



# Enabling legal frameworks for sustainable land use investments in Zambia

Legal assessment report

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Photo by Ollivier Girard/CIFOR

Davison Gumbo team leader in Zambia and regional scientist, Center for International Forestry Research (CIFOR), interviewing charcoal burners. The *Brachystegia* genus is used for charcoal production in the country.

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The International Development Law Organization (IDLO) enables governments and empowers people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. IDLO works along the spectrum from peace and institution-building to economic recovery in countries emerging from conflict and striving towards democracy. It supports emerging economies and middle-income countries to strengthen their legal capacity and rule of law framework for sustainable development and economic opportunity.

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# Abbreviations

AfDB	African Development Bank
BCP	BioCarbon Partners
BIT	Bilateral Investment Treaty
CBFI	community-based finance institution
CCBA	Climate, Community and Biodiversity Alliance
CDC	Commonwealth Development Corporation
CEEC	Citizens Economic Empowerment Commission
CIFOR	Center for International Forestry Research
COMESA	Common Market for Eastern and Southern Africa
EIA	environment impact assessment
EITI	Zambia Extractive Industries Transparency Initiative
EMA	Environment Management Act
EPF	environment protection fund
ERB	Energy Regulation Board
ESIA	environmental and social impact assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FQM	First Quantum Minerals Limited
FPIC	free, prior, informed consent
GDP	gross domestic product
GHG	greenhouse gas
GIGA	German Institute of Global and Area Studies
GMO	genetically modified organism
GOZ	Government of Zambia
ha	hectare
ICP	Informed Consultation and Participation
IDLO	International Development Law Organization
ILO	International Labour Organization
IMSCC	Inter-Ministerial Secretariat on Climate Change
IPPA	Investment Protection and Promotion Agreement

IUCN	International Union for Conservation of Nature
JFM	joint forest management
KML	Kalumbila Minerals Limited
LCM	Luanshya Copper Mines
LDC	least developed countries
MFEZ	multi facility economic zones
MSCGT	Mazabuka Sugarcane Growers Trust
MSMEs	micro, small and medium enterprises
MW	megawatts
NEAP	National Environmental Action Plan
ODA	overseas development assistance
OECD	Organisation of Economic Co-operation and Development
PSDRP	Private Sector Development Reform Programme
PV	photovoltaic
REDD+	Reducing Emissions from Deforestation and forest Degradation "Plus" conservation, the sustainable management of forests and enhancement of forest carbon stocks
SACCOS	Savings and Credit Cooperative Societies
SADC	Southern African Development Community
SULTS	enhancing sustainable livelihoods through land tenure security
UDHR	United Nations Declaration of Human Rights
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
USD	United States Dollar
VAT	value added tax
ZDA	Zambia Development Agency
ZEMA	Zambia Environmental Management Authority
ZILMIS	Zambia Integrated Land Management and Information System
ZLA	Zambia Land Alliance
ZLDC	Zambian Law Development Commission
ZMW	Zambian Kwacha
ZSC	Zambia Sugar Company

# Executive summary

Land-use investments are increasing in Zambia, led by both foreign and domestic private investors (OECD 2012, 28; Ogunbumni 2014).<sup>1</sup> The economy of Zambia relies significantly on land use and natural resource capital (Rasmussen 2013) and the Government of Zambia (GOZ) has identified land-use investments as essential to the development of key economic sectors – energy, forestry, mining and agriculture (ROZ 2006). This follows a strategy to harness its natural assets to build the country’s prosperity (Rasmussen 2013).

Land-use investments can activate development, boosting the economy and creating direct benefits such as local employment and infrastructure. However, positive development opportunities are not automatic. Economic, social and environmental inequities can arise from investments, including breach of property rights, unsustainable land use and environmental degradation and labor rights abuses. Historically, the contribution of land-use investments to Zambia’s development is questionable. For example, an increase in land-use investments has not corresponded to reduced poverty levels, with 60% of the population still living below the poverty line (Rasmussen 2013).

This research seeks to understand how strengthening law and policy frameworks and the regulatory and governance capacity of officials and civil society could enable Zambia to

manage investments so that they contribute to sustainable development outcomes. The research shows that inadequate regulatory frameworks and weaknesses in the rule of law have allowed investors and the Zambian “elite” to circumvent legal requirements. However, when the rule of law is upheld by investors through adherence to robust social and environmental safeguards, it can act as an enabler of sustainable investments. This study provides guidance on how the legal framework of Zambia can be strengthened to effectively regulate sustainable investments.

Four major challenges, common to all four key sectors, were identified that limit the capacity of Zambia to attract and regulate sustainable investments. The report focuses on a detailed analysis of these four challenges:

- There are very few incentives that support sustainable land-use investments.
- Customary land tenure remains insecure, with limited processes enshrined in the legal framework to uphold social safeguards, such as consultation with land users.
- There is low institutional capacity to enforce the social and environmental safeguards that are established in the law.
- Access to information on investments is limited in Zambia, which reduces the potential for public scrutiny and participation.

The report concludes that Zambia’s legal and institutional framework, particularly its implementation and enforcement, should be strengthened to more effectively regulate sustainable investments that adhere to social and environmental safeguards. The four key legal challenges identified and addressed in this report provide some initial insights into where legal reform efforts in Zambia could be focused to better attract and regulate investments for sustainable development outcomes.

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<sup>1</sup> “... annual FDI inflows increased from about USD 160 million in 2000 to USD 1300 million by 2007, but slowed down to USD 900 million in 2008... Over the 5-year period ending in December 2010, Zambia attracted FDI to the order of USD 7 billion, of which a sizeable proportion financed “green field” projects in mining and quarrying, construction, telecommunications (mobile telephony in particular), agriculture, tourism and manufacturing... By any measure, this is an impressive performance”.

# 1 Introduction

Zambia has a population of 14.08 million and a total land area of 752,614 km<sup>2</sup> (Aregheore 2009; World Bank 2014a). It is a country with abundant natural resources, including forests, arable land, water and minerals. It has approximately 49.9 million hectares (ha) of forests, which cover approximately 60% of the country (ROZ FD et al. 2008, xiv). Almost half (47%) of its total land mass has the potential to be arable land, of which only 15% is currently under cultivation (Aregheore 2009; Deininger et al. 2011). Water resources are abundant, including hydropower potential of approximately 6000 megawatts (MW), of which only 1985 MW has been developed (ZDA 2013a, 3). There are 2 billion tonnes (t) of extractable copper-cobalt and a number of other minerals below its surface (ZDA 2013b, 7).<sup>2</sup>

Zambia's long-term development planning strategy, Vision 2030, identifies agriculture, energy, mining and forestry as key economic sectors. Indeed, the economy of Zambia relies significantly on land use and natural resource capital (Rasmussen 2013). This report analyzes investments in these four key sectors and investigates how to achieve prosperity and development in Zambia while guaranteeing the sustainable management of natural resources.

Over the past decade, Zambia has seen a sharp rise in foreign and domestic investments in the key sectors of energy, forestry, mining and agriculture (OECD 2012, 28).<sup>3</sup> A number of factors have

contributed to this increase: the rapid growth of emerging economies such as China and India that are consuming more natural resources; a rise in biofuel demand – materials for which are grown in southern Africa – for use as an alternative to fossil fuels in industrialized countries; and the relative stability of Zambia's economy (Mujenja and Wonani 2012, 10). Due to the nature of the agriculture, energy, mining and forestry sectors – that are based on natural resources – investments in these sectors generally require tracts of land in order to develop the resources under them. For this reason, this report refers to them as “land-use investments”. Land-use investments include projects by foreign and domestic investors, from micro, small and medium enterprises (MSMEs) to large, multinational corporations. Recent studies document that domestic investment in medium-scale land plots is a more significant driver of land use in Zambia than foreign investment (Ogunbunmi 2014; Jayne 2014).<sup>4</sup> However, investment in small-scale landholdings has not correspondingly increased; domestic smallholders constitute a key investment opportunity but have been overlooked by the legal framework.

The Government of Zambia (GOZ) has identified that domestic and foreign private land-use investments are essential to the development of the identified key economic sectors and ultimately for the continued economic growth of Zambia into a “prosperous middle-income country by 2030.” (ROZ 2006) Zambia is seeking to attain and sustain annual real economic growth rates between 6% and 10% from 2006 to 2030 (ROZ 2006, s 3.1.2). Due to strong fiscal and private sector reforms, aided by political stability for over 20 years, Zambia recently gained lower

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2 Apart from copper and cobalt, other metallic metals include gold, zinc and lead, iron, manganese and nickel.

3 “... annual FDI inflows increased from about USD 160 million in 2000 to USD 1300 million by 2007, but slowed down to USD 900 million in 2008... Over the 5-year period ending in December 2010, Zambia attracted FDI to the order of USD 7 billion, of which a sizeable proportion financed “green field” projects in mining and quarrying, construction, telecommunications (mobile telephony in particular), agriculture, tourism and manufacturing... By any measure, this is an impressive performance”.

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4 There has been a rapid rise of medium-scale farmers (5–100 ha) in Zambia, with a 2272.7% growth change between 2001 and 2012. In the number of farms between 10 and 20 ha.

middle-income country status (OECD 2012, 8). A side effect of this achievement is that overseas development assistance (ODA) is declining. Therefore, the GOZ's strategy to achieve economic growth is to mobilize the private sector to finance the development of its natural resource sectors and harness its natural assets to build the country's prosperity. This strategy is based upon the idea that land-use investments can lead to the development of the economy, as natural resource wealth enters the economy to bolster scarce public domestic sources of capital. Land-use investments can also create direct benefits such as local employment creation, wealth generation and infrastructure establishment. These socioeconomic gains are particularly important to rural areas, where the majority of large-scale land investments are located. Moreover, foreign direct investments can have spillover effects such as technology and knowledge transfer and an increase in the productivity and competitiveness of domestic industries (Morrissey 2012, 31; Amendolagine 2013).

However, the potential positive development opportunities and economic, social and environmental progress that investments can make are not automatic. For example, the large-scale acquisition of property rights by private investors has led to conflicts between investors and those who have ownership and/or access rights to the land (Polack et al. 2013; German et al. 2011, 36). In Zambia, insecure land tenure is prevalent,<sup>5</sup> and there is evidence that property rights are not always acknowledged or upheld by investors, who gain formal title in land without arranging for appropriate consultation with or compensation for local communities. Land degradation and unsustainable land use is also driven by natural resource sectors. With modern and industrialized methods of forestry, farming, electricity production and mining, land is used intensively by: clearance and deforestation, overgrazing by livestock, inappropriate irrigation, excess fertilization, urban sprawl and pollution from industries, quarrying and mining activities (Barman et al. 2013, 1095). Over time, this leads to degradation: the reduction

in the capacity of the land to provide ecosystem goods and services and assure its functions over a period of time for the beneficiaries of these (FAO 2014). The consequences of land degradation include: reduced productivity, food insecurity, loss of income and livelihoods, destruction of important ecosystems, loss of biodiversity and increased vulnerability to natural hazards, including climate change.

Sustainable investments are particularly important to developing countries like Zambia because they provide a gateway through which to realize ambitious sustainable development targets. Therefore, governments have a primary responsibility to create a framework that can enable nationwide sustainable development for investors to follow.

Despite the increase in economic investments in Zambia, the contribution of these investments to the country's sustainable development is questionable. Are investments effectively upholding socioeconomic rights, including land and livelihood protection and protecting the environment, particularly with growing pressures on Zambia due to negative effects of climate change? Similar questions are being asked in the context of the "sustainable landscapes" framework, which seeks to provide tools and concepts for allocating and managing land to achieve social, economic and environmental objectives in areas where agriculture, mining, forestry, energy and other productive land uses compete with environmental and biodiversity goals (Sayer et al. 2013, 8350). According to the sustainable landscapes framework, the sustainability of any one sector must be conceptualized within a broader framework of sustainable land use as a whole. In other words, an improvement in sustainability in one sector will only be as successful as improvements in all land-use sectors, as all are interlinked. For example, forest degradation is driven by many sectors beyond forestry, such as agriculture, energy (charcoal), mineral resources and infrastructure. In a sustainable landscapes paradigm, the performance of one sector or one land-based investment in a country (a landscape) is measured against its contribution to broader development goals such as poverty eradication, green growth, food security and nutrition, mitigation of and adaptation to climate change and sustainable land use (CIFOR 2014).

<sup>5</sup> Insecure land tenure is defined as land rights that are not well protected by the law, including land rights that are not documented or codified. This is often the case with customary land rights, although it is not necessarily the case that customary systems are insecure. It does not include illegal occupation of land, or occupation not considered as legal by government or local authorities.

In Zambia, an increase in investments has not corresponded to reduced poverty levels in Zambia. Although the annual economic growth rate reached 7.3% in 2012, 60% of the population still lives below the poverty line (Rasmussen 2013). Modest gains in social development are observable, with reduced infant and maternal mortality and increased per capita income from USD 680 in 2006 to USD 980 in 2009 (ROZ MCTI 2011, 3). However, whether this is due to investments or other socioeconomic interventions is not clear.

While there does not have to be tension between land-use investments and socioeconomic development and environmental management, inadequate regulatory frameworks and weakness in rule of law tend to allow investor's financial interests to overshadow social and environmental safeguards. Controversy over the cause and effect relationship between investments and development benefits or disadvantages is not unique to developing countries. Despite the potential for damage, land-use investments are important to developing countries like Zambia because they provide a gateway through which to realize ambitious sustainable development targets, such as those set by Vision 2030.

## 1.1 The project and methodology

The International Development Law Organization (IDLO) and the Center for International Forestry Research (CIFOR) have identified the growing numbers of investments in land use activities and concerns about the long-term sustainability of such investments, as a timely legal problem for sub-Saharan Africa. This research project thus aims to improve knowledge on how national legal and institutional frameworks – broadly defined to include laws, regulations, institutions and policies – affect land-use change and sustainable investment in Mozambique, Tanzania and Zambia, with a particular focus on the energy, agriculture, forestry and mining sectors.

This project began with inception workshops in each country to guide the methodological approach of the assessments. The assessments then used a consistent methodology, in collaboration with in-country legal experts and researchers. The research teams analyzed relevant policies, laws, reports and case studies on land-use investments across the four sectors in each country. They met with

representatives of community organizations, civil society, concerned government agencies, academic institutions and the private sector. (The full list of key informants is included in Annex 2.) Due to the broad scope of work and time constraints, the research teams had limited opportunities for direct consultations with communities. Opportunities for further research and testing of a number of key findings would thus be valuable.

The research work culminated with validation workshops in Dar es Salaam, Lusaka and Maputo and with the completion of the legal assessment report for each country (the “legal assessment reports”). These assessments discussed major challenges to and opportunities for sustainable investments that are common to the four resource sectors. A synthesis paper also presents a summary of these key findings.

Tanzania, Mozambique and Zambia were chosen as the target countries for this project because of their common experience with rising investments over the past decade. The three legal jurisdictions also have a relatively comparable state of socioeconomic development, legal systems that allow for a comparative assessment and economic systems that significantly rely on land use and natural capital.

### Key research questions

1. What is the nature and status of legal frameworks governing land-based investments in the key sectors of energy, mining, forestry and agriculture in Tanzania, Mozambique and Zambia?
2. How can the legal frameworks of Tanzania, Mozambique and Zambia be strengthened to effectively regulate sustainable investments that adhere to social and environmental safeguards?

### Subsidiary research questions

1. How have voluntary international agreements and standards on sustainability been transcribed into national laws or processes?
2. Is the implementation of the legal frameworks of Tanzania, Mozambique and Zambia sufficient to positively influence the actual practices occurring on the ground, or do investors continue to circumvent or operate in the margins of the law?

The scope of this research project is limited to the laws relating to the social and environmental repercussions of investments. It does not seek to investigate in detail the economic aspects of the law that may impact sustainable investments, such as banking laws, business licensing or investment treaties (see e.g. Cotula 2013a). Moreover, gender considerations are only preliminary reviewed, as well as the importance of accessible dispute resolution mechanisms.

## 1.2 Definition of Sustainable Investment

### 1.2.1 Sustainable investment

The concept of a “sustainable investment” does not have an internationally agreed-upon definition. However, there are a wide variety of international regulatory and voluntary standards on sustainability. For the purposes of this project, the definition of “sustainable investment” is based upon a review and analysis of 10 global sustainability and sustainable investment standards (see Annex 1). Therefore, while this definition is not comprehensive and may not be applicable to all countries in sub-Saharan Africa, it is internationally grounded and forms the foundation for the challenges and opportunities identified in the legal frameworks of Tanzania, Mozambique and Zambia.

Taking a broad perspective, a sustainable investment is an investment that contributes

to the achievement of sustainable development of a country (OECD 2011, 19): development that is fair, within the carrying capacity of the planet (Pengra 2012), and leaves no one behind. In addition to accounting for the triple-bottom line of investors, a sustainable investment thus contemplates the equitable distribution of financial and natural capital wealth across a society. This includes not only impacts upon directly affected citizens, but effects across the society, including the socioeconomic development of a country’s citizens and the environmental stewardship of the country in which it is based.

Delving more specifically into the socioeconomic and environmental requirements of a “sustainable investment”, there are nine elements that enjoy broad convergence across the 10 sustainability standards (Figure 1).

