

1-1-1977

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Recommended Citation

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THE REQUIREMENT OF DOMESTIC PARTICIPATION IN NEW MINING VENTURES IN ZAMBIA

*Muna Ndulo**

The Mines and Minerals Act¹ makes domestic participation a mandatory pre-condition for the establishment of any mining enterprise by a foreign investor, and the law fixes the conditions of the requisite domestic capital participation. This Article looks at the background of this policy decision, the terms of participation, the objectives of the policy, and the state's prospects of realising these objectives in practice.

I. BACKGROUND TO THE POLICY

The policy of requiring participation was announced in 1969² and was subsequently incorporated into the Mines and Minerals Act in the same year. It is not a novel provision in the context of the history of mining activities in Zambia. In the early period of mining in Zambia the British South Africa Company required two-thirds of every registered mining location to be held by the registered holders on joint account and one-third by the British South Africa Company.³ It exercised this interest at the time formal permission was requested to work for profit.⁴

The Zambian government, following the attainment of independence in 1964, virtually confined itself to an increase in tax revenues obtained from the mining companies by demanding that the existing companies Zambianise mining posts at all levels as rapidly as possible.⁵ This was despite a 1963 United Nations Economic Com-

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¹ Mines and Minerals Act, 1976, No. 33, § 20.

² KAUNDA, *TOWARDS COMPLETE INDEPENDENCE* 36 (1969).

³ See Letter from Secretary of the Company to the Colonial Secretary, May 5, 1911, C.O. 417-507. Later this could be substituted for royalty payments. See IMPERIAL INSTITUTE, *THE MINING LAWS OF THE BRITISH EMPIRE AND OF FOREIGN COUNTRIES, NORTHERN RHODESIA* 17 (1930).

⁴ The requirement was unpopular among miners who complained that it made it impossible to procure capital for many propositions which would otherwise attract capital by their intrinsic merit, and that, where investors were prepared to invest their capital subject to the condition, it resulted in an undue inflation of the capital and in consequent repetition of mining propositions. See Letter of High Commissioner to the Colonial Secretary, November 5, 1969, C.O. 417-424.

⁵ The year after independence, an export tax was introduced and the income tax rate was

mission recommendation that in view of the significance of the industry in the economy of the country, the government should have direct participation,⁶ and also despite the fact that in 1964 the existing mining companies had offered the government minority participation in their mining ventures.⁷

The government's attitude can be attributed to the fact that soon after independence there was general insecurity on the part of mining companies and their workers. As a result, it did not want to take measures which might have increased the insecurity.⁸ And not unnaturally, there was also lack of confidence on the part of government in its own ability to manage such a large enterprise.

This policy change in 1969 was in fact largely due to the behaviour of foreign firms in Zambia, both mining and non-mining. While in 1953-1963 the country was still a British protectorate and a member of the Federation of Rhodesia and Nyasaland, the tendency was for secondary industry in the Federal Sector to be concentrated in Southern Rhodesia, whereas the North remained a supplier of revenue for the copper mining industry and a market for manufactured goods.⁹ It was not only the Southern Rhodesian industries which served Northern Rhodesia, but also those of South Africa.¹⁰ The major mining companies, for instance, were subsidiary companies of South African mining houses. It had been the custom over many years for the Zambian subsidiaries to be administered from the South.

Most foreign firms, mining and non-mining, looked to South Africa for supplies, and stock was brought up from Southern Rhodesia or South Africa as needed. After the Unilateral Declaration of Independence in Rhodesia the companies went on as before, although it became increasingly contrary to government policy, especially as Zambia responded to the United Nations call to impose sanctions

increased. See Copper Export Tax Act, 1966, and Taxes Charging and Amendment Act, 1965, § 19(2).

⁶ U.N.I.E.C.A./F.A.O., Economic Survey Mission of the Economic Development of Zambia 39, U.N. Doc. E/CN.14/302 (1964) [hereinafter cited as U.N. Economic Survey].

⁷ Prain, Address to the National Affairs Association, Lusaka, 1964.

⁸ The government attributed its lack of action to the fact that the mines were too big. See KAUNDA, ZAMBIA'S ECONOMIC REVOLUTION 50 (1968) [hereinafter cited as KAUNDA].

⁹ The scale on which this was done was massive and it is estimated that Zambia lost well over 84 million Kwacha over the ten year period of federation (one Kwacha equals US \$1.22 as of 1976). See U.N. Economic Survey, *supra* note 6, at 36.

¹⁰ In 1964 Southern Rhodesia supplied 39 percent of all imports and South Africa a further 21 percent. See CENTRAL AFRICAN RESEARCH - 4, THE SIGNIFICANCE OF ZAMBIA'S NEW ECONOMIC PROGRAMME 1 (1968) [hereinafter cited as CENTRAL AFRICAN RESEARCH - 4].

on Rhodesia.¹¹ She had also been committed to reducing her dependence upon imports from South Africa. But many companies appeared unwilling to seek alternative sources of supply of goods in East Africa or elsewhere despite government requests. A marked reluctance to set up genuine separate company structures in Zambia was also apparent; indeed some branches had little more than a nominal existence and were used to order imports from Britain which were off-loaded en route to Rhodesia to circumvent sanctions.¹²

Allied to these economic consequences were political side effects. Africans could find little opportunity to acquire managerial or technical expertise. During the colonial period it was impossible for them to obtain loan capital on the terms granted to Europeans and various legal restrictions prevented them from advancing beyond certain levels. For example, until 1960 Africans were barred from becoming apprentices.¹³ Academic limitations were also severe; at the time of independence, Zambia had only 960 Africans with school certificates and less than 100 graduates.¹⁴ As a result, the mines were staffed at senior levels totally by expatriates. In 1969, of the employees of the mining companies operating in the country, 40,000 were Zambians (mostly unskilled) and about 7,000 expatriates were in skilled jobs. On the board of the mining companies, there were two Zambians, one indigenous Zambian and one expatriate who had taken Zambian nationality.¹⁵ Efforts to Zambianise in the five years since independence had been largely unsuccessful,¹⁶ as shown in the following chart.

¹¹ *Id.* at 2; for example, coke from Wankie had to be replaced for mining use at great cost with supplies from Germany. See *Zambian Economic Survey*, AFRICAN DEVELOPMENT, October 1973, at 13.

¹² Republic of Zambia, Commission of Inquiry, *Report of the Tribunal on Detainees*, (1967). This report revealed many practices that were going on and showed that there was general sympathy among the white population to Rhodesia's point of view.

¹³ CENTRAL AFRICAN RESEARCH - 4, *supra* note 10, at 2.

¹⁴ U.N. Economic Survey *supra* note 6, at 34.

¹⁵ CENTRAL AFRICAN RESEARCH - 4, *supra* note 10, at 2.

The situation has not changed much with government participation in existing mines. Of the over 30,224 workers, only 107 Zambians held senior staff position. See Nchanga Consolidated Copper Mines Ltd., *Annual Report* (1974). And yet the government target was much higher. See *Zambianisation Committee Report Progress of Zambianisation* (1972).

¹⁶ An official inquiry in 1966, however, found no reason to doubt the sincerity or good faith of the companies with respect to their programmes for the training and promotion of Zambians, REPORT OF THE COMMISSION OF INQUIRY INTO THE MINING INDUSTRY 73-74 (1966). But there is a contrary view, e.g., M. BUROWAY, *THE COLOUR OF CLASS ON THE COPPERBELT MINES: FROM AFRICAN ADVANCEMENT TO ZAMBIANISATION* (1972). The local employees seem to believe that the companies are to blame. See *Times of Zambia*, Feb. 11, 1974, at 1.

