study would ascertain whether there are any systems in place to ensure that investors are made liable to their pledges. The study would also use the information as the basis for suggesting possible mechanisms through which this could be done or enhanced if such a mechanism exists.

Assessing whether the current investment framework and legislation is sufficient enough to attract meaningful- and development-based investment

This would involve a legal and policy analysis of the existing system in place for ZDA to be able to attract and ensure development-oriented investment. This would also involve the transparency of the whole process and suggesting additional measures that need to be put in place to ensure that investment create development.

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