Further, a sustainable investment is one that does no harm to the human rights of local communities, including protecting their livelihoods and upholding their rights over land. A sustainable investment can spur co-benefits through alignment to existing government development policies. Such co-benefits may include employment opportunities or local infrastructure development and ensure that citizens enjoy improved well-being from investments. Generally, sustainable investments avoid further marginalization of the poorest in pursuit of economic development, with the wealth generated from natural resources spread equitably across a society. A sustainable investment promotes public participation and local decision-making

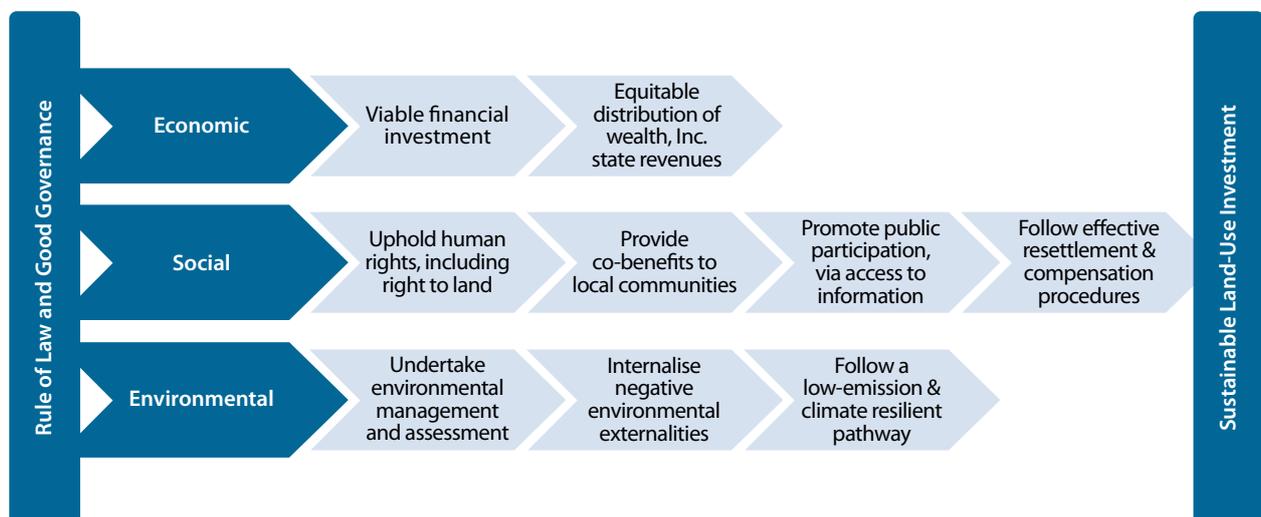


Figure 1. Illustrative elements of a sustainable investment.

for the duration of the investment, engaging closely with local communities to ensure buy-in and acceptance by all concerned stakeholders. To facilitate effective public participation, a sustainable investment is also transparent; information on its activities, structure, financial situation, performance, ownership and governance is made readily available to interested persons in a clear and comprehensible form.

Furthermore, a sustainable investment is one that is environmentally responsible by proactively evaluating, managing and monitoring its impact on the local environment. It also incorporates all costs of an investment into the final price of natural resource products, including environmental damage caused to waterways, the climate system and the soil. Internalization of these environmental externalities creates greater efficiency in natural resource use and management, as it raises the cost and limits excess consumption. Finally, a sustainable investment follows a low-emission and climate-resilient development pathway (UNDP 2014). Such a pathway involves reducing levels of greenhouse gas (GHG) emissions against industry business-as-usual standards and building resilience to climate change.

Climate resilience is the term used to describe adaptation mechanisms to enhance the capacity of people, local economies and the environment to cope with the negative impacts of climate change and to recover from its shocks. While specific reference to GHG emissions is only found in the United Nations Framework Convention on Climate Change (UNFCCC) sustainability standard – and the SDGs by virtue of their recognition of the UNFCCC – IDLO and CIFOR consider mitigation of and adaptation to climate change integral to the sustainable development of sub-Saharan Africa. First, sustainable investments provide a critical development pathway for developing countries that wish to uncouple economic and social development from GHG emissions. Second, local communities in sub-Saharan Africa are among the world's most vulnerable to climate change, particularly due to their reliance on rain-fed agriculture (Adams et al. 2013, 1). To be sustainable, investments should therefore contribute to the climate resilience of the region.

The three elements of sustainable investments are governed by a common principle: adherence to the rule of law and good governance, which is informed

and established by a strong legal framework that is effectively implemented and equally applied by independent and impartial courts. The rule of law embodies universal principles of equality, good governance, citizen empowerment and participation. Rule of law can act as an enabler to sustainable development, equitable growth and poverty reduction (UNDP 2013; UNGA 2013, 2; IDLO 2014). Strengthening the rule of law by bringing regulatory frameworks into compliance with international norms and standards, and by supporting their effective implementation can be critical to build the basis for sustainable development (Anyanwu 2012, 425).

There are other important ingredients for sustainable investments, such as political will, in-country capacity and resources to implement laws, and knowledge and understanding of the importance of sustainable development among both governments and citizens. While the report touches on these issues, the focus of this research project is on laws and institutions and their ability to act as enablers to sustainable investments.

Adherence to this definition of sustainable investment is demanding and many investments will not meet all of the aforementioned criteria. Indeed, the aim of this definition is to establish a good practice international standard and frame the discussion of the laws and institutions of Zambia, in order to identify key challenges and innovations.

Despite the high standard, IDLO has identified two investments in Zambia that adhere to the overall essence of this definition of “sustainable investment”. This report analyzes these investments as examples of what is possible, in Case study 2 and Case study 4, to inspire others to follow suit and to draw broader policy lessons from these investment models. Further information on other unsustainable investment examples is available in case studies throughout the report.

### 1.2.2 Report structure

This study is structured into three major sections. Section 2 provides a broad overview of the governance structure of Zambia as it affects sustainable land-use investments and a brief review of the legal frameworks governing sustainable investments in the four key sectors of energy, mining, forestry and agriculture. Section 3 provides an in-depth analysis of the Zambian

legal framework surrounding the four common challenges to sustainable investments that form the focus of this report. Key findings are proposed throughout the document as possible ways of action and Section 4 concludes the findings.

Case study examples are provided throughout Section 3 to highlight specific ways in which the common challenges identified impact investments,

communities and government actors in Zambia. In addition, two current sustainable investments in Zambia will be provided as an illustration that profitable, sustainable investments are possible. An analysis of why these investments chose to prioritize environmental or social sustainability provides some insight into the kind of legal incentive mechanisms that may attract sustainable investments in the *Zambian context*.

# 2 Situating sustainable investments within Zambia's existing legal frameworks

## 2.1 Governance structure

Sustainability is a key element within Zambia's governance structure, defined to include Zambia's supreme law, the constitution and Zambia's long-term development strategy, Vision 2030. The constitution explicitly outlines the importance of balancing the need to attract investments to develop Zambia with the need to ensure their environmental and social sustainability (Constitution of Zambia 1996, art 112). Vision 2030 includes sustainable development among its seven basic principles (ROZ 2006, 2). In addition, Zambia's policy engagement with the issue of climate change, as a particular long-term development challenge, contributes to Zambia's policy direction on sustainable development. Zambia has identified climate change as a particular development challenge, due to its impact on rainfall patterns, resulting in floods and droughts (ROZ 2010a, i). The longer term goal of Zambia's National Climate Change Response Strategy 2010, echoed in the *Sixth National Development Plan*, is to ensure climate change is mainstreamed in all substantial and vulnerable sectors of the economy by 2030 (ROZ 2010a, iii ; ROZ 2011, 38). (For further discussion of Zambia's sustainable development governance structure, see Annex 3).

## 2.2 Devolution

Zambia recently introduced a decentralized system of governance, in which its district-level councils have been given a greater number of governance functions and greater decision-making power (Mason-Case 2011).<sup>6</sup> While the central

government retains the responsibility for overall policy-making and regulatory functions, such as national development planning and coordination and nationally significant project implementation, the councils have become the focus of development activities and service delivery. Elected councilors have been given the responsibility of facilitating local communities' access to effective participation in the planning and resource allocation processes (ROZ 2009). This devolution of governance functions aims to enhance efficiency in decision-making and service provision, equity in allocation of resources and participation in development (ROZ 2009).

Although this research project does not delve into all of the challenges surrounding the implementation of decentralization in Zambia, some areas will be touched upon. The challenges include financial and human resource scarcity, as well as sectoral legislation that does not yet align with the decentralized governance structure, or provide specific functions for councils (personal communication from Planning Department Officer, Environmental Planner, Chief Health Inspector and Legal Assistant from local government, 2013). Any strategy to improve the sustainability of investments in Zambia will have to respond to the jurisdictional requirements of decentralized administration, such as public participation requirements, environmental management plans and enforcement.

## 2.3 Overview of the existing legal frameworks in the energy, forestry, mining and agriculture sectors

Each target land-use sector is governed by different institutions, stakeholders, laws and policies. However, the basic regulatory framework for investors within each sector is the same (Table 1). Specific sectoral legislation and policies regulate

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<sup>6</sup> The Zambian public administration framework is divided into the Central Government, Provincial and District Administration and City, Municipal and District Councils. Zambia counts 9 Provinces and 73 Districts, within which there are Councils dispersed across 4 Cities, 14 Municipalities and 54 Districts.

**Table 1. Regulatory framework of target land-use sectors in Zambia.**

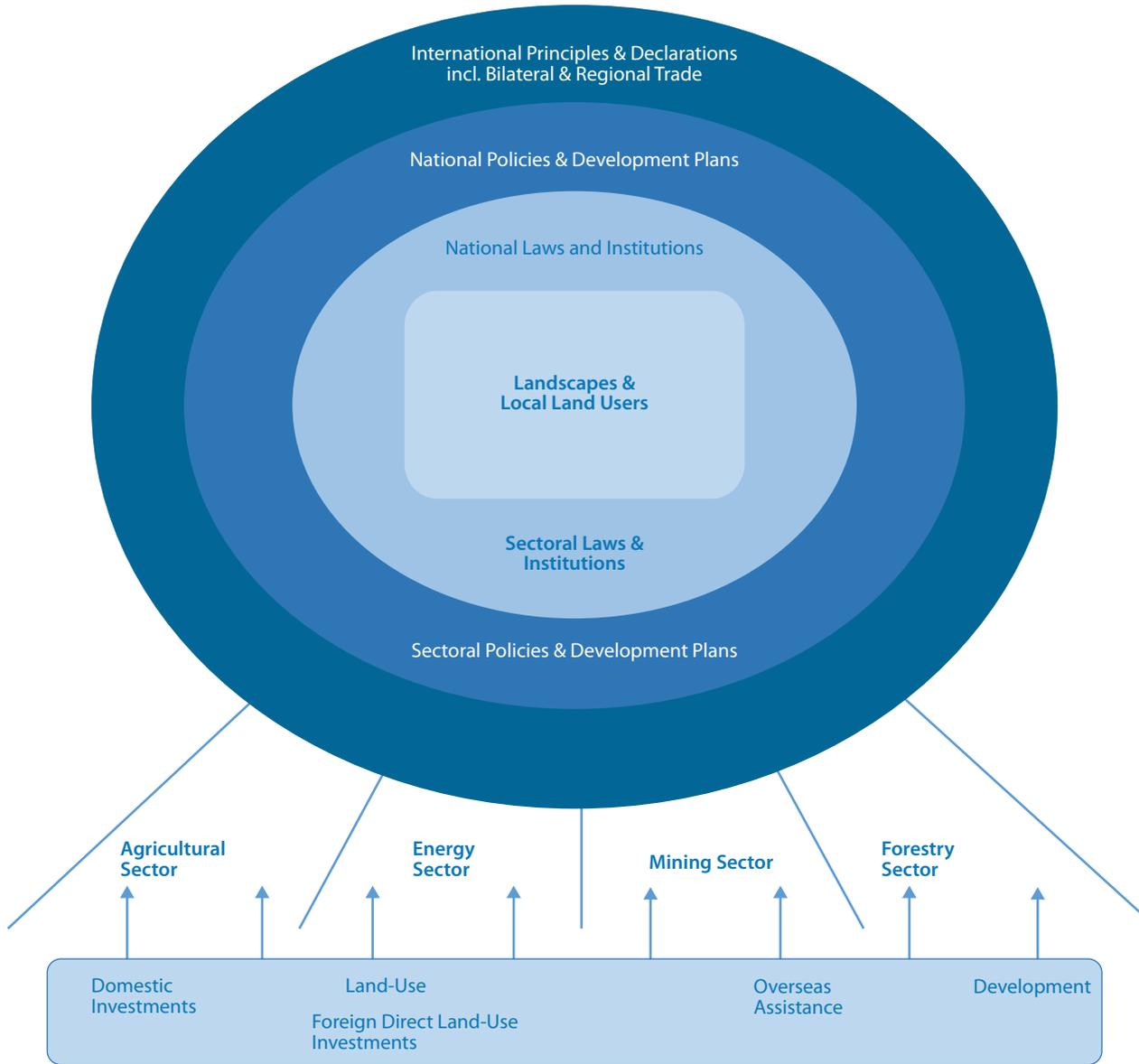
Sector	Responsible sectoral institution	Key sectoral legislation	Key sectoral regulations	Key sectoral policy documents
Forestry	Department of Forestry Ministry of Lands, Natural Resources and Environmental Protection	Forests Act 1973 Forests Bill 2013 <sup>1</sup>	Forests Regulations Forests (Timber Export) Regulations 1977 Local Forests (Control and Management) Regulations 2006	Forest Policy 1998
Energy	Energy Regulation Board Ministry of Energy and Water Development	Energy Regulation Act 1995 Rural Electrification Act 2003		National Energy Policy 2008
Agriculture	Agricultural Lands Board Ministry of Agriculture and Livestock	Agricultural Lands Act 1960 Agriculture (Fertilisers and Feed) Act 2010		National Agricultural Policy 2004 Farm Block Development Programme 2005
Mining and Minerals	Mines Development Department Ministry of Mines	Mines and Minerals Development Act 2008 Mines Safety Act 2011	Mines and Minerals Development (Prospecting, Mining and Mining of Uranium Ores and Other Radioactive Mineral Ores) Regulations 2008	Mining Policy 1995

the respective sector and allocate an institution with administrative responsibility for it. For the purposes of investment, these responsibilities include predominantly the issuance of licenses and monitoring investors' adherence to license requirements. A brief outline of each sectoral legal framework, as it relates to sustainable land-use investments, is available in Annex 3.

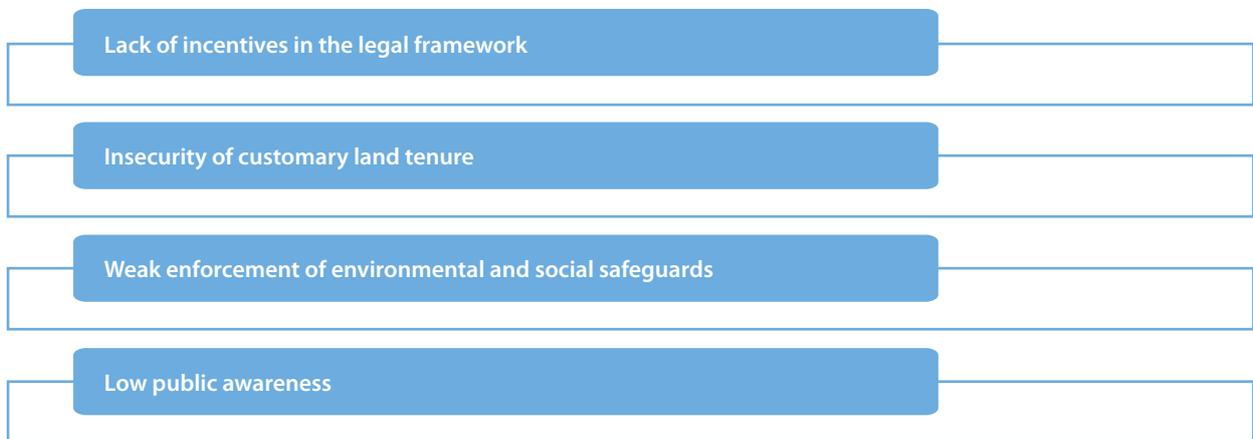
Beyond the sectoral framework, investments in each sector must also adhere to international standards and investment agreements and crosscutting legislation and policies, such as the constitution, Zambia Development Agency (ZDA) Act, the Lands Act and environmental regulations under the Environmental Management Act (EMA) (Figure 2). Details of the crosscutting legislation are in Section 3,

alongside an analysis of the common challenges facing sustainable investments. An integrated approach across sectors offers a potential solution to these common challenges.

There are very few express incentives the legal frameworks governing investments in the forestry, energy, agriculture and forestry sectors that support sustainable land-use investments. This is a common challenge to all four sectors' legal frameworks; along with three other common challenges, these are the focus of the remainder of the study (Figure 3). Section 3 analyzes the four common challenges to sustainable land-use investment, which are the focus of this report and proposes key findings for a legal and institutional framework that better enables sustainable land-use investments in Zambia.



**Figure 2. Sustainable land-use investments and multilevel governance.**



**Figure 3. Challenges to sustainable land-use investments.**

# 3 Key challenges for sustainable land use investments in Zambia

Lack of sustainable incentives in the legal framework, insecurity of customary land tenure, weak enforcement of environmental and social safeguards and low public participation and awareness are the four common challenges to sustainable land-use investments in the forestry, energy, agriculture and forestry sectors. They form a key barrier to the equitable distribution of benefits and wealth from investments in Zambia and the development of Zambia into a climate-resilient country. These challenges are particularly relevant to the legal framework, the institutional structure and to their effective implementation. Key findings are therefore focused on improvements to the legal frameworks, to attract sustainable investments and establish strong social and environmental regulations and strengthening institutional and governance structures to improve implementation and enforcement. Despite a primary focus on government, the study also promotes the need to build the capacity of smallholders, civil society and communities, so that Zambians can reap the benefits of investing in and helping the development of their own country.