EXPATRIATE LABOUR STRENGTH IN MINING INDUSTRY¹⁷

(1965-1969)

Year	Average Strength	Engage- ments	Resig- nations	Displaced by Zambianisation
1965	7,035	902	1,131	247
1966	5,981	1,213	1,403	360
1967	5,378	1,011	1,058	292
1968	4,845	1,088	1,124	178
1969	4,727	947	1,127	100

In the years 1964-1969, the Zambian economy expanded rapidly. With the end of Federation, the return of control over the country's revenue made possible a great increase in government spending. Manufacturing developed at a fair pace and its contribution to the gross domestic product rose significantly.¹⁸ But this rapid expansion was inevitably accompanied by inflationary pressures, and these were made dangerous by the desire of some companies to extract high profits from a relatively small capital investment. Some companies committed the smallest possible paid up capital and exported most profits while relying extensively on local borrowing for their projects. Quite apart from the fact that local borrowing is in conflict with the interests of the host state, it also means there will be less credit available for domestic entrepreneurs.

There was no exchange control for the first few years after independence and the absolute freedom to export profits was used to the fullest.¹⁹ Some resident companies purchasing merchandise from

¹⁷ MINING YEAR BOOK OF ZAMBIA, (1969). Most replacements of expatriates were in the personnel divisions of the mining companies and not at operational levels; e.g., in 1965 there were only 9 Zambian shift bosses out of 823. See PROSPECTS OF ZAMBIA MINING INDUSTRY 18 (1970).

¹⁸ The contribution of manufacturing to gross domestic product rose from L14,100,000 in 1964 to £30,000,000 in 1967 (from approximately 1977 US \$24,250,000 to US \$51,600,000). Its volume rose by 25% per year on average, despite the limitations imposed by the Rhodesian situation. See CENTRAL AFRICAN RESEARCH - 4, *supra* note 10, at 2.

¹⁹ This led the government to limit the amount of dividends that could be externalized to 50% of profits. KAUNDA, *supra* note 8, at 7.

parent organisations abroad added as much as a third on the cost price when making payments. This allowed them to remove capital at a still higher rate while at the same time increasing Zambia's cost of living. This behaviour did much to whip up feeling against foreign companies within the country. The major reason for the introduction of the policy of government participation is therefore to ensure that mining right holders operate within the framework of the overall economic and social goals of the country.

The policy is also borne out of a desire to ensure that the mining industry is not completely foreign owned and controlled—a desire widespread among developing countries, particularly in relation to extractive industries.²⁰ In these countries the ordinary man in the street sees no value in theoretical political independence if most of the decisions relating to employment, inflation, pricing, and basic economic considerations which affect his ability to work and look after himself and bring up his family are in the final analysis dependent upon decisions made in other countries. The need for this domestic involvement can best be understood when it is realised that before 1969, there was no direct indigenous financial participation in mining activities as such, although some local capital had been invested in the big mining companies, and there were a few local companies exploiting minerals such as mica and limestone.²¹

The policy was first implemented in 1968 with regard to nonmining activities.²² Two precedents for this policy could be seen in Zaire, a neighbour and a fellow member of the International Copper Organisation, which had taken similar moves in relation to its mining industry in 1966, as had Chile, another fellow member of the Copper Conference.²³

²⁰ This desire, though widespread among developing countries, is not confined to them. Such rich countries as France and Canada have been concerned about the limitations on their independence created by large scale American investments, and Britain is frequently worried by the loss of freedom that arises out of running a reserve currency with inadequate backing. Canada's concern has been so great that in 1973 the government passed the New Foreign Investment Review Act which in clause 2 states: "This Act is enacted by the Parliament of Canada in recognition by Parliament that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern." Bill C-132, 1973, 1st Sess., 29th Parl., 21 Eliz. II. See also Wahn, *Towards Canadian Identity—The Significance of Foreign Investment*, 11 OSGOODE HALL L. J. 517 (1973).

²¹ United Nations Secretariat, *The Status of Permanent Sovereignty over Natural Wealth and Resources* 170, U.N. Doc. A/AC. 97/5/Rev. 2 (1962).

²² KAUNDA, *supra* note 8, at 11.

²³ Members of the C.I.P.E.C. have undertaken to keep each other informed of important

This desire for economic independence should be distinguished from a desire to cut off all foreign investment. In fact, in the Second National Development Plan one aspect of the government's mineral policy is stated to be the creation of a favourable investment climate in order to encourage the private sector to increase its level of interest in exploiting the mineral potential of the country.²⁴ It emphasises that legislation must always reflect this objective. There is a general realisation of the need for foreign capital in the development of the country's mineral resources. Throughout its history, the industry had been developed by foreign capital.²⁵ In the early part it was largely British, American, and South African capital which put mining on a sound footing and to this day has a significant interest in the existing mines, although now control rests in the state. And even if foreign investment were not to take the form of financial investment, at least in the beginning "know-how" would have to be contracted from abroad and financing arranged by borrowing from abroad if new mining projects were to be generated and successfully realised. Because of these and other benefits, discussed later, which the country derives from foreign capital, it does not wish to nationalise the mines completely.

II. THE TERMS OF PARTICIPATION

Various ways exist of enforcing domestic participation. One such way, which has been adopted in Botswana, is for the government to issue a certain percentage of all equity stock free of charge to itself. Another, of which the operations of the government of Ghana in relation to that country's gold and diamond mines provide one of many examples, involves enunciating a policy that a certain proportion of the equity of all major mining companies should be owned by the government and then inviting the companies concerned to enter negotiations with a view of giving effect to this policy.

developments in their own mining industries and cooperate in matters of mutual interest. For instance, they sometimes cooperate on measures aimed at improving the price of copper, *e.g.*, cutbacks on production. See *Chairman's Statement*, Nchanga Consolidated Copper Mines Ltd. (1975).

²⁴ REPUBLIC OF ZAMBIA, SECOND NATIONAL DEVELOPMENT PLAN 91 (1971) [hereinafter cited as SECOND NATIONAL DEVELOPMENT PLAN]. See also Kaunda, in *Industrial and Mining Corporation Ltd., Annual Report* (1974).

²⁵ Basic sources on the history of the industry include, K. BRADLEY, *COPPER VENTURE* (1952); J. BANCROFT, *MINING IN NORTHERN RHODESIA: A CHRONICLE OF MINERAL EXPLORATION AND MINING DEVELOPMENT* (1961); F. COLEMAN, *THE NORTHERN RHODESIA COPPERBELT 1899-1962: TECHNOLOGICAL DEVELOPMENT UP TO THE END OF THE CENTRAL AFRICAN FEDERATION* (1971).