To complement the analysis, case study examples are provided to highlight specific ways in which the four challenges impact investments, communities and government actors in Zambia. In addition, two current sustainable investments in Zambia will be provided as an illustration of what is possible.

## 3.1 Lack of incentives in the legal framework

To attract the investment required to achieve the goal of a “prosperous, middle-income country”, it is key to mobilize the private sector. A highly effective method for attracting private investments is the creation of incentives (UNEP-FI 2012, 11). The need for public incentives is particularly pressing with regard to low-carbon technologies,

many of which are (at least perceived to be) more risky and expensive than traditional investments (Griffith-Jones et al. 2009, 26). Effective incentives work to lower the risk of low-carbon, sustainable technologies, making them more competitive (UNEP-FI 2012, 28). The United Nations Development Programme (UNDP) has divided incentive mechanisms into two categories: financial mechanisms that lower the price of low-carbon technologies and transfer investor risks to public actors, such as development banks (Waissein et al. 2013, 13), and policy-based mechanisms that “seek to remove the underlying barriers that are the root causes of risks.” (Waissein et al. 2013, 13) Loan guarantees are an example of financial incentives, while support for policy design and institutional capacity building is an example of a policy incentive (Waissein et al. 2013, 13). An effective mix of both types of incentives is needed to attract sustainable investments.

In Zambia, there are very few express incentives that support sustainable investments. This section will expand upon this challenge and include a discussion of bilateral investment agreements and investor-State contracts in which Zambia generally grants rights and protection to foreign investors. Subsequently, national-level incentives are examined, including incentives for MSMEs, which particularly require government support due to their greater difficulties to access credit. An example of a sustainable investment is provided in Case study 2 to draw out possible regulatory incentives. Finally, “incentives to behave” such as environment rehabilitation funds are reviewed for their efficacy.

### 3.1.1 Bilateral investment agreements and investor protection and promotion agreements

A common method of securing an attractive business environment for investors is the negotiation of treaties between governments – bilateral investment

treaties (BITs) – and contracts between individual investors and governments – investor protection and promotion agreements (IPPAs). Through these agreements, investors can negotiate conditions outside of those provided by the law. BITs and IPPAs are well established in international trade but this report cautions care in their use because of the opaqueness, lack of equality between investors and lack of sustainability safeguards.

### Bilateral investment agreements

BITs have become one of the most important international “policy derisking” legal mechanisms for the encouragement and governance of foreign direct investment (Elkins et al. 2006, 815). BITs typically grant rights to foreign investors, including protection from expropriation and the right to international arbitration in the event of an investment dispute. In the case of Zambia, it is no different.

As of June 2013, Zambia had signed 12 BITs, two of which have been ratified by Germany and Switzerland (UNCTAD 2013).<sup>7</sup> Zambia has also signed bilateral reciprocal promotional and protection of investment protocols with most of the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) Member States (USBEB 2012). Research into a selection of such treaties available online, including BITs with Germany, Egypt, Netherlands, Belgium, Finland and Switzerland shows that they incorporate the following clauses (Bennett 2008):

- **Protection from expropriation/nationalization** – agreement that each State will not expropriate or nationalize any asset or investment belonging to nationals from the other State. An exception in most BITs involves expropriation or nationalization that takes place for a public purpose that is nondiscriminatory and that is subject to prompt and adequate compensation.
- **Most favored nation and national treatment** – each State will treat investments made by

investors from the other State in a manner that is at least as favorable as the manner in which it treats investments made by either: (i) investors from other States, or (ii) its own citizens.

- **Repatriation of investment and earnings** – each State permits the unrestricted transfer of investments and earnings made by nationals of the other State. These transfers are to be effected without delay and in the currency in which the investment was originally made.
- **Observation of contractual obligations** – each State agrees that it will observe any obligation that it has entered into with investors from the other State. Treaty protection is given to any obligations undertaken in a contract between the investor and the State, such as a concession contract or license for a project.
- **Dispute resolution** – any breach of the BIT will entitle the investor to commence arbitration proceedings against the relevant State. The investors can enforce their claims directly against the host State in a neutral forum, generally an international arbitral tribunal.

These are all standard clauses to BITs and create favorable conditions for investors from the contracting party entering Zambia. There are no conditions in any of Zambia’s BITs relating expressly to the sustainability of investments and this is a missed opportunity to regulate foreign investors.

### Investment protection and promotion agreements

The Government Technical Negotiating Team, on behalf of the GOZ, signs IPPAs with private companies undertaking significant investments of USD 10 million and above as another “policy derisking” method (ZDA Act 1997, s 17(j)). The negotiating team is guided by two documents called the *Guiding Principles on IPPA Negotiations* and the *Standard Template on IPPAs* whose objective is to give policy direction on the required contents of IPPAs (ROZ MCTI 2008). Since 2008, the government has signed 36 IPPAs (ROZ MCTI 2011, 40). Similarly to BITs, the IPPAs promote investments by assuring investors of the security of their investments and the government’s commitment not to expropriate without due process of law (ROZ MCTI 2011, 40). The IPPA guidelines also require compliance with Zambian laws and encourage employment of qualified Zambians (ROZ MCTI 2011, 40; Matapo 2012, 45).

<sup>7</sup> Belgium and Luxembourg 18 May 2001; China 21 June 1996; Cuba 22 January 2000; Egypt 28 April 2000; Finland 7 September 2005; France 1 January 2002; Germany 10 December 1966 (entry into force on 25 August 1972); Ghana 18 May 2001; Italy 20 April 2003; Netherlands 30 April 2003; Seychelles 7 December 2010; Switzerland 3 August 1994 (entry into force on 7 Mar 1995).

Concerns have been raised about whether such investor-State contracts (as well as BITs) provide a fair economic deal for low-income countries, including whether they effectively address social and environmental considerations (Cotula 2013b). The potential inequity of these investor-State contracts is particularly apparent when contracts seek to limit the applicability of national laws to the investment by “freezing” the laws in place at the date of contract signature (Ng’ambi 2010, 108). If the law is changed, the government can be required to pay compensation to foreign investors, and this effectively puts pressure on national regulators not to update the law. This can lock in inequitable fiscal arrangements and lax environmental and social safeguards, which the government is not willing or able to improve. These so-called stabilization clauses were part of existing mining and mineral development agreements in Zambia (Conrad 2012, 23).

### **Stabilization clauses in mining and mineral development agreements**

Development agreements were negotiated and signed individually with private mining companies in the mid-1990s, in conjunction with the privatization of Zambia’s mines (Hart Group 2013, 18-21). Because the price of copper was low at the time, the development agreements formed part of a generous incentive package for investors, with agreements that included provisions above and beyond the general incentives in the law (Haglund 2013, 2). By including stabilization clauses in these development agreements, the GOZ was cornered into maintaining low tax and royalty rates for mining activities (Hart Group 2013, 19). Development agreements were eventually repealed with the enactment of the Mines and Minerals Development Act 2008, and the practice of negotiating individualized terms with each mining investor was formally stopped (Haglund 2013, 2). In the development agreements, international arbitration by the International Center for Settlement of Investment Disputes was envisaged for any breach of contract. While it appears that breaking the development agreements did not lead to international arbitration, this risk was a significant decelerating factor to the reform of the taxation regime in Zambia (Manley 2012, 26). Nevertheless, royalty rates were eventually established, a variable profits tax introduced and a windfall tax enacted by the Mines and Minerals Development Act 2008. However, Zambia has still only collected 7 to 8% of the revenues from mining

over the last decade, which is low in comparison to its international counterparts (Haglund 2013, 10).

In addition to locking in inequitable fiscal terms, stabilization clauses can likewise seek to prevent compliance with updated environmental or social regulations, including labor laws (Conrad 2012, 24). Although it is common for governments to adopt some investment risks to attract private companies to their country, these mechanisms would be applicable to all, unlike individually negotiated IPPAs. Stabilization clauses should be used sparingly and in particular should not lock in inequitable tax and royalty rates for long periods or seek to freeze environmental and social safeguards (Conrad 2012, 24). The GOZ should be free to enact generally applicable laws that bolster the environmental and social safeguards concerning investments.

The negotiation of IPPAs has been questioned as a continuation of the opaque and individualized development agreements (Matapo 2012, 45). However, the standard template on IPPAs expressly excludes stabilization clauses and states that fiscal terms and tax schedules will not form part of IPPAs and will instead follow those provided in the national laws.

Restricting the use of individualized contractual terms between the government and natural resource investors is important to improve the transparency and integrity of investment contracts and balance the protection of investors with the right of Zambia to regulate investments stringently and distribute natural resource wealth equitably. With all investor incentives and regulations publicly available to view in laws and regulations, scrutiny of investments by the public is possible and both government and investors are more easily held to account.

#### **Box 1. Incentives provided in IPPAs (Richardson 2010, 929)**

In 2001, Illovo Sugar Ltd negotiated an IPPA with the GOZ with a variety of incentives, including:

- 0% import duty on machinery
- Secure access to finance at reduced prices
- Treatment of sugar as a priority product, within the food processing sector identified within Schedule 2 of the ZDA Act (see below)
- Reduction in its national and local tax burden

### 3.1.2 Incentives in the national law

In its national legal framework, the GOZ has arguably implemented a strong set of financial incentives to attract investments although these are predominantly not targeted at sustainable investments. As well as sector-level incentives, these are particularly regulated through the ZDA Act of 2006.

The objective of the ZDA Act is to “foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy”, among other objectives related to specific investment priorities (ZDA Act 2006, preamble). The Act also establishes the ZDA, a “one stop shop” for all international investors to Zambia, with the aim of assisting foreign investors navigate the regulatory framework. However, as with the sectoral legal frameworks, the investment framework is not directed at sustainable land-use investments. Indeed, it is telling that sustainability or environmental considerations are not listed as a primary objective of the act. Nevertheless, the ZDA Act require that when considering a license or permit, thought be given to “the impact the proposed investment is likely to have on the environment...” (ZDA Act 2006, s 69). The primary objectives of the ZDA Act include socioeconomic sustainability considerations, such as “provide and facilitate support to micro and small business enterprises”, promote “joint ventures and partnerships between local and foreign investors” and “encourage education and skills training so as to increase productivity in business enterprises” (ZDA Act 2006, preamble).

The ZDA Act introduces incentives for investors, valid for 5 years from the time of granting of the investor license, permit or certificate of registration, or for such period as the minister responsible for finance may prescribe (ZDA Act 2006, s 55). This makes it clear that the act requires an investor to hold a license, permit or certificate of registration issued under the act to be eligible for these incentives (ZDA Act 2006, s 59 and pt X). The incentives can either be specified under the ZDA Act or under the Income Tax Act (Income Tax Act 2006) or Customs and Excise Act (2006). The fiscal incentives provided by the ZDA are comparative to other countries in the region, such as Gabon and Tanzania (URT 1997; ROG 1998).

General incentives include (ZDA 2013a, 11):

- Income earned by companies in the first year of listing on the Lusaka stock exchange qualifies for a 2% discount on the applicable company tax rate in the particular sector, however companies with more than one third of their shareholding in the hands of Zambians qualify for a 7% discount.
- Initial allowance of 10% 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 for the building and construction of an industrial or commercial building are tax deductible.
- Carry-forward of losses up to 5 years.
- Relief for VAT registered enterprises on imports of eligible capital goods.
- Zero rate on export of taxable products.
- Relief of VAT on transfer of business as a going concern.
- Equal treatment of services for VAT-reverse VAT.
- VAT relief on input tax paid for purchases made by registered suppliers.
- Input tax claim for 3 months prior to VAT registration for businesses that have already commenced trading.

The ZDA Act establishes a number of ‘priority sectors or products’ (ZDA Act 2006, s 2),<sup>8</sup> which are entitled to further incentives (ZDA Act 2006, ss 3 and 56). However, investments in a priority sector or product must be over USD 500,000 to receive the incentives. This threshold excludes many MSME investments and indicates a clear preference in the investment framework for large-scale investments. Specific taxation concessions for priority investments are (ZDA 2013a, 11):

- 0% tax rate on dividends for 5 years from year of first declaration of dividends.
- 0% tax on profits for 5 years from the first year profits are made. For year 6 to 8, only 50% of

8 (a) Floriculture; (b) Horticulture; (c) Processed foods; (d) Beverages and stimulants, including tea and coffee; (e) Production and the processing of cotton, cotton yarn, fabric and garments in the textile sector; (f) Manufacturing of the following engineering products: copper products; iron ore and steel; cobalt; other engineering products; (g) Beneficiation of phosphates and any other related material into fertilizer (h) Beneficiation of rock materials into cement (i) Production and processing of raw timber into wood products (j) Production and processing of cattle hides, crust leather, leather products in the leather sector; (k) Building of mini-hydro power stations (i) Education and skills training. Priority sector or product is defined as a sector or product that has a high growth potential.

profits are taxable and for years 9 and 10, only 75% of profits are taxable.

- 0% import duty rate on raw materials, capital goods, machinery including trucks and specialized motor vehicles for 5 years.
- Deferment of VAT on machinery and equipment including trucks and specialized motor vehicles.

Reforms to the ZDA Act have improved transparency with regard to incentives for priority investments. Previously, the ZDA Act gave the Minister responsible for finance, in consultation with the minister responsible for trade, the power to specify additional incentives for the purposes of promoting major investments in an identified sector or product of over USD 10 million (ZDA Act 2006, s 58). This practice was disallowed in 2012, citing the desire for uniformity (USBEBA 2012). However, taxation incentives for specific priority sectors, such as the agriculture sector, continue and include (ROZ 2011, 19):

- Corporation tax at 15% on income from farming and non-traditional exports;
- Farm works allowance of 100% of expenditure on stumping, clearing, prevention of soil erosion, bore holes, aerial and geophysical surveys and water conservation;
- Development allowance of 10% 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;
- Dividends paid out of farming profits are exempt for the first 5 years the distributing company commences business;
- Carry forward losses for 5 years.

In addition, due to a number of tax holidays established by the mining legal framework,<sup>9</sup> mining companies are effectively paying no income tax. According to a report on Zambia's investment policy framework, the taxation regime is seen as being inequitable by many Zambians, who say that the country is not benefitting sufficiently from the mining sector (OECD 2012, 99).

In terms of the distribution of mineral resource wealth to the country, the GOZ receives a mineral

royalty on base metals at 6% of the norm value of the base mineral extracted, as well as variable profit tax of up to 30% (Hart Group 2013, 26). However, the mining sector also receives a number of incentives, aimed at making mining ventures more profitable and therefore attractive to investors, particularly from the Income Tax (Amendment) Act of 2008 and Income Tax (Amendment) Act of 2009 (Hart Group 2013, 27):

- In Zambia, VAT registration is compulsory for companies with a turnover exceeding ZMW 200,000 (USD 35,000) per annum.
- Exploration companies in the mining sector have guaranteed access to input tax claims for five years on pre-production expenditure.
- Dividends paid by a mining company holding a large-scale mining license that continues to pursue the mining of base metals is taxed at 0%.
- Income earned by companies in the first year of listing on the Lusaka stock exchange qualifies for a 2% discount on the applicable company tax rate; however companies with more than one third of their shareholding in the hands of Zambians qualify for a 7% discount.
- Importation of most capital equipment for the mining sectors is duty free.
- There are capital expenditure deductions for mining equipment, plant, machinery and other capital expenditure claimed at the rate of 25% per annum. The deductions are available from the year that the asset is brought into use.
- The debt to equity ratio reduction from 2:1 to 3:1 encourages further investment in the sector.

Zambia's Finance Minister recently announced a cut in the mining sector capital allowance from 100% to 25%, which effectively means that mining companies will be taxed earlier. A commonly held view is that this will remove the incentive for mining companies to invest in new long-term mining projects. However, according to the Extractive Industries Transparency Initiative, a strong level of exploration activity continues to exist (Hart Group 2013, 23).

Industrial land is also being identified for the establishment of multi-facility economic zones (MFEZs) - industrial parks for export-oriented and domestic-oriented investments (ZDA 2013c). The MFEZ include infrastructure to attract and facilitate investments. Four MFEZs with access to key business infrastructure have been announced and are under construction: the Chambeshi MFEZ, the Lusaka South MFEZ, the Lumwana MFEZ and the Lusaka East MFEZ (OECD 2012).

<sup>9</sup> See the specific taxation concessions for priority investments in Section 3.1.2.

### Box 2. MFEZ preference economic growth over environmental protection?

The site for the Lusaka South MFEZ lies within a former forest reserve. Under the Forests Act 1973, forest reserves can be declared by the president, by statutory instrument or altered by a similar process (Forests Act 1973, s 8). In 1985, the Lusaka South Forest 26 was degazetted by the president, due to urbanization in Lusaka, opening this area up for development (Malomo and Wint 2003, 79). Robert Chimambo of the Zambia Climate Change Network affirmed: "Sadly, the proposed location of the Multi Facility Economic Zone in Forest Reserve 26 will mean the destruction and degradation of the forest, which is right on top of the Lusaka aquifer. This would also mean poisoning the rivers and the groundwater..." (Chiombe 2013).

### Little priority shown to domestic investments

The ZDA Act makes no distinction between foreign and domestic investors (ZDA Act 2006, s 2). The taxation system also does not discriminate, with a standard corporate tax rate applicable to all of 35% (OECD 2012, 95). However, the abovementioned tax incentives demonstrate that this standard rate is reduced for priority investors, in line with the GOZ's policy for attracting foreign investment in these key economic sectors. Most MSMEs are not provided with similar tax incentives, leading to an effective disincentive against these investors (Table 2). However, MSMEs with an annual turnover of less than ZMW 250 million can opt to pay a presumptive tax at 3% of turnover, instead of tax being based on the assessed profit from income (OECD 2012, 99). In addition, MSMEs that register with the ZDA are exempt from (ZDA 2013d):

- paying customs duty for rural-based enterprises;
- paying income tax for 5 years (rural-based);
- paying income tax for 3 years (urban-based);
- paying a manufacturing license for 5 years.

Nevertheless, other tax incentives such as VAT relief are not available to MSMEs, because they fall under the threshold to be registered for VAT and cannot therefore make input tax

**Table 2. Marginal effective tax burden per sector in Zambia.**

Sector	Marginal effective tax rate (OECD 2012, 95) <sup>2</sup>
Agriculture	10%
Tourism	5%
Mining	0%
Manufacturing	5%
Finance	30%
Average effective tax rate	10%
MSME sector	22.5%

Source: OECD (2012) Investment Policy Reviews: Zambia, 95

claims for their purchases and costs of production (OECD 2012, 100). Overall, the investment legal framework in Zambia does not provide as many financial incentives to local MSMEs as it does to larger foreign investments.

### Private sector development reform programme

In addition to the ZDA Act, the Private Sector Development Reform Programme (PSDRP) also seeks to enhance private sector development and improve the investment climate of Zambia through legal reforms to streamline and simplify investment procedures (PSDRP 2006). Between 2006 and 2009, the PSDRP undertook a number of regulatory reforms. These included the: "abolition of price controls, liberalization of interest rates, abolition of exchange rate controls, 100% repatriation of profits, free entry investment in virtually all sectors of the economy, trade reforms aimed at simplifying and harmonizing the tariff structure and removal of quantitative restrictions on imports. Moreover, it shortened the time taken for business name registration and company incorporation for investments from 21 days to 3 days." (ROZ MCTI 2011, 3)

Overall, these reforms are positive and Zambia increased its rank on the World Bank's "Ease of Doing Business" from the 90th position out of 183 economies in 2009 to the 76th in 2011. Zambia's ranking fell to 90th in 2013, but has since regained 7 places (ROZ MCTI 2011; World Bank 2014b). In the sub-Saharan African region, Zambia has been recognized as being among the top reformers (OECD 2012, 25).

### “Ease of Doing Business” in Zambia

- Sixth worldwide in accessing credit
- Fourth best performer worldwide for starting a business
- Best in COMESA in accessing credit
- Third in COMESA in overall ease of doing business, starting a business and paying taxes
- Best among the SADC’s least developed economies in overall ease of doing business

**Figure 4. Ease of doing business in Zambia.**

Source: World Bank (2014b); OECD (2012).

In 2009, the PSDRP was extended for a second phase (2009–2014) and its focus was rationalized to concentrate on five priority areas: (i) business licensing and regulatory reform; (ii) MSME development, (iii) labor and labor productivity (iv) public–private partnership development and (v) trade expansion (PSDRPII 2009, 18). While a detailed analysis of the progress of this reform program is outside the scope of this report, the second priority area is particularly interesting to note, given the abovementioned conclusion that taxation incentives for MSMEs are limited, with a clear priority placed on foreign direct investments.

#### Prioritization of MSMEs

In the second phase of the PSDRP, the GOZ identified MSMEs as priority investors and recognized that the development of MSMEs can reduce poverty, improve livelihoods and contribute to the sustainable development of Zambia, through wealth and job creation (PSDRPII 2009, 20). The GOZ has established a number of mechanisms to support and unlock the potential of the MSME sector: the creation of the Citizens Economic Empowerment Commission (CEEC) (see Case study 1) and the establishment of an MSME division within the ZDA. However, MSMEs continue to face a number of barriers, including limited access to finance, shortage and high cost of inputs, lack of appropriate tools and machinery, low

technical and entrepreneurial skills and lack of skilled labor (PSDRPII 2009, 20). This section will investigate to what extent the GOZ’s efforts are prioritizing MSMEs and suggests some key findings to reduce the challenges that remain, with a particular focus on access to credit.

The ZDA has a dedicated directorate for MSMEs, which facilitates technical assistance and capacity building to improve the business development and entrepreneurial skills of MSMEs and seeks to establish business linkages between domestic and foreign investors. The business linkages ought to promote foreign investors’ procurement of goods and services from MSMEs (OECD 2012, 67). The CEEC also promotes preferential procurement for MSMEs with local participation in the award of public procurement contracts (Microfinance Transparency 2011, 9; OECD 2012, 68). However, evidence gathered by the Organisation for Economic Co-operation and Development (OECD) shows that linkages between foreign and local businesses remain limited and outgrower schemes within the agricultural sector provide the majority of connections between foreign investors and local producers (OECE 2012, 68). The OECD recommends “strengthening local support industries around the MFEZ to promote linkages with investors located in the zones” (OECD 2012). The current MFEZ policy establishes a minimum threshold of USD 500,000 for an investor to qualify, which is probably prohibitive to local MSMEs (Microfinance Transparency 2011, 5). The waiving of this threshold for local MSMEs could open access to opportunities provided by the MFEZs to local MSMEs. Physical proximity within the MFEZs between foreign and domestic investments could facilitate better linkages.

#### Access to credit for MSMEs

While Zambia’s business reforms have improved access to credit for investors, access to formal financial institutions to obtain credit for Zambian nationals and SMSEs is low in Zambia. A survey concluded in 2009 established that 62.7% of Zambian adults are financially excluded (FinScope 2009, 31).<sup>10</sup> Only 13.9%

10 “Financial exclusion is defined to mean individuals who use no financial products - neither “formal” nor “informal” – to manage their financial lives.”

of Zambian adults use traditional financial products supplied by commercial banks, rising to 22.6% in urban areas and decreasing to 8.6% for rural areas (FinScope 2009, 28–30). Compared to neighboring countries, access to finance in Zambia is low: 41% of the adult population in Botswana use commercial banking products, compared to 21% in Nigeria and 19% in Malawi (FinScope 2009, 35). Mozambique has a higher percentage of the adult population that is financially excluded compared to Zambia, at 78% (FinScope 2009, 35). A total of 66.1% of women in Zambia are financially excluded, which is substantially higher than the 59.2% of men (FinScope 2009, 37). There are a number of reasons behind the low levels of inclusion in access to finance, but the most significant barrier is that the majority of the Zambian population works in the informal sector, without a steady income (Microfinance Transparency 2011, 4).<sup>11</sup> Only around 700,000 of the 6,184,000 people in Zambia's labor force are formally employed (ILO 2009). Therefore, formal commercial banking remains outside their grasp. Alternatives such as microfinance institutes exist in Zambia, but have limited outreach and uneven geographic spread, with the majority in Lusaka or in other more developed urban centers (Microfinance Transparency 2011, 10). According to a 2012 study by Microfinance Transparency, microfinance institutes largely target Zambians with formal employment and who have a bank account; "there is little evidence that the recent developments in the microfinance sector have resulted in increased access to financial services for the unbanked." (Microfinance Transparency 2011) Therefore, these institutions do little to increase access to credit for the 62.7% of Zambian adults who are financially excluded.

The Banking and Financial Services (Microfinance) Regulations 2006 were enacted to boost the impact of the sector, as well as to protect depositors' funds (Microfinance

Transparency 2011, 9). The regulations establish a number of requirements, including a licensing process for microfinance institutions, a minimum number of five directors on a microfinance institution board, minimum primary and regulatory capital, regular submission of accounts and the payment of a supervisory fee to the Bank of Zambia, the regulatory authority established by the law (Banking and Financial Services (Microfinance) Regulations 2006, s 4, pt III, pt V, pt VI). According to Microfinance Transparency, while the regulations have led to improved levels of disclosure and transparency, their accounting and reporting requirements are too stringent. The regulations have resulted in the counteractive outcome that microfinance institutions' operating costs are increasing. For example, the requirement for five directors on the board increases staffing costs and the regular submission of management accounts and audits increases operating costs. Licensed microfinance institutions are therefore not able to provide access to credit to the poorest section of the population (Microfinance Transparency 2011, 9-10). The design of the regulations could be revised to provide greater support to microfinance institutions and allow greater divergence among these institutions, so that the types and products offered service a greater proportion of Zambian society.

An estimated 740 Savings and Credit Cooperative Societies (SACCOS) and community-based finance institutions (CBFIs) with approximately 13,000 members operate in Zambia. However, according to the International Labour Organization (ILO), cooperatives in Zambia are generally weak, with poor organizational structures and poor income bases (Loljih 2009, vi). Therefore, the contribution of these cooperative financial institutions to Zambians' access to credit is limited.

Overall, therefore access to credit for MSMEs remains a key barrier to facilitating the development and contribution of MSMEs to Zambia's sustainable development. However, rural credit services to the most poor could be improved through a review of the Banking and Financial Services (Microfinance)

11 Other reasons for the low levels of financial inclusion in Zambia include "the lack of appropriate documentation to open a bank account, lack of trust and knowledge about financial products and how to access them and attitudinal barriers with 66% of adults claiming they have no need for bank accounts".

Regulations, to reduce the governance, reporting and auditing requirements to a level more in line with microfinance institutions' capabilities, without lessening the oversight by the Bank of

Zambia. Revision of the Regulations should be undertaken with the aim of opening microfinance institutions and their services to a greater proportion of the Zambian society, including the most poor.

### Case study 1 – Providing access to credit through the Citizens Economic Empowerment Commission

The Citizens Economic Empowerment Act was introduced in 2006 and establishes the CEEC (Citizens Economic Empowerment Act 2006, pt II). The mandate of the CEEC is to promote broad-based and equitable economic empowerment of citizens that are or have been marginalized or disadvantaged and whose access to economic resources and development capacity has been constrained due to various factors such as race, sex, educational background, status and disability (Citizens Economic Empowerment Act 2006, s 6). The CEEC provides opportunities for citizens to invest in Zambia via loan funding to citizens who propose viable business ideas. The CEEC is a government initiative that seeks to overcome some of the common constraints affecting MSMEs, such as inaccessibility to finance and markets and the high cost of borrowing from the commercial banks (PSDRPII 2009, 20). Investments across a variety of sectors are eligible for CEEC loans, with targeted industries in 2014 providing an indication of a preference for the agriculture sector: beef, fish, honey, timber, cotton, edible oils, stock feed, cassava, tourism, rice, groundnuts (CEEC 2014). This is perhaps reflective of the 70% of Zambia's economically active population that work in the agricultural sector. As of February 2012, the Commission had approved 1634 MSMEs and disbursed loans worth ZMW 174 million (≈USD 28 million) to 1439 projects across Zambia (CEEC 2012). Unfortunately, the recovery rate for the loans provided by the CEEC has been below expectations, with only 42% of loans repaid as of February 2012 (CEEC 2012). This led to a suspension of the empowerment fund for a year until 13 February 2013.

The CEEC follows a decentralized structure and undertakes its functions from offices in Lusaka and in all nine provincial capitals, with an overall staff of 56 employees, although there are more staff in Lusaka (Kachungu 2011). As with many other institutions analyzed in this study, the CEEC is burdened with a lack of resources and low capacity of staff, particularly in rural districts (Kachungu 2011).

The CEEC's mandate is particularly targeted at providing opportunities for marginalized or vulnerable citizens to effectively participate in the national economy, especially women, youth and the physically challenged. However, the distribution of funds does not necessarily follow this mandate. A total of 20% of CEEC funds were provided to MSMEs wholly owned by women (CEEC 2013, 2). In particular, the Chilimba Market Product is a project within the CEEC focused on trading marketers, particularly women. The CEEC has provided ZMW 1.6 million (≈USD 258,500) to markets across Zambia, which are estimated to have benefited more than 2000 women (CEEC 2013, 3). In addition, as of 2013, 8% of CEEC funds had been provided to youth entrepreneurs (Mukumbuta 2013). In terms of geographic spread, CEEC loans have been skewed towards Lusaka and the Copperbelt, with only 35% of all loans reaching rural areas of the country, outside these two major centers (Mukumbuta 2013). In 2013, the CEEC committed to changing this distribution of benefits, confirming 90% of project financing to rural areas and 70% to youth and women (Mukumbuta 2013). If this commitment is effectively implemented and combined with an awareness-raising campaign about the role of the CEEC, this could ameliorate engagement of marginalized and vulnerable Zambians in the economy, as per the CEEC's mandate.

**Key finding:** To complement the redistribution of project financing to rural areas (90%) and youth and women (70%), the CEEC should undertake an awareness-raising campaign in key areas of the country to promote greater knowledge of its role and mandate and increase the capacity of marginalized and vulnerable Zambians to apply.

### Lack of incentives for sustainable investments

An analysis of the ZDA Act, including taxation incentive schemes, the PSDRP and the various government mechanisms established to improve the development of MSMEs confirm that although the GOZ have established a strong investment environment, there are only a few provisions in place specifically that will attract sustainable investments, including for MSMEs. As seen above, the majority of tax incentives are biased towards large, foreign investments and within that category, do not prioritize low-carbon technologies (personal communication from manager of planning and policy of national government department, 2013). From a socioeconomic perspective, the ZDA does not give preferential treatment on the basis of origin and foreign investors are free to repatriate 100% of their profits and capital after settlement of all of their local obligations, leaving little money in the country (ROZ MCTI 2011). In addition, MSMEs struggle to gain access to credit, particularly those in rural areas or entrepreneurs from vulnerable sectors of society, such as women and youth.

In sectoral frameworks, only limited incentives for sustainable investments exist.

### Mining

The mining law includes a dedicated environmental process for environmental assessment, which complements the crosscutting environmental and social assessment established by the EMA Act. Mining activities must be in accordance with accepted mining standards that stipulate avoidance of wasteful mining (Mines and Minerals Development Act 2008, s 81). When State mining officials discover that a miner is using wasteful practices, officials must notify the miner and require him or her to present reasons for not ceasing to use such practices (Mines and Minerals Development Act 2008, s 81). If the mining right holder breaches statutory obligations, the Mines and Minerals Development Act gives a mining advisory committee the right to terminate the mining right (Mines and Minerals Development Act 2008, s 88).

To ensure that damage to land and the environment by the mining activities are

corrected, the Act makes provisions for the rehabilitation of the land over which the mining right or license has effect, and the filling in, sealing or fencing off of excavations, shafts and tunnels (Mines and Minerals Development Act 2008, ss 76(b) and (c)). This rehabilitation is done at the expense of the license holder (Mines and Minerals Development Act 2008, s 5(2)(b)). Despite these provisions, Zambia's national climate change response strategy asserts that the mining and minerals regulatory framework continues to lack effective incentives to encourage the adoption of environmentally friendly waste disposal systems, rehabilitation measures and pollution control guidelines (ROZ 2010, 75).

The application for a large-scale mining license under the Mines and Minerals Development Act includes the requirement to produce a plan for employment of citizens of Zambia and the training of those citizens once employed (Mines and Minerals Development Act 2008, ss 24 and 25). A mining license holder must also compensate the owner or lawful occupier of land subject to the mining rights for any disturbance of the rights or damage done to the surface of the land by the subsurface operations (Mines and Minerals Development Act 2008, s 132).

### Energy

The energy sector includes a small number of incentive structures specifically designed to attract sustainable investments, such as renewable energy technologies. The current legal framework for energy in Zambia also provides a limited number of specific provisions for sustainable investments, namely:

- the inclusion of biofuel energy in the definition of energy provided by the National Energy Policy in 2008 for the purposes of regulation under the Energy Regulation Act; (National Energy Policy 2008, 6)<sup>12</sup>
- the inclusion of power generation as a priority sector under Schedule 2 of the ZDA Act, opening the power generation sector up to specific incentives; (ROZ 2013a; Statutory Instrument No. 15 2011)

<sup>12</sup> Renewable energy sources are defined as solar (thermal & photovoltaic), mini/micro-hydro, biomass (agricultural waste forestry waste, industrial/municipal wastes, energy crops and products), geothermal and wind.

- the removal of value added tax (VAT) and excise duty on all imports of solar energy equipment; (Statutory Instruments No. 32 and 33 2008)
- the use of solar energy in the rural electrification program, which has led to the installation of solar photovoltaic (PV) systems in about 400 households in Zambia's Eastern province and 250 chief/chieftainess palaces and schools around the country by 2008 (Walimwipi 2013, 8).

The national energy policy acknowledges that Zambia has great potential in terms of adapting to clean and renewable sources of energy; however, there is very little research in that area. For example, there is no readily available data on the available renewable energy sources in Zambia (ROZ 2013a).

Priority was placed on the biofuel industry by the GOZ in the early half of the 2000s, including the creation of specific biofuel farm blocks to stimulate production and the introduction of mandatory E10 and B5 blends for biodiesel transport fuel (German and Schoneveld 2012, 477; Hermele 2013, 28). However, although strong socioeconomic gains were expected from smallholder farmers' participation in this new industry (Petrick 2013), a variety of factors combined to lead to the failure of most biofuel investments in Zambia; these included: difficulty in meeting European import criteria, lack of country-specific knowledge of the crops and the wide dispersal of Zambian farmers, which made cooperative schemes difficult to operate efficiently (German and Schoneveld 2012, 482; Petrik 2013).