The Zambian mining legislation follows neither of the above two but instead legislates a government option to participate up to the extent of 51% of the equity shares on terms fixed by it. This option is in practice held by the Mines Industrial Development Corporation whose issued capital is held 100% by the state. This condition is imposed by section 20 of the Mines and Minerals Act, and the granting of a prospecting license is made dependent on the applicant agreeing to this condition being included in the license. So far all prospecting licenses that have been issued have carried this condition, and no license has been refused on the grounds that the applicant does not wish this condition to be included. The relevant part of the section reads as follows:

An application for a prospecting license may be granted subject to conditions, including, in particular (a) a condition requiring the applicant to agree to the Republic, or any person nominated on behalf of the Republic, having an option to acquire an interest in any mining venture which might be carried on by the applicant or by any person to whom he transfers his mining right, in the proposed prospecting area.²⁶

A. *The Decision to Participate*

The state does not have to participate, and has in fact refused participation in one case,²⁷ although the case in point is not a very good example of the government's nonexercise of the option, since it was an existing mine, and the mine was operating at a loss. It may also indicate that the state will not exercise its option in the case of projects of doubtful viability. It makes a decision whether to participate or not and the extent to which it will participate within the limits of 51%. It may also ask another investor to participate on its behalf.

The procedure for the implementation of the policy where a condition as to participation has been included in a prospecting license, or carried over into an exploitation license is that, prior to applying for a mining license, the holder must notify the state and the holder of the option that he intends to apply for a mining license and

²⁶ This is carried on in the exploration license under § 31(1)(g), which provides that "[a]n applicant for an exploration license may be rejected where the applicant is unable or unwilling to comply with any terms or conditions on which the relevant prospecting license was granted and which are applicable to the granting of the exploration license." Mines and Minerals Act, 1976, No. 33, § 31(1)(g).

²⁷ This is the case of Mkushi Copper Ltd.

requires the holder to exercise his option.²⁸ An application for a mining license may only be granted if the holder of the option exercises the option or informs the holder of the license in writing that the option will not be exercised or fails to act within six months of being required to exercise his option.²⁹

Should the option not be exercised at the time of the grant of the mining license, it is not exercised thereafter except upon the invitation of the mining right holder. This stipulation appears in an annexure attached to prospecting licenses. The provision is generally interpreted by miners and mining officials as meaning that once the government does not exercise its option at this time the mining right holder can operate without any fear of government participation as any such measure would be a breach of the prospecting license. Any other interpretation would be contrary to the concept of vested rights, which is an essential element in the encouragement of mining investment, in that it would be eroded if negotiations relating to participation by government or its nominees were to take place after the issue of prospecting or exploration licenses.

B. *Government Participation in Prospecting*

The state's policy at the moment is that, as far as possible, prospecting in all fields should be by the private sector and that prospecting by the government or a para-statal group should only be undertaken when there is no probability of activity by the private sector.³⁰ This attempts to rule out the possibility of domestic participation in the earlier stages of mining activity.

The stage at which the state decides to take an interest is regarded as a disincentive by many mining right holders, in that the high risk part of mining is left to private companies. In the initial stages of prospecting and exploration there is a relatively low capital requirement but a very high risk element. This gradually changes as a project matures until at the time of the exploitation of a mineral deposit there is a very high capital investment, and the risk factor has been reduced to a minimum level. It also means in practice that domestic capital jumps on the bandwagon of the winner but not on

²⁸ Mines and Minerals Act, 1976, No. 33 § 46(19)(b).

²⁹ Notification takes the form of a notice which states the percentage of the ordinary shares in the company to be acquired and signed on behalf of the government and sent by registered post to the registered office of the company. Notification is given, where the option is held by any person on behalf of the Republic, to that person, and, where it is held by the state, to the Minister of Mines.

³⁰ SECOND NATIONAL DEVELOPMENT PLAN, *supra* note 24, at 91.

that of the losers—in that if a firm spends K8,000 on finding minerals, it may then have to give 51% of its shares to the state, whereas if a firm loses K8,000 in trying to find minerals and finds none, the state will not be interested in its ventures and it will have to bear the loss alone.

It is understandable that the state should insist on minimising the use of its funds in the high-risk period, as it would be difficult to justify, in a poor country, the expenditure of much-needed public revenue for what is to the public eye seemingly unproductive activities in the short-term, save in exceptional circumstances where prospecting has virtually dried up; which is not the case in Zambia.³¹ Besides if government participates at low levels without technical back-up, it is not very helpful.

Moreover, it is not exactly true to state that when the government does not participate in prospecting directly it contributes nothing, since it in fact contributes indirectly in several ways. When a company is prospecting, although on the debit side it has risk and the amount of its investment, it has on the credit side the mineral to be discovered, limited infrastructural costs, general social and educational costs, and its use free of charge of the basic geoscientific data compiled by the Geological Survey Department. The actual contribution of the government in respect of the last item alone can usually be as high as 10% of the expenditure incurred by the prospector in a normal prospecting programme.³²

But perhaps there is a need to re-examine this policy in the light of the need to improve the mining investment climate and in the light of better resource utilisation and the realisation that, with the acquisition by government of the natural resources in its country, the long-term goals are now much more significant than the short-term ones. The development of a logical minerals policy and rational mineral resources management becomes increasingly significant.

Since the cost of the shares can be either in cash or properties, the state could modify its policy by, for instance, building the infrastructure where it does not exist and using this to earn a proportionate equity share. One advantage would be that it would be spending

³¹ For instance it is expected that the production of copper will increase by 39.5 percent from 645,300 metric tons in 1971 to 900,000 tons in 1976, which gives a 6.8 percent average annual rate of growth for 1972-1976 as compared with 0.6 percent for the 1969-1971 period. SECOND NATIONAL DEVELOPMENT PLAN, *supra* note 24, at 91.

³² See WOAKES, SOME PERSONAL NOTES ON THE MINING INDUSTRY IN ZAMBIA (1972).

money on non-risk factors which are also of some use to other spheres of the economy. The setting up of a mining investment fund should also be considered, whose aim should be the promotion and development of mineral exploration. The fund could be owned jointly by the government and private mining interests. Its funds could be lent to miners to finance minerals development on a loan basis at reasonable rates of interest, particularly for programmes of prospecting and exploration. Increasingly there should be a move by the state away from simply taking over existing properties to creating new instruments and tools for achieving minerals development.

Indeed the state seems to have modified its policy in practice in some cases to take account of the complaints by miners as evidenced by two recent participation agreements. These two new ventures had been formed before the stage of mining had been reached. Mokambo Development Company was established as a joint venture between Mines Industrial Development Corporation and Geomin of Rumania.³³ The company, incorporated in May 1974, is undertaking geological and mineral investigations into the Mokambo copper ore body situated near the Zambia-Zaire border. Secondly, there is Mines Development Corporation-Noranda, which was formed between the state corporation and Noranda Mines Limited of Canada.³⁴ The company, incorporated on 29 July 1974, is undertaking mineral prospecting in five license areas in Central, Copperbelt, and North-Western provinces. Mines Industrial Development Corporation is carrying out its own prospecting on a small scale through its prospecting wing, Mindex.

C. *Payment for the Government Interest*

Unless otherwise agreed to by the government and the holder of the mining right, the consideration for the interest for which the option is exercised is payable in cash to the holder (if shares are transferred by the holder) or to the company (if shares are issued by the company). In the first case the cash paid has to be a sum equal to such proportion of all expenditure reasonably incurred by prospecting, exploration, development, relevant evaluation, metallurgical test work, and feasibility studies in or in relation to the prospecting area, as well as a reasonable proportion of overhead and general administrative expenses in cases where the holder or his

³³ MINES INDUSTRIAL DEVELOPMENT CORPORATION, [1974] ZAMBIA MINING YEAR BOOK 11.

³⁴ *Id.*

predecessors in title have held mining rights for other areas in Zambia.