## Forestry

Although the Forests Act 1973 does not include any provisions for the sustainable management of forest resources, the Forests Act 1999 directly incorporated climate change issues and community-based resource management principles, by including objectives of the UNFCCC, management of forests for carbon trade via mechanisms such as Reducing Emissions from Deforestation and Forest Degradation "Plus" Conservation, the Sustainable Management of Forests and Enhancement of Forest Carbon Stocks

(REDD+) (Fumpa-Makano 2011, 24), and joint forest management (JFM). JFM is a process in which considerable powers are delegated to customary communities over local forests (Forests Act 1999, pt V). Although JFM was promulgated in Statutory Instrument 47 of 2006, it never passed the pilot stage in Zambia.<sup>13</sup>

A new draft national forestry policy is currently being developed by the forestry department, which includes reference to carbon trading and community-based management of forests (Draft National Forestry Policy 2013, obj 5). The aim of the forestry policy is to support the drafting of a new Forests Bill, which aims to strengthen the current legal framework for sustainable forestry investments by specifically recognizing REDD+ and the rights and responsibilities linked to carbon. These include carbon tenure, national carbon accounting, and monitoring and benefit-sharing systems (personal communication from National REDD+ Coordinator, 2013). This Bill continues from the Forests Act 1999, but seeks to capture the progression of sustainable forestry mechanism over the past decade, as well as the lessons learned from Zambia's pilot JFM projects. It is expected that the Forests Bill will soon be tabled in parliament.

More specific incentives are required in the legal framework, if sustainable land-use investments are to happen in Zambia (personal communication from chairperson of environmental NGO, 2013). There are a number of different sustainable incentives that could be adopted in Zambia, with further sector-specific research and consultation required to provide specific recommendations. A range of the possibilities that Zambia could embrace to more actively attract sustainable investments for the energy sector are provided in Box 3.

## Governance and institutional structure surrounding incentives for investment

The ZDA, as the institution mandated with promoting trade and investment in Zambia, holds a unique position to attract sustainable investments. This position could be better utilized. Incentives are only available for

<sup>13</sup> Joint forest management program in Zambia was piloted in three provinces: Luapula, Central and Copperbelt provinces.

**Box 3. Incentives for renewable energy (IPCC 2011, 22; UNEP-FI, 2012)**

Common government financial de-risking policies in the energy sector include feed-in tariffs, quotas for renewable energy use, preferential tax policies or exemptions and direct government payments, such as rebates and grants. These financial policies reduce investment risk and increase the ability of renewable energy companies to access private finance by providing guaranteed revenue for renewable energy projects. Policy de-risking regulations may also promote the deployment of renewable energy, such as priority grid access, building mandates for solar panels or hot water heating, zoning laws and guaranteed purchase of renewable energy.

investors who register with the ZDA. Linking incentives to investment licenses, permits or certificates of registration under the ZDA Act is a positive attribute of the investment legal framework in Zambia, as it provides a mechanism by which to register and monitor all land-based investments' compliance with relevant requirements under the law (personal communication from consultant of environmental consultant firm, 2013). However, there is no mandatory requirement for investors to register with the ZDA and this discretion limits the benefit that could be accrued from having one body with information on all investments. Indeed, insight from one interview demonstrated that many domestic investors do not register with the ZDA, despite the possible incentives (personal communication from consultant of environmental consultant firm, 2013). It is most likely that the value of the financial incentives is not sufficient to attract domestic investors to the ZDA. In addition, the process of registration with the ZDA can be lengthy and costly, which may be a particular deterrent to MSME investors (OECD 2012, 39). A rationalization of the ZDA registration process and the incentives offered to registered investors could have a positive impact on the number of investors under the auspices of the ZDA. In particular, targeted incentives could be offered to domestic investors, similar to

the 'priority sector or product' distinction currently made in the ZDA Act, following a dialogue between the GOZ and domestic MSME investors (as represented by the Zambia Chamber of Small and Medium Business Associations). If incentives were specifically targeted to the issues facing this investor, it is more likely that MSMEs would register with the ZDA to access incentives.

From a governance perspective, there is a disconnect between the institutions that govern investment and the institutions responsible for environmental, social and climate change concerns. This is inconsistent with the process of mainstreaming climate change and environmental concerns across the laws and institutions of Zambia (personal communication from environmental resource mobilization specialist and senior environmental management from national government department, 2013). Although the ZDA is required to consider the impact the proposed investment is likely to have on the environment when considering an investment license, in reality, the ZDA does not take climate change or other environment considerations into account (personal communication from manager of planning and policy and chairperson of environmental NGO, 2013). Instead, economic development and business needs are prioritized. Nevertheless, climate change and social empowerment are acknowledged to be overarching challenges for Zambia and the ZDA would be an ideal institution to help address these areas. With a dedicated mandate to acknowledge environmental, as well as socioeconomic concerns, combined with trained staff that understand the benefits of sustainable investments to Zambia, the ZDA could become a key sustainable investment advocate (personal communication from manager of planning and policy, 2013). To ensure that this proposed mandate of the ZDA does not overlap with that of ZEMA or other environmental agencies, the ZDA's current 'screening' role could be expanded, so that investments registering with the ZDA are screened for their sustainability, while they are currently screened for their eligibility for an investment license. Capacity building of ZDA staff should accompany this new tool, to ensure an appropriate level of understanding of sustainability standards.

### **Case study 2 – Agricultural “outgrower schemes” – overstated and broken promises or sustainable investments?**

In Zambia, there are examples of investments that have adhered to this project’s definition of sustainable investment. A deeper analysis of why these investments chose to balance environmental or social sustainability with economic development provide some insight into the kind of legal mechanisms that may attract sustainable investments in the Zambian context. One such sustainable investment is the KASCOL smallholder outgrower scheme, which established a strong social partnership between the investor and smallholder contract farmers. This case study reviews the differences between this sustainable agricultural investment and a failed investment, both of which developed outgrower schemes, to draw out key findings for policy reform.

In Zambia, the promotion of private investment in agriculture is a central part of government efforts to enhance economic development. Outgrower schemes are one such investment method, currently promoted primarily through the Farm Block Development Programme. Outgrower schemes are a form of contract farming in which smallholder farmers grow crops under production contracts with large-scale enterprises, in exchange for crop price guarantees, inputs, such as fertilizer and seeds and other services. There are a number of potential development benefits for smallholder farmers involved in outgrower schemes, including employment, input support, guaranteed market access and infrastructure and/or grants for community projects (German and Schoneveld 2012). From the large-scale investors’ perspective, outgrower schemes provide secure supply from local farmers, who are often the most efficient agricultural producers. Outgrower schemes also displace production risk to farmers (Prowse 2007, 1). The following two examples provide a comparative assessment of whether development benefits from outgrower schemes can be realized in practice or not.



**Example 1 – Sustainable investment – KASCOL model** (personal communication from legal researcher, University of Massey, Lusaka, December 2013; personal communication from manager of agricultural company, December 2014; Mujenja and Wonani 2012; Mungandi et al. 2012).

Kaleya Smallholders Company Ltd (KASCOL) is a model of an outgrower scheme in Zambia, in which smallholders are empowered and benefit from involvement in the investment. KASCOL is an agribusiness company operating in Mazabuka district, in Zambia’s Southern province, producing sugarcane. The model it has adopted is based on the close coordination and interdependence of a number of different players. First, all sugarcane produced is sold to Zambia Sugar Company Plc (ZSC), which sells to local and export markets. Second, KASCOL is the producer organization. It owns 2168 ha of land, provides overall management of this land and initially provided all of the inputs for farming (water, irrigation, fertilizer). KASCOL was originally a joint venture between the GOZ, the Commonwealth Development Corporation (CDC), the Development Bank of Zambia and Barclays Bank of Zambia, although it is now privatized. Third, the Kaleya Smallholders Trust is the farmers’ association, which now holds shares in KASCOL. Finally, 160 smallholder farmers constitute the Kaleya Smallholders Trust and produce the sugarcane. The farmers lease about 1000 ha (4 to 7.5 ha each) on 40-year renewable leases from KASCOL.

KASCOL’s model is based upon partnership and includes smallholder farmers as both producers in the supply chain and as shareholders in the decision-making and profit making of the company overall.

a Under the Farm Block Development Programme, the government acquires and makes land available to investors, as well as installing basic infrastructure for its development: roads, bridges, electricity, dams, health centers, etc. Each farming block is designed to have at least one core large-scale farm (core venture) of 10,000 Ha, several commercial farms of 1000 to 5000 ha and small farm holdings of between 30 to 3000 Ha, preferably under outgrower arrangements. This system creates clusters of infrastructure, market access and inputs, such as water and fertilizer, from which many smallholder farmers can benefit.

A process of working together over 30 years has led to consensus-building and trust between the different players. The producer organization role of KASCOL has been vital in getting to this stage and is a major differentiation from standard outgrower models, where the large company contracts the farmers directly. KASCOL represents farmers' interests and helps to rebalance the power relations between investors and farmers (Prowse 2007, 2), in the case where concerns have arisen or opportunities presented themselves. For example, when KASCOL was privatized, the Kaleya Smallholders Trust was established and purchased a number of shares to gain a collective equity ownership of a proportion of KASCOL. Kaleya holds approximately 13% of the equity in KASCOL and a district-level sugarcane grower association holds an additional 25% equity. Therefore, smallholder farmers are included in the investment not only as contracted wage laborers but as equity participants. Moreover, as smallholder farmers' capacity has increased, a number of inputs have been devolved to them, including fertilizer supply and distribution. The KASCOL model demonstrates, therefore, that engaging affected communities in the decision-making and ownership of a large-scale investment, rather than only as contracted wage laborers, can lead to a greater sense of involvement and buy-in by rural communities.

In addition to KASCOL, the government played a pivotal role in initiating this investment. In the 1980s, when the ZSC was owned by the GOZ, the farmers brought into the outgrower scheme were protected and trained. The government at the time had a policy to improve the livelihood of smallholder farmers through training and involvement in markets and investments.

Farmers involved in the KASCOL scheme are now also producing to fair trade standards. This was an initiative of KASCOL, who provided training on how to adhere to fair trade standards of production. Conditions include natural inputs, that is to say free of genetically modified organism (GMO), as well as high labor standards (Fairtrade Labelling Organizations 2011).<sup>b</sup> The farmers receive the fair trade 'premium' of USD 6 per tonne, on top of the price that they already receive for the sugar. This premium goes directly to the Kaleya Collective Farmers' Trust and has helped to pay for a number of community programs, including a school bus, an ambulance and improvement of drinking water.

KASCOL's role as landowner is also a factor in this model's success. Smallholder farmers hold long-term contracts and leases with KASCOL, which would be broken if they did not produce the agreed-upon crop, in this case sugarcane. This limits farmers' autonomy, but provides greater security to KASCOL. On the other hand, farmers' contracts with KASCOL provide security of leasehold land title and steady income, based upon a portion of the total expected profits of the harvest. At the time of writing, farmers are guaranteed to receive 50% of the expected profits, with KASCOL retaining the remaining 50%. According to research by Warwick University, in 2010 Kaleya smallholders earned on average ZMW 1900 per month, compared to an average of ZMW 250 from growing maize (Richardson 2010, 933). It is important to note that KASCOL absorbs the risk of a bad price for sugar, not the farmers. KASCOL, in its turn, has a guaranteed market for the sugar produced, due to its arrangement with ZSC.

Finally, in the KASCOL model, outgrower farmers are also concentrated geographically, such that targeted infrastructure has provided benefits to a high number of local farmers.

In 2009, the European Union (EU) supported the establishment of a similar smallholder outgrower scheme, entitled the Magobbo sugar scheme. The scheme is built on the KASCOL model and implemented through the Mazabuka Sugarcane Growers Trust (MSCGT), which includes approximately 900 farmers (Kalinda and Chisanga 2014, 12).

<sup>b</sup> Fair Trade labor standards include that salaries must be equal or higher than the regional average or than the minimum wage (averaged at K500-600 by the Manager of an Agricultural Company interviewed); health and safety measures must be established in order to avoid work-related injuries, such as supply of protective clothing; freedom of labor including no child or forced labor.

It should be noted that the two outgrower schemes involved with the ZSC have not been without social conflict, diminishing the overall sustainability of this investment. In 2000, ZSC attempted to evict the approximately 100 residents of Kabanje village by court order, claiming that it had purchased the deeds to the land in the 1970s (Mpundu 2007). Farmers responded that they had not been properly consulted and in protest, some residents of Kabanje burned sugarcane fields owned by ZSC (Mpundu 2007). It is alleged that there have also been disagreements over the price for sugarcane received by smallholders from KASCOL, which smallholder farmers' claim has been reduced due to KASCOL's high service fees (Richardson 2010, 934). In Magobbo, there is some evidence that a number of smallholder farmers were forced to incorporate their land into the outgrower scheme (Richardson 2010, 928-29).



### **Example 2 – overstated and broken promises: Marli Investments Zambia (German and Schoneveld 2012)**

... Marli Investments Zambia Ltd. was a joint venture between South African, Indian and Zambian investors into jatropha. The company claimed to have signed contracts with approximately 25,000 outgrowers and distributed 12,650,000 seeds/seedlings and estimated to have more than 11 million trees and an estimated 125,000 ha under contract. This was made possible through the deployment of 96 field officers and more than 180 coordinators (presumably the "contract farmers" observed in fieldwork) working to promote the project. Findings highlight problems related to the contractual agreements between farmers and Marli, as well as the early social and environmental impacts accruing from this scheme. Farmers, for the most part, approached these outgrower agreements with high expectations and minimal awareness of the possible risks associated with returns on investment or company control over pricing and land use. Agreements were found to be signed by farmers but not the company, resulting in one-sided contractual obligations. This, together with provisions requiring farmers to keep land under jatropha for 30 years and sell only to Marli and allowing Marli to set prices one-sidedly, highlights the potentially exploitative nature of these agreements. ... With Marli failing to live up to most promises and disappearing altogether in 2008, the risks of such agreements are very real indeed.

The socioeconomic benefits for communities and farmers engaged in the Marli outgrower schemes were few, due to unfair contracts between the investor and the outgrower farmers, which resulted in low prices, long contract periods and inequitable contractual dealings on behalf of the investor (German et al. 2011). Information asymmetry and opaqueness also led to misunderstanding among outgrowers about the "guaranteed benefits" that they were to receive, leading to unmet promises and, ultimately, no income for the crops produced.



### **Analysis of agricultural outgrower schemes**

The example of KASCOL is representative of very few agricultural investments in Zambia in a number of ways. First, in most outgrower arrangements, such as the Marli investment, there is no producer organization such as KASCOL representing smallholders. Normally, the large-scale investor contracts directly with farmers. The KASCOL model demonstrates that organizations that represent smallholder employees are vital to achieving a strong, balanced partnership between large-scale investors and smallholders in investments that involve rural communities as employees, such as the outgrower model. Organizations that represent farmers have collective bargaining and negotiation power and can reduce some of the risks on individual smallholders, such as a bad harvest or fluctuations in crop prices.

Second, farmers are not part of cooperatives in many outgrower arrangements, such as the Marli arrangement. While farmers may have autonomy over their land, the lack of a governing body reduces the security of the large-scale investor, as farmers can choose to grow a different crop, with no repercussions to their land rights. It also reduces the security of the farmers' income, as the risk of producing the crop required by the large-scale investor remains with the smallholder. Where no producer organization, such as KASCOL, exists to own land and lease it to farmers, farmers could establish a farming cooperative, with collective ownership. Establishment of smallholder farm cooperatives would retain farmers' collective title over their land, while ensuring group responsibility for production and improving bargaining power (Lolojih 2009, 1). Farming cooperatives are relatively common in Zambia (Lolojih 2009, 4),<sup>c</sup> because the GOZ often requires this form of community organization before they will provide inputs, such as fertilizer (Lolojih 2009, 19; personal communication from legal researcher, University of Massey, 2013).<sup>d</sup> However, cooperatives that exist are generally weak and inactive (Lolojih 2009, 6). If the GOZ could rebuild this institutional structure, farming cooperatives may be a viable alternative to a private producer organization such as KASCOL acting as an owner of the land and a representative of farmers in outgrower arrangements with large-scale investors (Coulter et al. 1999).

Third, at the involvement of the CDC points to the initial development focus of the KASCOL project, in opposition to Marli Investments Ltd, which was a purely commercial investment. This makes the KASCOL project significantly different to the many, commercially focused, agribusiness investments that are being carried out in sub-Saharan Africa. Nevertheless, at the time of writing, both the ZSC and KASCOL are equally successful commercial ventures. Therefore, it should be clear that socially equitable investments are not a limitation to commercial success. Moreover, the role of the GOZ in the KASCOL model is that of initiator and demonstrates the important place that government holds in improving the livelihoods of smallholder farmers by establishing policy commitments requiring employment and training of farmers under equitable conditions in outgrower schemes. Mandating smallholder farmers' involvement in sustainable markets and investments that adhere to minimum labor standards, provide fair wages and contracts and reduce farmers' individual risks of production can empower these local investors.

The Farm Block Development Programme is one particular policy that could adopt some of the lessons of the KASCOL model. There are a number of considerations behind this recommendation. Firstly, within the Farm Block Development Programme, the government is promoting the outgrower model of agricultural development. Secondly, despite 8 years since the establishment of the programme, only one or two of the farm blocks are close to being ready to attract the large, "core venture" investors. The GOZ has built roads and dams and provided electrification for the Nansanga farm block, which have attracted a number of smaller investors (Chu 2013, 212).<sup>e</sup> However, it may be that these supporting infrastructural investments are not sufficient for large-scale investors, who require greater economies of scale. Smaller-scale investments may be more appropriate for this type of outgrower model, closer in size to the 2000 ha of land owned by KASCOL than the approximately 100,000 ha of land in each proposed farm block (Hallam 2009, 6).

Therefore, smallholder farmers could be given higher priority in the Farm Block Development Programme, via the establishment of organizations like KASCOL that are mandated by the government to train and improve the livelihoods of farmers. These organizations could replace or work in tandem with the core venture investor to negotiate contracts with all farmers, easing the start-up requirements for investors and ensuring greater oversight of the program on behalf of smallholder farmers.

c In 2008, 47% of the 16,133 registered cooperatives were agricultural.

d The government's Fertilizer Support Programme requires cooperative structures to be in place before benefits can be accrued.

e "In 2011, 259 small plots (10–50 ha), 22 medium plots (51–100 ha) and 29 large plots (101–900 ha) were allocated by the Ministry of Lands."

### 3.1.3 Incentives to behave – environmental protection bonds and remediation insurance

The incentives explored above focus on turning Zambia into an attractive investment environment to investments, so that Zambia becomes a desirable business destination. In the “carrot and stick” idiom, these incentives are the carrot. In this section, the term incentive is used in the opposite manner, as a “stick” to induce sustainable behavior. Environmental protection bonds and remediation requirements are established in Zambia to provide a financial incentive for investors in land-use activities to respect their regulatory or contractual commitments to protect Zambia’s environment (Gerard and Wilson 2009, 1098). The investor must provide a financial sum as a ‘bond’, which acts to guarantee compliance with environmental regulations, as the bond is released only if the investor is compliant, but retained to pay for environmental damages, if not. Recalling the definition of sustainable investment, environmental bonds require investors to internalize the cost of environmental degradation to compensate for environmental damage that may arise (Boyd 2001, 3). Environmental bonds are used in Zambia both in sectoral legislation, as well as in the crosscutting EMA.

The Mines and Minerals Act of 1995 established an environmental protection fund (EPF) with the aim of securing closure costs. These costs cover rehabilitation of the environment due to damage from the ecological costs of mining throughout the lifetime of the project (Mines and Minerals Development Act 2008, s 82; Mines and Minerals (Environmental Protection Fund) Regulations 1998). The EPF became fully operational in 2008, with the introduction of the Mines and Minerals Development Act 2008 (Mines and Minerals Development Act 2008, s 122). Mining companies with ongoing environmental concerns contribute 5% of profits to the EPF, calculated based on an annual audit. The moderate and poor environmental performers pay 10% and 20%, respectively to the EPF (ROZ 2012). This money is held as security for any outstanding costs of environmental rehabilitation that remain at the closure of the mine and will be repaid once the responsible minister is satisfied that all conditions have been met (Mines and Minerals Development Act 2008, s 122). According to the Zambia Extractive Industries Transparency Initiative

(EITI), almost USD 3 million from Zambia’s total mining and minerals revenue was paid into the EPF in 2010 (Hart Group 2013). This relatively low figure demonstrates that mining companies are avoiding payment to the EPF (see Box 4).

There are also forestry-sector-specific protection funds in Zambia. These include the Forest Revenue Fund, which receives income from licenses, fees and concessions, the Forest Development Fund, which promotes the wood processing industry and afforestation and reforestation programs within the forest sector and the Fund for Joint Forest Management, which supports local forest management efforts (Held et al. 2013, 30). The latter two funds are supported by a portion of national revenues for forestry. These national forest funds can mobilize resources to improve sustainable management of forests; however, there is little evidence available to determine how well capitalized Zambia’s national forest funds are in practice. Broader experience with these funds in the sub-Saharan African region has been mixed (Gondo 2012, 23).

From a cross-sectoral perspective, the EMA requires rehabilitation to be undertaken where investors are directly responsible for land dereliction or contamination, within a period specified by a government inspectorate (EMA 2011, s 80). The investor is directly responsible for all costs of a rehabilitation effort and noncompliance with this provision can lead to a fine of up to 300,000 penalty units, imprisonment for up to 3 years, or both (EMA 2011, s 80).

In addition, Section 98 of the EMA provides for environmental performance bonds, based on a register of industrial facilities or plants undertaking

#### Box 4. Avoiding payment of environmental bonds

In 2009, the advocacy group Citizens for a Better Environment sued Luanshya Copper Mines, Chambishi Metals PLC and Lafarge Cement for defaulting on payment of USD 8.7 million, USD 12 million and almost USD 13 million, respectively in mandatory environmental liabilities into the EPF (Simbeye 2009).

activities that have or are likely to have adverse effects on the environment when operated in a manner that is not in conformity with good environmental practices. While it is unclear what exactly is meant by “good environmental practices”, this provision could be a source of motivation for companies to limit and mitigate any environmental degradation. All bonds will be placed into the new environment fund, established by the EMA. It should be noted that this fund has not yet been operationalized because modalities are still being worked out. However, there is an interim environment fund, which was started by funds from cooperating partners, operating under different guidelines from those prescribed under the EMA.

While Zambia’s legal framework appears to be quite strong in establishing incentives to behave, how strictly these requirements for bond and remediation payments are enforced is a serious concern, exemplified by the Citizens for a Better Environment litigation in Box 4. As outlined below in Section 3.3, it is necessary to question the capacity of environmental agencies to undertake the task of monitoring compliance with environmental remediation requirements. In addition, to be successful in mitigating environmental harm, the amount of money paid into environmental bonds must be linked to the potential damage. In this way, the Mining and Minerals Development Act 2008 is a positive example of poor environmental performers paying more (20%) than moderate (10%) or standard (5%) performers.

### 3.1.4 Key findings

Although the GOZ establishes quite a strong investment environment, there are only a few provisions specifically seeking to attract sustainable investments. More targeted incentives are required in the legal framework if sustainable land-use investments are to be attracted to Zambia. A legal framework for sustainable investments is also one that balances the protection of investors with Zambia’s right to regulate investments stringently and to distribute natural resource wealth equitably. The use of individualized contractual terms between the government and land-use investors, which protect these investors’ interests, restricts the transparency and integrity of investment contracts and limits the scrutiny of investments. All investor

incentives and regulations should be in publically available laws and regulations, so that both government and investors are more easily held to account.

Little priority is shown to domestic investors in Zambia’s investment legal framework, particularly MSMEs. To improve the incentives for MSMEs, these local investors could be better integrated into MFEZs, such as by reducing the minimum threshold of USD 500,000 for MSMEs. The physical proximity between foreign and domestic investments within MFEZs could facilitate better linkages. Rural credit services to the most poor could also be improved, including through a review of the Banking and Financial Services (Microfinance) Regulations, to reduce the governance, reporting and auditing requirements to a level more in line with microfinance institutions’ capabilities, without lessening the oversight by the Bank of Zambia. Revision of the regulations should be undertaken with the aim of opening microfinance institutions and their services to a greater proportion of Zambian society, including the poorest sections of the population.

The ZDA, as the institution mandated with promoting trade and investment in Zambia, holds a unique position to attract sustainable investments. This position could be better used. For instance, a new screening tool could be developed, to assist the ZDA in reviewing investments for sustainability criteria. Capacity building of ZDA staff could accompany this new tool, to ensure that they gain an appreciation of sustainability standards and the importance of sustainable investments to Zambia’s development.

From the KASCOL model of outgrower investments, a number of insights into the kind of legal mechanisms that may ensure equitable smallholder engagement in the Zambian context emerge. First, engaging affected communities in the decision-making and ownership of a large-scale investment, rather than only as contracted wage laborers, can lead to a greater sense of involvement and buy-in by rural communities. Organizations that represent smallholder employees are vital to achieving a strong, balanced partnership between large-scale investors and smallholders. Organizational structures such as farmers’ collectives can also reduce some of the risks to individual smallholders, such as a bad

harvest or fluctuations in crop prices. Second, the government can play a key role in improving the livelihoods of smallholders by establishing policy commitments requiring employment and training of farmers under equitable conditions in outgrower schemes.

In particular, these requirements could be adopted into the Farm Block Development Programme. Regulatory guidance to investors regarding their social obligations could include requirements to train employees in new techniques and technologies, minimum labor standards, or consultation on investment decisions concerning smallholder employees. In addition, smallholder farmers could be given higher priority in the Farm Block Development Programme, via the establishment of organizations like KASCOL that represent farmers. These organizations could replace or work in tandem with the core venture investor to negotiate contracts with all farmers, easing the start-up requirements for investors and ensuring greater oversight of the program on behalf of smallholder farmers.

Environmental bond payments and remediation requirements can provide a financial incentive for investors in land-use activities to respect their regulatory or contractual commitments to protect Zambia's environment. However, they only act as an incentive to behave for investors if the financial incentive is high enough and the requirement to pay is effectively enforced.

### 3.2 Insecurity of customary land tenure

Attracting sustainable investments is only one part of ensuring that investments contribute to the sustainable development of a country; effective regulation of investments (once they have commenced construction and operation) is equally as important to uphold the social and environmental sustainability of investments.

Land tenure is vital to land-based investments, as it defines the right to own, use, manage and dispose of the lands on which natural resources are situated. Moreover, in countries such as Zambia where both livelihoods and the national economy are dependent upon natural resources, land becomes a sensitive area of potential

conflict (Mason-Case 2011, 15). Customary land tenure in Zambia is insecure, particularly in rural areas where customary laws prevail. This insecurity stems from: a lack of recognition of customary land rights in practice; abuse of customary land rights in situations where conflicts between competing land users emerge, (specifically communities, traditional authorities, government and investors); and displacement of customary land rights holders (Pritchard et al. 2013, 8).

Land acquisitions raise a number of social obligations for investors if they are to adhere to the definition of sustainable investment provided by this research project. Sustainable investments involve the obligation to consult and obtain agreement from community members on the acceptability of an investment and the right to community participation in investment decision-making, to negotiate how the land will be used and co-benefits from any investment. In addition, sustainable investments highlight a right to compensation and to equitable resettlement in the event that an investment is incompatible with cohabitation. This section investigates whether these social obligations are adhered to in practice and provides key findings on how to strengthen the legal framework, particularly for customary land rights holders. It also provides initial insights into how to strengthen the insecurity of customary land tenure and proposals to limit foreign acquisition of land titles.

#### 3.2.1 Land tenure in Zambia

The Land Act 1995 is the primary piece of legislation governing land acquisition in Zambia (Lands Act 1995). All land is vested in the president, who holds the land "in perpetuity for and on behalf of the people of Zambia" (Lands Act 1995, s 3), but land can be leased. Indeed, the Land Act 1995 facilitates both foreign and domestic lease of land to Zambians and non-Zambians alike (Lands Act 1995 s 3(3)). There are four different types of leases, with the most relevant for investment the 99-year renewable leasehold for surveyed land.<sup>14</sup> Land in Zambia is leased directly from the Commissioner of Lands, who is based within the Ministry of

<sup>14</sup> Only if the land has been surveyed are leases granted for 99 years; a 14-year lease is granted for unsurveyed land.

Lands and is the direct delegate of the president. Arguably, the commissioner is therefore subject to limited parliamentary scrutiny (Nolte 2013, 15). Following the policy of decentralization, the Ministry of Lands has devolved land administration and depends on district councils to process applications for leases and evaluate requests for conversion of customary land (Draft Land Administration and Management Policy 2006).

Zambia follows a dual land tenure system, which is a remnant of its colonial past: land is either customary land or State land (Nolte 2013, 12).<sup>15</sup> Customary land titles are recognized by Zambian law and operate in parallel to formal or statutory land titles. The majority of land in Zambia is under customary tenure and the vast majority of the Zambian population relies on land in customary areas for their livelihood. Since the introduction of the Lands Act 1995, both types of land have been open to lease by national and foreign investors (although customary land is only open to lease if it is converted). An idiosyncrasy of Zambian law is the necessity to convert customary land to privately owned State land in order to gain a leasehold title and be used formally for commercial purposes (Lands (Customary Tenure) (Conversion) Regulations 2006, s 31). This is an irreversible process (Lands Act 1995, s 8). It is leading to a decrease in the amount of customary land in Zambia (Nolte 2013, 13),<sup>16</sup> and a consequential decrease in the authority of traditional leaders.

The aforementioned outcome can be attributed to the fact that customary land in Zambia is held in trust by traditional authorities – chiefs – who have the legal authority to oversee customary land

on behalf of the community.<sup>17</sup> Thus, chiefs are the primary negotiators with any potential lessees of the land, including investors. A chief's power is nevertheless tempered by a limit of 250 ha on land transfers (ROZ 1985). Despite this limit, there are reported cases of chiefs overstepping this limit (Case study 3) (ROZ 1985). To convert customary land to leasehold, investors must receive written approval from the chief and the local authority who must confirm that they are “not aware of any other right(s), personal or communal, to the use and occupation of the land or any other part of the land” (Lands (Customary Tenure) (Conversion) Regulations 2006, ss 31(2) and 31(3)). The chief is also legally required to confirm that the community has been consulted on the proposed conversion (Lands (Customary Tenure) (Conversion) Regulations 2006, s 31(2)).

In practice, the legal mechanisms in place to uphold customary land rights are easily circumvented by investors and by Zambian “elites” – parliamentarians, government officers, traditional authorities and certain middle- and upper-class citizens (Ogunbunmi 2014; Jayne 2014). These local elites are politically influential and have access to information and money to undertake land transfers quickly and sometimes without consultation with local land users. The absence of formal regulations establishing the process to be followed when transferring customary land, including consultation with local communities, renders customary land titles insecure (personal communication from executive director of land NGO Lusaka, 6 December 2013). Thus, while the majority of Zambians live on customary land, these people may not be consulted on or compensated for their land when it is acquired by investors.

### 3.2.2 Consultation with the local community

As mentioned above, the chief does not actually own land under customary tenure. The Zambian high court confirmed in the case of *Mwiinda v.*

15 “As was the practice in other British colonies, colonial rulers retained the traditional customs in rural areas (for native reserves and trust land), whereas in urban areas modern civil law and private property practices (freeholds and leaseholds) were introduced on so-called crown land...” (Nolte, 2013).

16 It is estimated that from 94% customary land vs. 6% State land in 1995, the ratio has change to 90%: 10% or 80%: 20%.

17 Traditional authority structures are recognized institutions in Zambia and run in parallel with government institutions, just as customary land runs in parallel to State land laws. Individual Headmen and Headwomen govern villages and are appointed by and report to the local Chief. Traditional leaders administer customary land under customary law, which should not be in conflict with the Lands Act 1995: *Lands Act 1995* (Republic of Zambia) s 4(a).

*Gwaba* that village headmen/headwomen and chiefs are not landowning authorities; they only perform control and regulation functions in land use and acquisition (*Mwiinda v. Gwabaheld* (1974) ZR 188). These traditional authorities hold the land on behalf of the whole

community in the capacity of a caretaker or trustee. This implicitly requires the community's approval or disapproval, via consultation, of any land transfers.

### Case study 3 – First Quantum Minerals Limited and Chief Musele (Mining Watch Canada 2013)

On 14 July 2011, an "Agreement" was entered into by His Royal Highness Senior Chief Musele of Northwestern Zambia and Kalumbila Minerals Limited (KML), a subsidiary of First Quantum Minerals Limited (FQM), relating to 518 km<sup>2</sup> of surface rights.<sup>a</sup> This agreement aimed to "establish a framework for co-operation under which the signatories... pronounce their clear intention to cooperate in the allocation, development and operation of the Surface Rights for the Trident Project".<sup>b</sup> Effectively, the agreement sought to transfer the property rights relating to the 518 km<sup>2</sup> of the Musele customary land from the Musele traditional authority to FQM and its subsidiary company, KML.

According to this agreement, the parcel of land would have been exchanged for a USD 259,000 payment to the chief, 80% of which would have been transferred after surface rights were confirmed. The agreement also sketched out FQM's compensation and resettlement commitments.

However, on 14 February 2013, a ministerial task force convened and confirmed that Zambia's Lands Act of 1995 forbid any Chief from transferring more than 250 ha of customary land. Thus, the agreement between Chief Musele and FQM was null and void and the task force stated that the land acquisition process would have to start fresh and be approved by the president.

Aside from the illegal transfer of customary land, further claims of corruption and exploitation have been ongoing for the Trident project (Mining Watch Canada 2013),<sup>c</sup> including corruption and coercion in relation to the construction of a dam, which is part of the project. FQM/KML sought approval from the Zambian Government to construct the Chisola dam, but a protection order was issued by ZEMA due to concerns raised over the vast amount of land acquired and the compensation and resettlement packages for people in the area. In an attempt to lift this protection order, FQM/KML served 30-day notices of redundancy to all 500 workers on the dam project, purportedly as a result of the decision by ZEMA. In addition, FQM/KML wrote to Chief Musele with news of these imminent redundancies of people from his chieftaindom and sought to encourage Chief Musele to use his power to lift the protection order (Letter, 16 July 2013).

According to FQM, the Trident project gained approval of its environmental impact assessment and resettlement action plan in September and October 2013 and should be commissioned in mid-2014 (First Quantum Minerals 2014).

This is a strong example of the ever-present tension between the demand and desire for continuing economic growth superseding social protection in Zambia.

a The said agreement defines "surface rights" as meaning "the grant of land to be held for a term of 99 years under a Direct Lease from the Government, or as extended and the mining, infrastructure and all other development thereon, operation thereof and access thereto, which may be staged or sized appropriate to rate of development of the Trident Project and its economic capacity."

b The Trident Project refers to four large-scale mining licences held by FQM within 518 km<sup>2</sup> of the Musele chief/chieftaindom in the Solwezi district of northwest Zambia. FQM's North-Western projects are expected to account for nearly half of Zambia's 2015 national target of 1.5 million t.

c A group of NGOs led by ActionAid Zambia and Musele Nkisu Task force (MNT) allege that vast tracks of land were illegally developed, that compensation for villagers is inadequate, that their relocation is illegal and that FQM's extensive mineral claims are a threat to the surface rights of the entire chief/chieftaindom.