The expenses, however, have to be those incurred by the holder of the mining right or his predecessors in title from the date of issue of the prospecting license under the Act to the date of the exercise of the option as may be equal to such interest (not exceeding 51% thereof) as the state may decide to acquire in the mining company.³⁵ In the second case the cash paid is to be ascertained by reference to the following formula:

$$\frac{x = yz}{100-z}$$

where x equals the amount to be subscribed, y equals the total of the said expenditure, and z equals the percentage interest nominated by the government.

The expenditure must be reflected in annual accounts certified by a firm of independent accountants acceptable to the government, and the accounting year relating thereto shall be agreed upon by the holder of the mining right with the government, whereupon the accounts are to be produced for the government within three months after the end of such agreed year.

It is important that the government pay for its shares in a fair form, if its action is not to frighten away other mining investors. On the basis of the formula above, the state agrees to pay for its share of prospecting and development, carried out in the whole of the original prospecting area in which the new mine is found, and to pay for mine construction expenditure on the same terms as other shareholders. Although, of course, for all the original prospector's outlay on prospecting, he ends up getting only half a mine instead of a whole mine, the only loss he incurs is the interest and reward for risk on the prospecting expenditure.

A problem has arisen at times with regard to exploration expenses. Where a company finds minerals, does the state on acquiring an interest pay exploration expenses for the whole license or only for those expenses that can be said to be related to the mineral to be mined? Such was the case in the Lumwana license area, where there was a dispute as to whether the state was to pay for investigations of uranium when the mine in which it was to participate was going to be one for copper. The state refused to pay the exploration expen-

³⁵ See Annexure attached to prospecting licenses.

ses for uranium. This problem may not easily arise with respect to prospecting because at that stage the mining right holder is investigating mineral occurrences generally, whereas at the exploration stage specific ore bodies are investigated.

This issue really arises out of the problem already discussed, that of the state's non-involvement in the high-risk stages of mining. The government's decision concerning Lumwana was consistent with its declared policy. And the payment for exploration expenses by the state of minerals not being mined would be unjustified in that the state would be reimbursing the wealthier miners, in so far as such a miner would have had some results for his expenses, whereas, it does not reimburse miners whose prospecting programmes produce no results.

In so far as this practice is a disincentive to the attainment of an increased level of prospecting, the cost to the prospector could be mitigated if a company wishing to utilise data could pay something, and also by the suggestion earlier in this section for the establishment of a mining fund, so that some of the money for prospecting might be obtained at a reasonable rate of interest. Moreover, it must be realised that in the end the company recovers the money when it starts to mine for profit, as the tax law allows for such expenditure to be recovered as is discussed later.

Upon the payment of the government part in the expenses, as calculated according to the formula outlined above, the government requires the mining right holder to make available to the government, free of all encumbrances, such number of the issued ordinary voting shares in the capital of the mining company being formed as represents the percentage of voting rights in the whole of the issued share capital of the company equal to the percentage of the interest in the mining company for which the option is exercised. A new mining company has to be formed with itself and the private investor as the sole shareholders in the new company.

There is usually no difficulty in valuing the shares to be acquired by the state. The value of the shares is usually taken to be the estimated value of the investment. There is no difficulty largely because the circumstances in this case are different from those prevailing in an on-going mining venture. In an on-going concern a government is usually mindful of the historical cost of the project and the write-offs that have been allowed, as was the case in 1969 when the state acquired a majority interest in the existing mines. A company running an existing mine will be mainly concerned with its current and future cash flow from a project, as was the case with

the pre-1969 mining companies.³⁶ In such cases the state tends to discount the reward due to the investor for originally finding a deposit and for taking the risk of bringing it into production. In doing so, it is usually influenced by high levels of past profits earned by the projects.

Participation in new mining projects is a different matter. In this situation the participation required by the state is in a sense part of the price a company is paying for its mining right. It is directly analogous to a tax on distributable profits. To the mining right holder the financial aspect of participation is more or less just a new form of taxation.³⁷ The investor is interested in his net return on the money he puts into a project. When he does his calculations before making his investment decision or before determining whether to continue with a project, he estimates the profit he will make, and then deducts the various taxes he has to pay, thus arriving at his after-tax profit. If there is participation by the state, he must then also deduct the dividend he has to pay to the state as shareholder. This gives him his true net profit. Of course he also has to allow for the fact that the government contributes to expenditures on investment once the state has decided to participate.

III. OBJECTIVES FOR THE STATE AND THE REACTION OF MINING RIGHT HOLDERS

The country aims to derive from this policy of co-ownership the well-known advantages of local equity participation in foreign ventures in developing countries as cited by several writers on foreign investment.³⁸

A. *Objectives of the State*

Government participation reduces deeply ingrained suspicions of foreign economic domination. This is particularly important in mining operations because usually their size is large in comparison with other industries. Whether such suspicions are justified in a particu-

³⁶ In the negotiations leading to the settlement over the 1969 nationalisation there were differences of opinion as to how much compensation was sufficient. See A. MARTIN, *MINDING THEIR OWN BUSINESS: ZAMBIA'S STRUGGLE AGAINST WESTERN CONTROL* 176 (1972).

³⁷ The joint company will pay a mineral tax of 51% of the pre-tax profits in the case of a copper mine, as well as a company tax—currently 45% of the balance of the pre-tax profits—though neither tax is payable until all the pre-production costs have been offset, *i.e.*, all capital expenditure is immediately deductible. See Nchanga Consolidated Copper Mines Ltd., *Annual Report* 9 (1974).

³⁸ FRIEDMANN & BEGUIN, *JOINT INTERNATIONAL BUSINESS VENTURES IN DEVELOPING COUNTRIES* 2 (1971) [hereinafter cited as FRIEDMANN & BEGUIN].

lar case or not, they have been recognised to be a real and an important aspect of that national sensitivity which characterizes many emancipated peoples who were formerly held in a state of political and economic dependency.

It stimulates the engagement of responsible local capital in productive enterprises where the option is exercised in favour of a local company.³⁹ It may even help to develop a nucleus of experienced managerial personnel in the public and private sectors in proportion to the participation of public authorities and private capital in joint ventures, in that local labour becomes directly involved in the industry through the equity participation.⁴⁰ This in fact has been the result in the other spheres of the economy where the state has participated. These companies have made the deliberate choice of hiring local talent, which has paid off in the sense that several former employees of the state-owned companies have gone into business for themselves, providing an indirect benefit to the economy. In addition to the skills which the inhabitants of the country acquire from employment in these enterprises, equity participation is also simply a mechanism for the transfer of technology from the developed countries.

But the overriding consideration for this policy is control of mining activities so that they operate within the overall economic and social policy of the country. There are many areas of conflict between the state and the mining right holders in their mining operations; one was the rate of development in the 1960's, when the mining right holders were keeping the minerals in the ground while the state was concerned with increasing the speed of extraction. Another major area of conflict which has often emerged is the use to which investable resources should be put. In the past, for instance, the miners have wanted the reinvestible profits confined to mining activities whereas the state wanted them applied to other spheres of the economy. There is also the problem of how much of the profits should be reinvested at all.

Sometimes the conflicts arise because of conflict of interest between the state and the mining companies. A case in point arose over the use of "formed coke" in processing lead and zinc at Broken Hill mine. The government, mindful of its obligations to the international community in relation to sanctions against the Rhodesian

³⁹ *Id.*

⁴⁰ NWOGUGU, *THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES* 12 (1965) [hereinafter cited as NWOGUGU].

regime, proposed that Waelz Kilns should be constructed to produce "coke" locally. This, it was anticipated, could prolong the life of Broken Hill mine by eight years, since the reserves were diminishing. The process cost approximately K70 to produce a ton of coke, whereas the cost of importing a ton of coke from the Rhodesian Wankie coal mines was about K27 per ton. Anglo-American Corporation Ltd., favoured leaving the Wankie market still open. In the first place they argued that it was cheaper to do so, but at the same time one must remember that the Anglo-American Corporation Ltd. owns equity interests in the Wankie Collieries.

There are conflicts about sources of equipment and other resources. The state, mindful of its duty to develop the country, would prefer local sources even if it means a small sacrifice in performance whereas the mining right holders tend to insist on the best and cheapest sources of supply. This was the problem over the development and the exploitation of Zambia's coal resources for use in the mining industry. Although the problem was also partly due to the fact that the coal was not as good in quality as the Wankie coal.

In theory, participation of domestic capital in foreign enterprises is acknowledged to have positive advantages in the possibility of fair policy decisions by the enterprise, because government directors sitting on the board are in a better position to scrutinize the activities of the business and to deduce its intentions correctly than would be an external group of officials to whom the miners might otherwise have to report.

The state has financial interests also by way of participation. Its equity participation in the existing mines has proved to have overall benefits in the area of profits in that it has effectively increased government revenues from mining activities.⁴¹ It has also reduced the concern that any immediate benefit to the balance of payments arising from the inflow of foreign capital would be more than offset in the long run by the outflow of dividends. The burden of dividend transfers and repatriation of foreign capital is thereby reduced, while still achieving the gains in acquisition of techniques and management skills, as well as in industrial activity, that a solo venture would have provided.

State participation also gives the state an opportunity to control the extent to which companies allow their parent bodies to profit

⁴¹ In 1974 quite apart from its tax receipts a dividend of K43.2 million was declared by the holding company to the state. See *Zambia Industrial and Mining Corporation Ltd., Directors' Report*, (1974).

from their subsidiaries. This in certain circumstances is important particularly with regard to the fact that most of the mining companies operating in Zambia are worldwide. It has been established that multinational corporations develop a planned and global strategy in their foreign operations and that sometimes, through transfer of products within a vertically integrated company, the prices which are used for these transfers are a major avenue for a subsidiary to receive or transmit financial resources to another subsidiary or to the head office. Participation affords the government directors an opportunity to scrutinize purchasing and marketing arrangements, the fees for provision of technical and consultancy services, and investment of surplus funds, all of which can be used by companies to make hidden or disguised profits outside the host country.

B. *Reaction of Miners to Government Participation*

There has been a change in attitudes from ten years ago; so much so that now there is no doubt that the great majority of mining right holders within the country welcome and are prepared to undertake joint ventures with the government⁴² in mine development and exploration, although given a choice they would prefer minority rather than majority participation. So far there has not been any case in which mining capital has had to withdraw because of the government's insistence on acquiring equity in a new mining venture, and there are no mines that have been discovered but are not in production because of this policy.

In some cases the mining right holders consider that there is an absolute business advantage in the association of the state with their enterprise. They may be short of capital, as in the case of Mkushi Copper Mines, which several times invited government to take an interest in it as a solution to its liquidity problems.⁴³

Also the country presents certain political and economic risks,

⁴² Mr. Oppenheimer has recently given some indication of the thinking of his group, the Anglo-American Corporation. In the course of his *Statement to Shareholders* at the 1974 Annual General Meeting he said:

No government likes its basic industries to be entirely foreign owned and yet in many developing countries individual members of the public either do not have the resources to invest in industry or, for ideological reasons are prevented from doing so. The only alternative in such cases to full foreign ownership is for government to take a direct interest. In these circumstances we willingly accept a partnership between the government as owners of the mineral rights and private companies that can provide the necessary financial resources and technical know how.

But see note 57 infra.

⁴³ Mkushi Mine has since closed. *Mining Mirror*, October 3, 1975, at 7.

such as nationalisation, devaluation, foreign exchange blockage, depreciating currency, and excessive taxation, so that some mining right holders are often willing to accept domestic participation in order to reduce the financial risk involved in mining investment. Their reaction to risk is to ask themselves whether the company is able to absorb a possible loss before proceeding and then inquire into the possibilities of diminishing its exposure to risk. This was partly the reason why Anglo-American Corporation Ltd. and Roan Selection Trust Ltd. in the early 1960's invited the state to take minority interest in their mining activities. Financially, they could have gone on their own without difficulty.

More recently this attitude is particularly noticeable in the new companies anyway; the larger the capacity for investment in relation to the amount of the pre-discovery investment, the better able the company is to absorb a possible loss. It must be realised that new mines are expensive to bring into production. For instance, any investment in exploration must be backed by a determination to follow up, by further investments of ever-increasing amounts, the indications proved by initial prospecting efforts.

An example of this is that an aerial geophysical survey generally requires an additional expenditure on the order of ten times its costs, on follow-up checking of indications provided by the survey. Thus an investment of K1 million on a large aerial survey will require an investment of an additional K10 million for follow-up on the ground, and unless these follow-up works are carried out the purpose of conducting the survey is negated. The follow-up will in turn lead to the development of one or more mines involving the expenditure of millions of Kwacha.

One way of reducing the impact of risk is by reducing the amount of capital invested. From this point of view, the availability of government or any other local currency loans is a very important incentive, in that it minimises the amount of equity capital committed by the mining company and therefore reduces the impact of risk. There is a good example in the case of the Lumwana prospecting area which is supposed to come into production in two to three years time. The prospecting was done jointly by Anglo-American Corporation and Amax, the prospecting wing of Roan Selection Trust Ltd. When they reached the stage of exploration the two companies indicated that they would not go on unless the state joined them. Although it contains one of the largest ore bodies—Lumwana has very low copper content—the state has decided to join the companies anyway. Anglo-American Corporation Ltd., seems to be coming to

nearly the same position over the recently discovered nickel deposits in its Maunali prospecting area; the company seems to be particularly worried over infrastructure costs.

Other positive benefits derived from such associations by the mining companies are that local voting control causes the state to feel a greater sense of responsibility for the success of the enterprise. For some it provides ready access to know-how, manpower, and knowledge of the geology of the country. The government, through its Geological Survey Department, has the most complete information about the geology of the country.

Writers on foreign investment recognise that a joint enterprise provides a bulwark against government interference or greater government participation,⁴⁴ in that the state will be more reluctant to impose profit restrictions, import controls, or even expropriation measures where local investors or the government itself is involved. And that participation in most cases sufficiently satisfies nationalistic aspirations to forestall any need for greater participation by the government itself by deflecting harmful emotional charges which the foreign venture may attract when it is big and successful and still remains completely foreign.

State participation provides a helpful liaison with local government authorities and financial institutions as the local officials, particularly the directors, are able to influence government action by private negotiations with government officials and politicians. This is especially true in a small country such as Zambia, where the limited population means that the individuals sharing power will often have much of their life experience in common. It is true that the foreign officials can do the same, but the function is better performed by local partners than by the investor company because they know the local situation better. In any case it is obvious that reports about the companies in which the state has participation will be given more credence if they are made by government officials than when they are made by the foreign company's men.