As flagged above, the primary legal mechanism to protect the customary land rights of local communities is the requirement for both the chief and local authority (district council) to confirm, through signed written consent that (Lands (Customary Tenure) (Conversion) Regulations 2006, ss 31(2) and 31(3); *Still Waters Farms Limited v. Mpongwe District Council and others* (2001) SCZ No. 90):<sup>18</sup>

- the land is available (it is not being used for other purposes);
- the members of the community were consulted;
- the investor's interest does not conflict with the needs, interests and rights of local land users.

However, this legal mechanism proves insufficient on closer inspection, as there is no formal process that the chief or district council must follow before signing land over to an investor. For example, there is no established process to demonstrate that the chief has indeed obtained consent from his subjects. Consequently, the chief often does not consult with the people of the chiefdom. This is partly based in the traditional understanding that the word of the chief is taken to represent the will of his people and the chief's decisions are therefore unquestioned (Nolte 2013, 19). According to research by CIFOR: "The main conclusion to be drawn from processes of local representation is that consent from customary authorities cannot be assumed to reflect true consent from customary land users and other affected parties." (German et al. 2011, 36).

If local communities are to be meaningfully and actively consulted in all land alienations, the current consultation processes around land alienation should be strengthened (ZLDC 2013). It is recommended that the law should offer a more prescriptive process, which chiefs, village headmen/headwomen and local authorities must adhere to before claiming community consultation (personal communication from the executive director of a land NGO, Lusaka, 2013). This would include for example: (i) minimum thresholds or quotas of community members at meetings in which the traditional authority introduces the potential land transfer; (ii) requirements for meetings with community representatives from all areas of the society, including vulnerable and marginalized

groups, with similar minimum thresholds or quotas of attendees; and (iii) minimum periods of notice and time for consideration before consent can be given. The details of the prescriptive process require further research to establish. However, Case study 6 in Section 3.3 investigates a sustainable investment that followed an international standard for community involvement and provides further insight into how to meaningfully and successfully engage.

In summary, the current legal mechanism to protect the customary land rights of Zambian communities is often ineffective, since the consent of the chief is not always demonstrative of consent from customary land users. Prescriptive provisions, establishing a policy and procedure for consultation with affected local communities and with complementary actions to ensure that they are implemented, could provide conditions to investors and traditional authorities of how they must undertake community engagement that effectively informs and gains consent from customary land users before customary land is transferred.

In other ways, a letter of consent from traditional authorities and local government is well suited to Zambia's circumstances. There are approximately 72 languages spoken in Zambia with no real common language among rural communities. When undertaking consultation with communities, therefore, an investor is likely to encounter a language barrier. Particularly given the complicated subject matter of an EIA, this is a difficult problem to overcome. A chief or village headman/headwoman, who speaks both the local language and English (which is the common language in cities and among the educated classes), could be the optimal channel through which to translate information from the investor to the community and *vice versa*. However, public consultation remains open to elite capture by the chief or village headman/headwoman and therefore a different solution is required.

### Community paralegals

A recommended community-level method of improving public consultation is the community paralegal model. In this model, a non-lawyer community member is trained in basic legal knowledge and rights and supported to act as a representative of community legal concerns in negotiations between locals and investors

<sup>18</sup> Land held under customary tenure can only be alienated if consent is obtained by the traditional chief/chieftainess from those whose interest may be affected by such allocation. Failure to consult renders the allocation or grant null and void.

(Knight et al. 2012, 12–13). Training sessions would be led by field teams, ideally including legal capacity-building professionals and local technical professionals, over a number of months. Training would cover the relevant national and customary laws, policies and processes and be tailored to specific community circumstances, taking language, local customs, literacy and other relevant considerations into account. Given the length and scope of the community paralegal model, it is likely that funding external to the GOZ would be required.

A trained paralegal could champion the customary land tenure rights of communities and be the focal point for consultations between the community and investors (Personal communication with Chairperson of Environmental NGO, Lusaka, 2 December 2013). More specifically, the paralegal would be trained to digest information about investments' benefits and challenges and communicate these to the community, then bring their concerns to the fore. In addition, community paralegals could lead the documentation of customary land tenure rights – an issue analyzed in more detail below. Certain organizations have also worked with communities to develop community protocols, documents that establish communities' "rights to govern their territories and natural resources according to their customary, national, and international rights and responsibilities [...and that...] regulate access to their genetic resources and traditional knowledge according to locally determined terms and conditions." (Natural Justice n.d.)

There is a high level of ignorance about the law in rural Zambia and a paralegal could be helpful in providing even a basic level of understanding (personal communication from the executive director of a land NGO Lusaka, 2013). The proposed community paralegal model follows the outcomes of a research project undertaken in 2011 by IDLO, in which paralegals were trained in community land titling processes. A key finding of that research was that "when communities have the responsibility to complete most project activities on their own, they are motivated to take the work more seriously, integrate and internalize the legal education more thoroughly, address intra-community obstacles more proactively and claim greater ownership over the community land documentation process than when a legal or technical professional completes all this work on behalf of the community." (Knight et al. 2012, 17–18) Therefore, embedding trained

paralegals within communities could assist in expanding community legal knowledge, strengthening local systems of land governance and ensuring community concerns are represented during land acquisition procedures with government or investors.

### **Lack of social safeguards guidance on farm block development programme**

An interesting example of the lack of guidance within Zambia's legal framework with regard to consultation with local communities is the Farm Block Development Programme. As mentioned above, although this program has not succeeded in attracting any large "core venture" investors to date, many smaller investors have purchased smaller farming blocks of land (see Case Study 4) (Chu 2013, 212). However, in publically available GOZ information on these farm blocks, there is little guidance on social obligations. Taking the Nansanga farm block prequalification information memorandum as an example, the majority of the document is unsurprisingly dedicated to the business opportunities presented by farming in Zambia (ROZ 2010b). However, the only mention of any training, labor and skills transfer requirements or labor standards to be adhered to by the core venture investor is "to assist small scale farmers meet international standards in production" and that "the core venture is expected to operate an outgrower scheme with the expected 310 small- to medium-scale farms." (ROZ 2010b) Given the GOZ oversight of this program, it presents a key opportunity for community consultation and labor standards to be established.

### **3.2.3 Resettlement and compensation packages**

The legal framework for land in Zambia does not provide customary rights holders with legally codified rights to compensation (ZLA 2008). Informal compensation arrangements are often undertaken and investors and chiefs can come to any sort of agreement for land, including monetary and in-kind compensations ranging from schools and health centers to cars or houses for the chief (Case study 5) (Nolte 2013, 18), The bringing of tributes to chiefs is a long-standing custom in Zambia. One interviewee succinctly affirmed that Zambia has not effectively established limits on the tributes that can be given to traditional leaders and that the extent and form of this tradition must be tempered to reduce corruption (personal communication from the executive director of a land NGO Lusaka, 2013).

#### **Case study 4 – Farm block development programme social safeguards?**

In 2013, Rural Net Associates Ltd bought a 10,000 ha farm block in Mpika through the Farm Block Development Programme. In an interview with a Rural Net Associates Ltd. consultant, it was confirmed that no guidelines relating to social obligations or minimum labor standards were provided by the GOZ upon purchase of the farm block (personal communication from a development consultant of an environmental consultant firm, Lusaka, 2013). Although the GOZ has established project implementation units in each district to provide guidelines for farm blocks, in practice, it is alleged that they have led to few concrete outcomes for farm block investors (personal communication from a development consultant of an environmental consultant firm, Lusaka, 2013). No monitoring is being undertaken on how these farm blocks are being used or how they benefit the local communities, or indeed the nation (personal communication from a development consultant of an environmental consultant firm, Lusaka, 2013). According to the RuralNet Associates Ltd consultant interviewed, many investors merely clear the farm blocks, without replanting. It is on their own initiative that this environmental consultancy is working collaboratively with outgrower farmers, including promoting conservation farming techniques, providing decent wages and creating resources targeted at directly improving the livelihoods of the country's poor and disadvantaged, as per its mandate. (RuralNet Associates n.d.)

#### **Case Study 5 – Negotiations between investors and traditional authorities for customary land**

In a study by the German Institute of Global and Area Studies (GIGA), which included interviews with some local chiefs on negotiations with private investors, a traditional chief explains his experiences and outlines the beneficiaries of said exchanges:

You see when we talk agreeing upon, [...] we've been to areas where we are lacking of schools, we are lacking clinics, we are lacking of roads and everything. We have to sit down and agree. If [...] you were given land of more than 250 Ha, what are you going to do for the community? What are you going to do for the Chief? What are you also going to do for the village headman? [...] We have to enter into a memorandum of understanding. And our memorandum of understanding does not even involve the government (Nolte 2013, 18).

Similarly, in a report by CIFOR, it was concluded that "Chiefs appear to be easily swayed by prospects of development and by the 'homage' typically provided by the investor; in almost every case, this involved at the very least improvements in or construction of a 'palace' for the chief." (German et al. 2011, 31)

#### **Resettlement**

Zambia's legal framework is silent on compensation and resettlement due to land acquisitions by land-use investments. The Zambian Constitution and ZDA Act provide protection for property rights against government acquisition – property may only be expropriated by an act of parliament and compensation must be at a fair market value and convertible at the prevailing exchange rate (ROZ MCTI 2011). However, this safeguard is only relevant for government acquisitions of land.

While Zambia has a resettlement policy, it also does not address the situation where investments cause displacement of persons with a claim to that land. The current policy on resettlement is based upon disasters and what the government must pay if a disaster occurs (personal communication from the executive director of a land NGO, Lusaka, 2013). It is therefore not easily applicable to large-scale land-use investments and its implementation can be easily circumvented (personal communication from a development consultant of an environmental consultant firm, Lusaka, 2013; personal communication from chairperson of an

environmental NGO, Lusaka, 2013; personal communication from an environmental resource mobilization specialist, Lusaka, 2013). To bridge this gap in the law, government agencies generally use the World Bank's guidelines on resettlement of people that are displaced (World Bank 2004), a fact corroborated in an interview with the Lusaka City Council that followed these guidelines in the Lusaka Ring-Road Project (HRCZ 2010). It is important for the GOZ to develop a national resettlement policy framework to internalize social safeguards relating to involuntary resettlement due to land-use investments. The development of procedures for seeking informed consent from affected communities can improve the resettlement and compensation process so that displacement only occurs in compelling circumstances and does not result in undue harm.

### Compensation for displacement

In instances of large-scale land acquisition by investors, these gaps in the legal framework often lead to inadequate compensation for displaced communities. Where compensation is given, it is generally not of a high enough value to compensate for the loss of access to sources of livelihood such as forest, land to grow crops, or access to water sources (PCLET 2006). As there is no process established by the law for resettlement and compensation, the intricacies of resettling local communities are often not reflected in resettlement and compensation packages, as established by the Human Rights Commission of Zambia's *Annual State of Human Rights Report*:

It's common to find a person involved in farming activities as a way of livelihood being compensated by building them modern house in town after displacement. However, these houses come with a lot of unforeseen costs and responsibility such as electricity bills, waters bills and ground rates to be borne by the occupants who in most cases have lost their source of livelihood. Subsequently, these people are overwhelmed with these bills and resort to renting out the houses and moving back to the hazardous area or similar marginalised area. ... due to this unreasonable and unjust practice, some of the displaced people have ended up in a deplorable condition of life style which deprives them of education, health, markets as they are moved far away from such and other related social

amenities. The full impacts of displacing people are not taken into consideration in the calculation of the compensation package (HRCZ 2010).

In resettlement policies and laws, specific provisions for the calculation of compensation should be considered, including country-specific criteria that should be taken into account, such as the provision of alternate livelihood options.

### 3.2.4 Security of customary land title

Customary land is recognized under Zambian law. However, translating these legal land rights into customary land tenure security involves fundamental challenges (Schoeneveld and German 2014, 187–203). There are few procedures in the Lands Act 1995 for allocating land under customary law, with this left to the discretion of traditional authorities, who allocate customary land to their communities, often without any formal codification of the land transfer. Due to this gap in the statutory legal process, it can be difficult to determine which land is used and enjoyed by whom when investors seek to acquire land under statutory law. According to one interviewee, chiefs may alienate customary land to investors on which rural communities graze or live, as there are no documents to show that the land belongs to that community. Without documentation and because all land within each chieftdom is held in trust by the chief, land may effectively be repossessed and given or sold to another person by the chief at any time (personal communication from a development consultant of an environmental consultant firm, Lusaka, 2013). A study by the Oakland Institute found that "Chiefs will often give land to foreign investors at a fraction of the cost of going through the ZDA-sanctioned process. As the land technically has no value until it is converted into a sellable asset (i.e. until it is converted to State land), many chiefs dramatically underestimate the value of this land." (Horne 2011, a33) This informal land market can be very disempowering for customary landowners.

The GOZ is currently seeking to reform laws to create greater land tenure security for customary land so that it is adequately protected by national law (personal communication from the executive director of a land NGO, Lusaka, 2013). A new Customary Land Tenure Bill aims to create a procedure to title customary land in a manner

similar to statutory land, in order to “elevate existing customary land rights into the nation’s formal legal frameworks and make customary land rights equal in weight and legal validity.” (ZLDC 2013). In formalizing land rights, the bill aims to secure rural communities interests in the land on which they live and work (ZLDC 2013), and to address community fears that non-titled land is too easily alienated (personal communication from the chairperson of an environmental NGO, Lusaka, 2013).

### Documentation of customary land rights

However, statutory land titling processes may not be appropriate for customary land and rural smallholders may not be better off with formal land title. In Zambia, any formalization of customary land rights should be careful not to convert customary land into statutory land, as the legal framework currently requires. Instead of formal land titling that creates a new statutory right to land, certification of land should register existing customary land rights. By documenting customary land rights, some degree of certainty that these land rights will be recognized is guaranteed, but the customary laws and processes surrounding customary land tenure are upheld (Pritchard et al. 2013, 44–45).

Civil society groups in Zambia are leading certification programs aimed to improve the security of customary land tenure. For example, the Zambia Land Alliance (ZLA) through the Enhancing Sustainable Livelihoods through Land Tenure Security (SULTS) project, is working with traditional leaders, government and civil society in three districts (Gwembe, Kafue and Solwezi) to improve land tenure administration (ZLA 2013, 6). Among other activities, traditional leaders are supported to provide land certificates for owners of customary land. While not carrying the same legal weight as formal title, these certificates provide greater security to the community about both individual settlements (houses) and blocks of land that are communally or individually used for grazing, farming or other livelihood activities. One challenge that has arisen from this project is that people have been abusing the certificate by using it to sell their land; many farmers are choosing this essentially short-term gain over the long-term value of their land (Personal communication with Executive Director of Land NGO, Lusaka, 6 December

2013). Further communication and awareness raising on the value of land would be helpful to build the capacity of communities to understand the long-term implications of land alienation, the real market value of their land and to improve their ability to negotiate with potential buyers.

It is suggested that further research into other sub-Saharan countries’ experiences with different models of land registration could be useful to determine the model of customary land documentation that may work best in Zambia.

Access to dispute resolution mechanisms for land can also be an important safeguard to increase security of land title, if mechanisms are accessible and effective. The Lands Act 1995 establishes the lands tribunal as a mobile court, to provide low-cost and accessible dispute resolution for land use conflicts (Lands Act 1995, s 20). However, lack of awareness among rural communities about the lands tribunal has reduced its effectiveness. In addition, the lands tribunal is limited to addressing statutory land cases and does not have jurisdiction to hear disputes arising on customary land (USAID 2010; Horne 2011, 14). As a result, the most common method for resolving land disputes continues to be through the local traditional leaders (Horne 2011, 14).

### 3.2.5 Access to information on land

Exacerbating the insecurity of customary land tenure, there is also very little centralized information available on landholdings and planned usage, such that identifying a suitable plot is time-consuming for investors (FIAS 2004). According to the Parliamentary Committee on Lands, Environment and Tourism, “there is a lack of statistics on the quantities of the various categories of land, as well as records on titles to land. Further, there has been no land audit in Zambia to determine the status of all land ...” (PCLET 2006) Only 8000 land titles are currently registered in Zambia (personal communication from chairperson of environmental NGO, Lusaka, 2 December 2013). Moreover, land title registration systems in Zambia are ineffective due to outdated standards, costs and complex administrative procedures (Mason-Case 2011). The system responsible for officially delivering statutory land titles and managing State lands is severely constrained by limited surveying capacity and a backlog of thousands of applications, many

of which have been pending for years (Roth et al. 1995).

To combat this lack of information, a land audit is proposed in the 2014 national budget, to collect information about who owns land in Zambia, both in terms of State and customary land (Chikwanda 2014, para 104). According to an interview with the ZLA, this is vital to “get the house in order” before revising land use-related laws and regulations. Equally important is profiling Zambia’s available natural resources in a parallel process. Arguably, only once information on land and natural resources is understood, can policy and development decisions be made on how best to manage these resources, including exploitation by investors (personal communication from an environmental resource mobilization specialist, Lusaka, 2013).

Complementing the proposed land audit, Zambia is currently implementing its first electronic land registry, which fulfills the Ministry of Lands’ mandate to “efficiently, effectively and equitably deliver land, maintain up-to-date land records and provide land information in order to contribute to socioeconomic development for the benefit of the Zambian people and country” (ROZ MLNREP 2013). The Zambia integrated land management and information system (ZILMIS) will permit electronic monitoring of the progress of each land transaction and replace the largely manual land registration process used to date (ROZ MLNREP 2013). The aim of implementing ZILMIS is to provide Zambian citizens with secure, transparent and traceable land transactions that will help identify fraudulent practices and restore and increase public confidence in the administration of land in the country. It also aims to improve certainty of land location and ownership, improve revenue collection and improve land transaction procedures.