It appears also that since the state began taking equity participation in the mining companies, greater local interest has been generated in their operations. The companies themselves have also become more interested in local programmes such as education, sport, and the like. Friedmann and Beguin suggest that there is an important managerial advantage of a relatively intangible kind which

⁴⁴ FRIEDMANN AND BEGUIN, *supra* note 38, at 385.

could result from this. They suggest that it has a favourable effect on the morale of the local employees, since it is a major step in the process of localisation by which a foreign investment assumes a local character and status, which, when it is achieved, makes it easier for the local employee to integrate his loyalties, with a consequent reduction in tension and improved work performance.⁴⁵

C. *Participation as a Disincentive to Investment*

Some international mining companies dislike the requirement of participation and try to avoid areas in which it is an established policy. To this extent it is a disincentive to investment. It has been cited as the reason why, for instance, low grade minerals of porphyries are being mined in the United States while exceptionally fine deposits of the same minerals are being neglected in Chile and Peru.⁴⁶ Several reasons have been suggested by writers on foreign investment for the companies' dislike of such requirements.

Friedmann and Beguin suggest that local participation can seriously inhibit an internationally integrated company in its operations. What might otherwise be complete freedom to fix transfer prices, marketing areas, and so forth, may be substantially circumscribed in the case of a joint venture with local equity participation. And to some extent, political and psychological conditions militate against joint ventures; when difficult and unstable conditions prevail in a country, the association of a foreign investor with local interests may increase the precariousness of the situation.⁴⁷

Yet perhaps the most widespread discouraging factor to a foreign investor is what has been widely acknowledged to exist—the disparity of outlook between the foreign investor and the local partners. In the business activities of developed countries, there is a certain community not only of tradition but also of scientific, technical, and legal standards, and there has also been more experience with responsible investment practices and legal supervision.⁴⁸ In a country like Zambia, this stage has not yet been reached. Power and wealth are concentrated in relatively few hands, and are not matched by a corresponding sense of responsibility. For instance, the partner from an industrialised country, usually a large corporation with world-

⁴⁵ *Id.*

⁴⁶ Carman, *Notes on Impediments to Mining Investment in the Developing World* 14 BAGAUNDA PAPER (1975).

⁴⁷ FRIEDMANN AND BEGUIN, *supra* note 38, at 383.

⁴⁸ *Id.*

wide experience, generally takes a long-term view of profits, placing the development of the enterprise before quick dividends.

Some of the investors, it is stated, resent direct participation by the government or a government-owned corporation in a capital-importing country.⁴⁹ This is particularly so in American mining circles; there it is felt that there is something inherently unsuitable about mixed government-private enterprises, since the government "wears two hats" as regulator and partner. Others fear government partnerships because they feel they would be subjecting themselves to the dangers of frequent changes in government policy. But it cannot be denied that in a country like Zambia the only alternative to initial participation by government is no local participation at all. There simply is no nongovernmental body big enough to form a mining concern.

Some writers have suggested that the policy of requiring domestic participation in foreign ventures is somewhat inconsistent with a declared policy of attracting maximum foreign investment. The government option, when exercised, utilises local capital that could have financed alternative development and thus would have enhanced the development of other sectors of the economy.⁵⁰ Further it has been argued that the inconsistency between the two sets of motives stands out sharply when it is realised that through government participation outside investors may be forced to divest themselves of their equity to make room for local interests, resulting in true disinvestment, with the foreign investor repatriating part of the capital he would otherwise have used.

If this happened it would be unfortunate because this is capital that would already have been attracted into the country. It is unlikely to happen in Zambia, since section 20 of the Mines and Minerals Act ensures that prospecting licenses, the very first mining rights, are granted to those who accept the principle of state participation should minerals be discovered.

It must also be realised, as has been demonstrated by the examples of the Lumwana and Mokambo license areas, that the reverse is equally possible—that is, that lack of government participation may discourage some investors who do not want to take a greater risk in searching for minerals and would prefer to share their risks with the state.

⁴⁹ *Id.*

⁵⁰ NWOGUGU, *supra* note 40 at 13.

The arguments also make a basic assumption that all mining companies that start or wish to start a mining venture have adequate financial resources to engage in such a venture. Mining being an expensive and risky business, this is not always so. It is not necessary to go further than Mkushi Mine, which closed after the government refused its invitation to take equity participation, to prove that not all mining companies have enough money to complete their venture.

Even when they do have the money they may not be willing to use it because of the size of the risk its use entails without government participation. As observed earlier in the Lumwana license area, for instance, the companies have indicated that they might not have gone ahead without government equity participation. And more recently, as pointed out earlier, Anglo-American Corporation Ltd. has invited government participation in respect of its Munali nickel prospect and has indicated that it might not go on if this is not forthcoming.

It has been suggested that since the government, in the event of its deciding to participate, would have to get its money from some other source, it is open to question precisely what the state receives for the percentage of the development costs that it subsidizes. Especially when the funds would readily have been provided by others, the state's money would not be optimally allocated.⁵¹

Where the government indemnifies the company for the total amount spent on prospecting and exploration it still gains, it is submitted. In the first instance, it cuts out the risk part and, secondly, the recoverable value of the mineral discovered will always be far in excess of the prospecting and exploration expenses. In that sense the money is optimally allocated. And as has already been stated, money is not always readily available once a deposit has been found.

The disincentive impact of government participation is nowadays minimal since direct government participation in mining ventures has spread among both developed⁵² and developing mining coun-

⁵¹ Gordon, *The Prospects for New Mine Investment*, in *ECONOMIC INDEPENDENCE AND ZAMBIAN COPPER: A CASE STUDY OF FOREIGN INVESTMENT* 203 (M. Bostock & C. Harvey eds. 1972).

⁵² Britain is now, for instance, insisting on participation before issuing prospecting licenses. *The Guardian*, May 28, 1976, at 1. Canada has government participation. See Drolet, *Mining Legislation and Responsible Authorities* (paper presented at the International Symposium of Technical Research in Mineralurgy and Management of Mineral Patrimony, Orleans-Lasource, 1975) at 11.

tries, so that its disincentive impact can no longer be as serious as when its practice was limited. This is quite apart from the fact that there are less and less alternatives available. In fact among developing countries recent demands for a new international economic order have led to an ever increasing number of governments, in these countries, demanding participation in the mining sector of their economies.

Its disincentive impact is definitely not placed very high on the list of disincentives by most mining right holders currently operating in the country. Several others are considered as more discouraging—such as the threat of outright nationalisation at undefined compensation levels, the political environment which may threaten the validity of contracts or result in the imposition of onerous controls, costs of services, legal complexities which make it difficult to know what the law is, foreign exchange restrictions, taxation, and the sheer magnitude of the investment required where the mine to be brought into production is on a large scale.

It may be questioned whether it is wise at all to have any measure which has the least prospect of discouraging any amount of much needed capital. In the final analysis, the answer to this problem is a question of balancing two evils. The cost of discouraging some mining investment may not be too high a price to pay for the control of the industry the government acquires, the direct government participation in profits which results, and the consequent reaction in stemming the outflow of profits. It is as important for Zambia to attract mining investment as it is for her to regulate the repatriation of profits which considerably reduce the investment resources in the country and limit its positive effects within the country; this could well be greater than the amount of investment discouraged.⁵³ The key to the government policy should be fair play with the private sector over its term of participation to minimise the disincentive effects of the policy.

IV. THE LEVEL OF EQUITY PARTICIPATION

As stated earlier, the state is at liberty to acquire any amount of shares up to a maximum of 51% in any new mining venture. A

⁵³ The organization of African Unity Conference of Heads of State at its 1973 meeting recognised this problem and resolved among other things to defend vigorously, continually, and jointly the African countries' inalienable sovereign rights and take concrete measures to regulate the repatriation of profits which considerably reduce the investment resources of African Countries. ORGANIZATION OF AFRICAN UNITY, DECLARATION ON AFRICAN CO-OPERATION, DEVELOPMENT AND ECONOMIC INDEPENDENCE (May 28, 1973).

decision whether to take minority or majority shares in a venture must depend on which of the two levels is more likely to reflect effective control.

A. *Minority Participation*

The desire to make mining rights holders operate within the wider terms of government's economic and social policy rather than in their own narrower terms can be achieved to some extent by limited participation of, say, 15% to 30% with two or three directors on the board. But in reality this achieves little more than increasing the information available to the state about the company. State-appointed directors sitting in at board meetings receive reports and schedules, but the real decisions continue to be made at the head office of the parent company. Further than that it would only have the advantage that state directors could ensure that a company board was fully apprised of government's policies in respect to matters which came up for discussion.

Majority participation by a foreign company will entitle it to a virtual power of veto in respect of a wide range of actions and decisions of the joint venture, since its equity holding would entitle it to a majority of the seats on the board. Several major corporate actions would require the approval of the foreign firm, with the result that the state would not have effective legal control of the source of all executive functions of the mining company—the board of directors—and over matters which it is necessary to have a say in if government control of the industry is to be effective.

All decisions relating to finance, including the development of new mines, would be subject to the majority veto. Thus, if the state wanted the company to engage in further exploration which did not appeal to the foreign partner, then it could not push forward its views very forcefully. The area of finance and planning of capital programmes of mining companies is one in which the state must exercise some control or have the opportunity to exercise meaningful control if any appreciable influence is to be exercised over the activities of mining companies in which it participates. For, as a United Nations study on multinational companies has noted, even in the most loosely knitted international firm, the minimal control or restriction which is exercised is control over the capital budget.⁵⁴

⁵⁴ UNITED NATIONS, REPORT ON MULTINATIONAL CORPORATIONS IN WORLD DEVELOPMENT 46 (1976).

Where the state participated only to the extent of less than 50%, it would also not be in control of the general meeting. Under the Companies Act of Zambia only three resolutions can be passed: a simple resolution, an extraordinary resolution, and a special resolution. The first one requires a simple majority, and the other two require much higher majorities in order for them to be passed.⁵⁵ Free voting at these meetings is out of the question in that in practice only two people attend a general meeting of a joint venture, since its members are the two holding companies of the equity participation.

Admittedly the same limitations apply to the foreign mining companies, because with their equity participation they too may not be in control of the board of directors when they take less than 50%, and they cannot change any major areas of policy in a general meeting without the consent of the state should it take an amount of shares which makes it impossible to pass a resolution without its cooperation. These limitations, however, are likely to hurt the government more than the private miner in that it is the government that is interested in changing certain attitudes of the mining investors.

If the government is to have a chance of a real say in the decision-making of a mining company in which it wishes to participate it must acquire majority equity participation. This will then entitle it to have half the directors, as in Mokambo Development Company and Mindeco-Noranda, so that its directors on the board have a real sanction to apply in terms of voting numbers. Zambia is insisting on at least 51% participation, and there is at present no indication that it will exercise its option in a mining venture for any share less than this.

A large number of mining right holders hesitate to participate at over 50% without a management agreement. This was the case in the 1969 partial nationalisations of the then existing mines. The experience of the state has been that these demands should be resisted, as they go a long way towards negating government control and influence on mining activities; indeed it has recently terminated its previous management agreements.⁵⁶

The control of the board of directors is not sufficient in itself. The board does not run a company; its affairs are manned by executives,

⁵⁵ Companies Act, Chapter 686 of the Laws of Zambia, §§ 12, 14, 15, 112.

⁵⁶ For the announcement cancelling the management agreements, see *Times of Zambia*, August 31, 1973, at 1.

who are charged with implementing the board's policies. It is therefore important to have some control over the executives. This in fact sometimes explains why, although foreign investors are not concerned with staffing of the operational levels and encourage local staffing because of the political pressures in favour of localization and the lower cost of local labour, they have a strong interest in controlling decisions with regard to the staffing of the management functions. It must be acknowledged, however, that it is also because it is not easy to get expatriates on hire except on secondment and management agreements.

It is preferable that the joint ventures should be self-managing. The employment agreements could only be justified if there were such a thing as the "neutrality" of management, *i.e.*, management systems were capable of universal application regardless of the social-political context and the ideological basis of the economic system. This, of course, is not the case. Management agents have their own values and their judgments on policy matters are going to be influenced by these values, and their employees owe their loyalty to them.⁵⁷

It may be argued that their recommendations are not imposed on their principles and that their job is only to offer a possible solution to the organisation. This argument assumes a technocratic board capable of perceiving alternatives, which, as will be pointed out later in this section, are lacking in Zambia. In addition, they are extremely expensive, (sometimes deliberately so that their advice will be regarded as preeminent) as they proved in the case of those agreements concluded in 1969 between Anglo-American Corporation Ltd. and Roan Selection Trust Ltd. on the one hand and the government of Zambia on the other.

⁵⁷ R. SKLAR, *CORPORATE POWER IN AN AFRICAN STATE* 203 (1975), quoted some mining executives of the Anglo-American Corporation as saying, "I feel as though I belong to the Company more than any country," and "My first loyalty is to Anglo; Harry Oppenheimer sent me here and there is something I can do for the group in this place."

MANAGEMENT AND CONSULTANCY FEES PAID TO
ROAN SELECTION TRUST LTD. BY
ROAN CONSOLIDATED MINES LTD. 1970-1973⁵⁸

Elements of Fees	Fees Paid (Million Kwacha)			
	1970	1971	1972	1973
$\frac{3}{4}$ % of sales proceeds	1.335	1.461	1.434	1.779
2% Consolidated Profits before income tax but after Mineral Tax	1.045	0.82	0.526	0.742
Total	2.380	2.221	1.960	2.521

This is disregarding the recruitment fee of 15% gross emoluments of a recruit in the first year of duty, if in service not less than six months.

The employees of management agents tend to stay for short periods of time and thus make those companies open to the criticism that they frequently use developing countries as training ground for young staff fresh out of business schools. There is some truth, too, in the criticism that most expatriate employees, particularly at the high levels, tend to be largely concerned with furthering their careers with the foreign company that is employing them.⁵⁹

B. Factors Affecting Control

The distinction between majority and minority participation may, of course, in certain circumstances be rather artificial, as equity alone, even when accompanied by joint management, can not lead to effective control. Participation needs to be backed up by government insistence on formalized planning and management and a requirement that the board will be consulted on all major matters. These techniques are designed to see that a company has a policy clearly defined, after careful thought and consultation, for each facet of its operation and that this policy is known throughout

⁵⁸ Calculated from figures of gross sales and profits in the Company's *Annual Reports*.

⁵⁹ For instance, since the termination of the management agreements the mines have experienced a loss of senior staff. See *Chairman's Report*, Nchanga Consolidated Copper Mines Ltd. (1975).

the company and related to each employee's job. These techniques are particularly relevant in that they will show up the areas in which there is a conflict of interest between the partners and see that an explicit policy is laid down to cover them. At the moment the existing joint ventures have a very poor working relationship with the government. There are no accepted policy guidelines for state officials who have become members for instance.

The state must appoint directors and executives to represent it on the board who are capable of looking after its interest. Its nominees must have a general knowledge of mining and of finance and management in order that they can withstand any arguments from their fellow directors from abroad when pressing for the carrying out of government objectives such as localisation and reinvestment of profits. The effectiveness the government-appointed directors can exercise on a mining venture will depend on their being a capable, alert, astute, and qualified team, so that, together with the foreign directors, they can supervise the activities of management. Care must be taken to see that people appointed to these posts understand and sympathise with the government's objectives, for some local people, because of their training, are very sympathetic to the point of view of foreign companies.⁶⁰

The Zambian government is faring rather badly in this regard. Owing to the relative youth of the country and the colonial neglect of education, there is no local stock of retired executives on which the government can draw to strengthen the technical knowledge of the government side of these boards. The paucity of available technical management is also a result of the disproportion established at the university level between the student population in technical faculties and other faculties, and is reinforced by the high percentage of failures in the technical faculties.

But the problem is more complex. Board appointments are usually a contentious question, as political and other factors such as ethnic considerations seem to play significant roles.⁶¹ Even in the cases where reasonably able people have been given such positions they have been transferred from company to company and also in and out of companies far too often—frequently for political rather than technical reasons. Several cases can be cited of managing

⁶⁰ This is particularly so if they have been trained by one of the companies involved, as such companies teach them how to approach problems from the company's own point of view.

⁶¹ Complaints by member of Parliament are frequent that appointments are made on political grounds. *Times of Zambia*, January 28, 1976, at 1.

directors being moved three times in a year,⁶² with the result that few of them have the opportunity to become familiar with their management tasks or conversant with the industry and its difficulties and consequently are rarely able to make rational judgments based on time tested operations. Their difficulties are increased too, by regular reorganisation of companies.

In one or two cases the government has appointed civil servants to the boards of directors of some mining companies.⁶³ In practice this is unwise, because they simply do not have the time to do the work effectively without sacrificing efficiency in their real jobs, and this problem is exemplified by the fact that they are usually unable to attend board meetings, being either on tour or busy in another way.

All these factors combine to produce board members without the necessary knowledge and ability. And the scarcity of available people produces a situation in which it is common practice to find one person being a member of several boards, many more than he can cope with. In consequence his supervision and control diminishes considerably, and his contribution becomes weak.

The need for directors who have mining experience can not be over-emphasized. After all, management is largely a question of decision, and decisions cannot be properly taken unless the mind is clear about objectives and priorities. It is not being suggested that a director need to possess a huge intellect to do his job properly. What he needs far more urgently is a clear comprehension of what he is aiming at—the object of the exercise from which he is able to issue clear and unequivocal instructions because he is in no doubt about the purpose of his management task. In a highly technological industry like mining, there are very few management tasks that do not call for a general understanding of technological operations.

C. Additional Measures towards Effective Control

Zambianisation is not only an important instrument in the transfer of technology to one's nationals, it is also an important way of increasing control over foreign ventures. Therefore the state should ensure that it operates efficiently but reasonably. The well-

⁶² For instance, in Mines Industrial Development Corporation, the Managing Directorship changed hands three times in 1975 alone.

⁶³ See Mines Industrial Development Corporation Ltd., Directorate of 1974, and Roan Consolidated Mines Ltd., Directorate of 1974. Both in MINES INDUSTRIAL DEVELOPMENT CORPORATION, [1974] ZAMBIA MINING YEAR BOOK.

intentioned policy of Zambianisation can create management difficulties which can endanger the performance of the industry where haste results in people with little or no knowledge at all of the operations they are supposed to manage being placed in management positions.

Although it is the policy of the government to increase local employment, the measures employed to implement it do not seem to be very effective. The main check on the rate at which the industry is being localised is through the control on the immigration of expatriates. The Immigration Department will not grant any entry permit to an expatriate unless the Ministry of Labour certifies that there are no local citizens with the necessary qualifications and experience to fill the job he is to take up and further, that adequate steps have been taken to train local personnel.⁶⁴

The problem with this provision is that the Labour Ministry acts mostly on the recommendations of senior mining officials who are themselves expatriates, for, after all, only they are better placed to judge on questions of qualifications and experience, as the local people at the Ministry of Labour are unable to grasp fully the scope and extent of the expertise that is required by the people to fill the jobs.

The other check could be the application of a tax on expatriates,⁶⁵ now applied to other categories of industry, to the mining industry. But this may be unsuitable as it operates as a cost of production.

It is suggested that a measure additional to the one pertaining to control of immigration could be taken. This could be done by creating a financial incentive to localisation of a different nature and one which does not create the same problem as the one above, by providing that when a company has Zambianised to a given percentage—a level to be determined by the educational standards of the country—it can deduct a fixed percentage of its net income free of taxes to reinvest in the activities of its own firm or in other mining activities.

Foreign investors draw their special strength from their ability and opportunity to think in terms that extend beyond any single country and the use of resources that are located in more than one jurisdiction,⁶⁶ and sometimes try to end up making the largest profit

⁶⁴ Immigration and Deportation Act, Chapter 122 of the Laws of Zambia, §§ 18, 19, and 20.

⁶⁵ See Selective Employment Tax Act, No. 9, of 1975.

⁶⁶ For detailed discussion of this, see R. VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF UNITED STATES ENTERPRISES* 265 (1971).

in the lowest tax country by transfer of pricing. It is important to start thinking in terms of devising measures which can assist in the control of this phenomenon where it exists. This can be done by regulations through which the state can get hold of the total accounts of a company, to supplement the present limited regulations in the Companies Act, which were originally devised for national companies.⁶⁷

An example of what is suggested is the recent agreement among the members of the Organization for Economic Cooperation and Development establishing a code of conduct among multinationals. Among other things, the code outlaws transfer pricing methods and requires multinational companies to give wide ranging information about themselves including annual financial statements of profits and sales, investments, numbers of employees on a geographical basis, and the disclosure of a consolidated profit and loss account.⁶⁸ Although this can best be undertaken on an international basis a start can be made with some measures on an individual basis.

In the final analysis, however, the ultimate source of power of foreign companies is in their control over the process of technological change.⁶⁹ Even if Zambia purchased advanced machinery, it may well find itself backward in a space of ten years. This is also the primary vehicle, as observed earlier, for the acquisition of abnormal profits where they exist. Companies keep this power by keeping research and development at home. Zambian legislation should encourage foreign companies to conduct research in Zambia concerning their projects. This could be done by creating incentives such as exempting profits to be spent on research studies from any form of taxation.⁷⁰

⁶⁷ Companies Act, Chapter 686 of the Laws of Zambia, §§ 120, 29, 90. All information relates to a company's domestic activities.

⁶⁸ The Guardian, June 22, 1976, at 14.

⁶⁹ The problem of technology is discussed at length in Kapalinsky, *Accumulation and the Transfer of Technology: Issues of Conflict and Mechanisms for the Exercise of Control* 80 INSTITUTE OF DEVELOPMENT STUDIES DISCUSSION PAPER (Sussex 1974).

⁷⁰ A limited incentive exists, but one has to spend the money first, as it is allowed in ascertaining the gains or profits of a business. See Income Tax Act, § 43.