The combination of a land audit to compile information on ownership of land and the electronic registry system to make the information readily available to Zambians will improve access to land information. Greater access to information on land availability can provide greater security to landowners and certainty to investors about land potentially available for their venture.

### 3.2.6 Right of foreigners to own land

The Land Act 1995, the primary piece of legislation governing land in Zambia, facilitates both foreign and domestic large-scale land investments, as land can be leased to both Zambians and non-Zambians alike. However, the 2013 constitutional review process uncovered a desire to set a limit on land acquisition for non-Zambians (TCDZC 2013). It was suggested that non-Zambians should not be given 99-year leases, but that their leasehold tenure should strictly be for the period of the proven investment. Stricter requirements could be placed on non-Zambians before being able to lease land for investments, such as a percentage ownership by Zambians. Moreover, the Zambian Law Development Commission (ZLDC) recommended that Zambian citizens be given priority in land allocation for investment in customary land areas (ZLDC 2013).

### 3.2.7 Key findings

The current legal mechanisms to protect the customary land rights of Zambian communities, such as the letter of consent from the chief and the district council, are not always demonstrative of consent from customary land users. Customary land rights holders are disempowered in Zambia, with little knowledge about redress for rights’ violations. Embedding trained paralegals within communities could assist in expanding community legal knowledge, strengthening local systems of land governance and ensuring that community concerns are represented during land acquisition procedures with government or investors.

The legal framework surrounding customary land tenure could also be strengthened. Prescriptive provisions, establishing a policy and procedure for consultation with affected local communities could provide more guidance to investors and traditional authorities on how to undertake community engagement that effectively informs and gains consent from customary land users before customary land is transferred. The development of procedures for seeking informed consent from affected communities ought to be based upon the premise that displacement occurs only in compelling circumstances of public interest and does not result in undue harm. The development of a national resettlement policy framework could internalize social safeguards relating to involuntary resettlement due to investments. In any such

resettlement policies and laws, specific provisions for the calculation of compensation should be considered, including country-specific criteria to be taken into account, such as the provision of alternative livelihood options.

Registering existing customary land rights through land certificates may also improve the security of customary land rights, as codification can provide proof of land rights. However, any certification scheme should be coupled with awareness-raising on the long-term implications of land alienation. Further research is required to assess the model of land registration that may work best in Zambia, taking other sub-Saharan countries' experiences into account and including community awareness of their land rights.

Greater access to information on land can provide greater security to landowners and certainty to investors about land potentially available for their venture. Zambia's proposed reforms to its land administration system should therefore be applauded, with the focus on both collecting information on land (land audit) and ensuring that this information is available and accessible (through a publically available land registry system).

### 3.3 Weak enforcement of environmental and social safeguards

Environmental responsibility begins with the proactive evaluation, management and monitoring of an investment's impact on the local environment. Socioeconomic sustainability includes a responsibility to promote public participation in investment decisions and to uphold human rights. Zambia's legal framework includes safeguards to guarantee that these environmental and social aspects of sustainability are assessed for any investments entering the country.

The Environmental Management Act (EMA) of 2011 is the principal piece of legislation that governs environmental protection and management, and the sustainable management and use of natural resources in Zambia (EMA 2011, s 3).<sup>19</sup> It provides coordination of environmental activities

<sup>19</sup> "Where there is any inconsistency between the provisions of this Act and the provisions of any other written law relating to environmental protection and management, the provisions of the EMA shall prevail to the extent of the inconsistency."

for all sectors and provides a relatively strong legal and institutional framework for the primary environmental and social safeguard mechanism in Zambia: EIAs. While generally a well-designed mechanism, there remain a select number of process-related legal barriers to an effective EIA, such as the qualification of consultants undertaking the assessments and the comprehensiveness of the EIA process against international standards, particularly relating to social considerations, which are reviewed in Section 3.3.2.

Implementation of the EMA remains a more significant challenge in Zambia (personal communication from environmental resource mobilization specialist, Lusaka, 2013; personal communication from development consultant of environmental consultant firm, Lusaka, 2013). This is due primarily to two factors investigated in this section: (1) the lack of capacity and resources of the government officers whose task it is to implement the EIA and; (2) limited public participation in the EIA process. An overarching issue, which makes overcoming these two challenges more difficult, is an absence of high-level political will to ensure the environmental integrity of investments.

The legal mechanisms established in the EMA to uphold the social and environmental safeguards are generally not followed in practice. The result is that the financial quantity of investments is still viewed as more important than their sustainability among Zambian decision-makers.

#### 3.3.1 Overview of environmental impact assessments in Zambia

The EMA provides for the legal right to a clean and healthy environment, reaching further than the constitution that only requires that the GOZ "strives" to provide a clean and healthy environment (EMA 2011, s 4(1)).<sup>20</sup> It is interesting

<sup>20</sup> Subject to the constitution, every person living in Zambia has the right to a clean, safe and healthy environment; s 4(2) The right to a clean, safe and healthy environment shall include the right of access to the various elements of the environment for recreational, education, health, spiritual, cultural and economic purposes. It must be acknowledged that the right to a clean and healthy environment in the EMA must be interpreted in the light of Articles 111 and 112 of the constitution, which in effect mean that economic, social and cultural rights are not constitutionally guaranteed in Zambia.

to note that it also asserts that, “the environment is vital to people’s livelihood and shall be used sustainably in order to achieve poverty reduction and socioeconomic development.” (EMA 2011, s 6(h)) Moreover, the EMA provides that, “renewable natural resources shall be used in a manner that is sustainable and does not prejudice their viability and integrity.” (EMA 2011, s 6(k)). Even from this brief introduction, it is arguable that the EMA is a progressive piece of environmental legislation within sub-Saharan Africa (Sambo 2012, 182).

As well as providing overarching principles for the environmental protection of Zambia’s natural resources, the EMA codifies a number of environmental safeguards that must be followed by investments in all sectors, including environmental impact assessments (EIAs). All investment projects – defined as “any undertaking, development, change in the use of land, or extensions and other alterations” (EMA 2011, s 2; EIA Regs. 1997, s 2) – that may have an impact on the environment require a full EIA. An EIA is a process of examining, analyzing and assessing proposed activities, policies or programs to determine the possible positive or negative impacts on the environment, including social and economic threats (EIA Regs. 1997). Any investor must seek prior written approval from the Zambia Environmental Management Authority (ZEMA) (EMA 2011, s 7(1))<sup>21</sup> before undertaking any project that is likely to have environmental impacts (EMA 2011 s 29(1)).

The first stage of the EIA process is to determine whether a full EIA is required, or if an environmental project brief would suffice. For projects that will have only minimal impacts on the environment, an environmental project brief is sufficient (EIA Regs. 1997, s 3(2)).<sup>22</sup> An environmental project brief is a report prepared by the investor including preliminary predictions

21 ZEMA’s mandate is the integrated environmental management of Zambia and ensuring the sustainable management and use of natural resources in Zambia. The authority exists under the umbrella of the Ministry of Lands, Natural Resources and Environmental Protection.

22 An environmental project brief is required in projects relating to urban area rehabilitation, exploration for and production of hydrocarbons including refining and transport, brick and earthen manufacture, glassworks, brewing and malting plants, plants for manufacture of coal briquettes and pumped storage schemes and bulk grain processing plants.

of the possible impacts of a proposed project on the environment and is the first stage of the full EIA process (EIA Regs. 1997, reg 2). Projects judged to have a higher degree of environmental and social disturbance must hire an independent consultant to undertake a full EIA and submit an environmental impact statement to ZEMA (EIA Regs. 1997, s 2). The distinction between those projects that require a full EIA and those that must only produce an environmental project brief is based in part upon the sector of the investment; for example: any mining activity, any large industrial activity and any major road must undertake a full EIA. The distinction is also dependent upon the size and nature of the investment: within the agriculture sector, large-scale agriculture investments must undertake a full EIA, including projects with irrigation schemes of more than 50 ha included. All other agricultural projects are required to provide an environmental project brief.

If a full EIA is required, a scoping stage initializes the process by developing specific terms of reference for the study that are submitted for approval by ZEMA (EIA Regs. 1997, s 8). ZEMA has 5 days to approve or reject the terms of reference. This scoping stage is very important to ensure that the EIA is asking the right questions to rigorously assess the environmental and social impacts of the proposed investment activity. If scoped too narrowly, the EIA may not be comprehensive and valid issues can be overlooked.

Upon approval of the terms of reference, the investor must hire an independent consultant to undertake the EIA (EIA Regs. 1997),<sup>23</sup> whose names and qualifications must be approved by ZEMA (EMA 2011, s 29; EIA Regs. 1997, s 9). The analysis stage of the EIA process involves a baseline study and impact evaluation, leading to the development of an environmental impact statement. The EIS should include information on (EIA Regs. 1997, reg 11):

- a description of the project and all reasonable alternatives, including all associated activities required to support the proposed project;
- a description of the proposed site and/or route, together with reasons for rejecting alternative sites and/or routes;

23 ZEMA has the authority to approve of the names and qualification of persons entrusted to do the impact study, selected by the investor.

- a brief description of the site and/or route and the surrounding environment including any information necessary to identify and assess the environmental effects of the project;
- the environmental effects of the project and reasonable alternatives, including the direct, indirect cumulative, short-term and long-term effects;
- the socioeconomic impacts of the project such as resettlement of the affected people.

It should be noted that within these criteria, the EIA regulations contain a requirement for social assessment. While this opens room for social assessments, it is still inadequate as the legally established process fails to incorporate critical elements such as gender assessments of proposed projects. While social impact assessment guidelines for reviewing EIA applications exist in draft form, these are not publically available on the ZEMA website (Walmsley and Patel 2011, 465).

The EIS should reference different alternatives to the investment, including the benefits and consequences of carrying out the alternatives (EIA Regs. 1997, reg 11). These alternatives are important, as they provide options that may improve the environmental and social integrity of the investment.

A vitally important social element of the EIA process is public participation (EMA 2011, s 6). Participation of the public, particularly communities that may be affected by an investment, are essential to ensure that investments take the concerns and needs of citizens into account. In addition and as further evidenced by Case study 6, participatory methods can generate important information about the socioeconomic and environmental trends of the region of a proposed investment, as well as capture local priorities (Mayoux and Chambers 2005). If incorporated into the design of an investment, this information can significantly impact an investment's socioeconomic sustainability. The public participation process established in the EMA requires any proposed EIA process to be publicized in detail in the media – usually leading newspapers with a circulation in the project areas – in a language understood by the local community for a minimum period of 15 days and subsequently at regular intervals throughout the process (EIA Regs. 1997, s 10(2)(a)). After the 15 days, the investor must hold meetings with the affected communities

to further present the project (EIA Regs. 1997, s 10(2)(b)). The Environmental Impact Assessment Regulations 1997 also include provisions to ensure that public views are taken into account during both the preparation of the terms of reference of the EIA (EIA Regs. 1997, s 8(2)), and during the analysis of the environmental impact statement (EIA Regs. 1997, s 16(1)).<sup>24</sup> ZEMA may also choose to organize public consultations in the locality of the proposed investment if it considers it necessary (EIA Regs. 1997, s 17).

Once completed, the environmental impact study is submitted to ZEMA, which is required to make a decision “within thirty days after receipt of a report from a public hearing or twenty days from the date on which an environmental impact statement was submitted” (EIA Regs. 1997, s 20(2)). Upon approval by ZEMA (often with conditions), the investor may implement the project. If ZEMA rejects the environmental impact study, the investor can appeal to the minister responsible for the environment and natural resources, who must respond within 14 working days (EIA Regs. 1997, s 24). If unsatisfied with the minister's decision, the investor can appeal to the high court of Zambia (EIA Regs. 1997, s 24; ECZ 2009 19).

As well as assessment of the environmental and social impacts of a proposed investment, ZEMA is also tasked with audit and monitoring responsibilities, detailed further in Section 3.3.3.

### 3.3.2 Challenges for the environmental impact assessment process

While the EMA establishes a strong EIA process in general, including a detailed process of incorporating public consultation, monitoring and auditing, there remain a select number of process-related legal barriers. This section will look briefly at four of these:

1. outdated EIA regulations;
2. the variation in stringency of process for different investments;
3. a lack of oversight regarding who undertakes the EIA;
4. harmonizing EIA requirements with international standards.

<sup>24</sup> “The Council shall [...] place a notification in at least two national newspapers three times per week for two consecutive weeks and broadcast a notification on national radio, detailing the place and times where copies of an environmental impact Statement are available for inspection and the procedure for submitting comments.”

First, despite the enactment of the EMA in 2011, the EIA Regulations of 1997 continue to be in force and the process above is based on the EIA Regulations 1997. These EIA Regulations do not therefore characterize the robust environmental and social safeguards that the EMA espouses (Sambo 2012, 180). The new EIA Regulations aligned with the EMA should have been enacted in the first quarter of 2012, but to date they remain in draft form. From a legal perspective, this is a notable shortcoming. The GOZ should prioritize the finalization of these revised EIA regulations to align this subsidiary legislation to the process and overall vision established in the EMA.

Second, the EMA establishes two tranches for projects impacting the environment: an environmental project brief for less significant impacts and a full EIA process for all others. It was noted above that large-scale agricultural projects, with irrigation schemes of more than 50 ha are required to undertake an EIA. The implication is that all agricultural projects under 50 ha, which do not include any new agrochemicals or crops and do not involve irrigation, are only required to perform a project brief. Particularly given the cumulative environmental and social impacts of agricultural investments on sustainable land use, a revision to this lesser requirement is suggested. Therefore, the requirement to undertake a full EIA should be the norm, with only very specific exceptions allowed – for example for domestic, smallholder investors.

A third recommended improvement within the EIA process is to improve oversight of the consultants that undertake the EIA. Although the EIA Regulations state that ZEMA has the authority to approve the names and qualifications of persons chosen to undertake the EIA, the legal framework provides no further criteria on how competence and independence ought to be ensured and there is no formal certification process (personal communication from environmental resource mobilization specialist, Lusaka, 2013). Therefore, arguably, people with any qualifications could be engaged to undertake an EIA in Zambia. However, there is a list of approved EIA consultants, from which investors are invited to choose by ZEMA (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013).

The stringency of EIAs was questioned by a number of interviewees, who sought greater

competence and professionalism among EIA consultants in Zambia (personal communication from officer, Environmental Licensing Unit of National Government Environmental Body, Lusaka, 3 December 2013). For example, an interviewee cited an example of an EIA for a road project (in north Zambia) being a “cut and paste” job from an earlier, similar EIA (personal communication from environmental resource mobilization specialist, Lusaka, 2013). It was obvious that no fieldwork was done because the species of plants cited as being in danger (due to the road leading north of Lusaka) do not grow in the north of the country, but was an important consideration in the EIA for the road leading south.

An agency could be established to train and certify EIA consultants, similar to the Zambia Institute for Advanced Legal Education, which trains law school graduates. This would both improve the quality and potential conflict of interest that is possible under the current system and would build capacity within Zambia to undertake environmental and social impact assessment work. At present, companies often bring in international experts to perform EIAs to a high(er) standard (personal communication from environmental resource mobilization specialist, Lusaka, 2013).

Fourth, it has become practice for international financiers, including multinational development banks such as the World Bank Group and the African Development Bank (AfDB) to require application of their environmental and social impact assessment (ESIA) operational policies during major investment projects. In Zambia, for example, projects financed by the AfDB over the past 4 years have all produced ESIA (AfDB 2014).<sup>25</sup> ZEMA could review the EIA Regulations against these global standards adopted by multilateral banks. Regular benchmarking of impact assessment processes with international standards can enhance their integrity but should maintain local relevance.

### 3.3.3 Capacity and resources of the Zambia environmental management authority

As well as assessment of the environmental and social impacts of an investment, ZEMA is also

<sup>25</sup> The projects include the Zambia - Maamba Collieries Power Generation Project, Botswana-Zambia - Kazungula Bridge, Zambia - Itezhi Tezhi Hydro Power Project and the Zambia-Malawi-Mozambique - Nacala Road Corridor Phase II.

tasked with monitoring and audit responsibilities. ZEMA is mandated to undertake inspections to ensure that investors have adhered to the environmental and social obligations established in their monitoring plan and impact management plan, which form part of the EIA report. These plans contain a description of agreed measures for: preventing, minimizing or compensating for any adverse environmental impact; enhancing beneficial effects; and monitoring effluent streams or other important environmental features that may be affected by the project (EIA Regs. 1997). Inspections focus on collecting data to ensure that the correct payment brackets are followed for environmental licenses. Investors are required to conduct a more thorough environmental audit of the project within a period of 12 to 36 months after the completion of the project (EIA Regs. 1997, pt VII). Audits require a broader inspection of the environmental impact of an investment that goes beyond the EIA report to investigate any environmental changes.

There are several challenges for ZEMA to effectively undertake these monitoring and auditing tasks, stemming from inadequate human and financial resources.

### **Human resource limitations**

In brief, greater staffing and funding is required for ZEMA's professional functioning. There are an insufficient number of agents to adequately perform ZEMA's mandate to assess, audit and monitor all investments (Tarr 2003). To reduce tasks to those manageable, ZEMA focuses on its monitoring responsibilities (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013). Audits are only undertaken 3 years after the completion of an EIA (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013). Thus, there is a clear need for government to employ more workers at ZEMA for effective inspection of environmental issues (Citizens for a Better Environment 2013). Uncompetitive conditions of service also result in a high staff turnover and should be addressed (PCLET 2006).

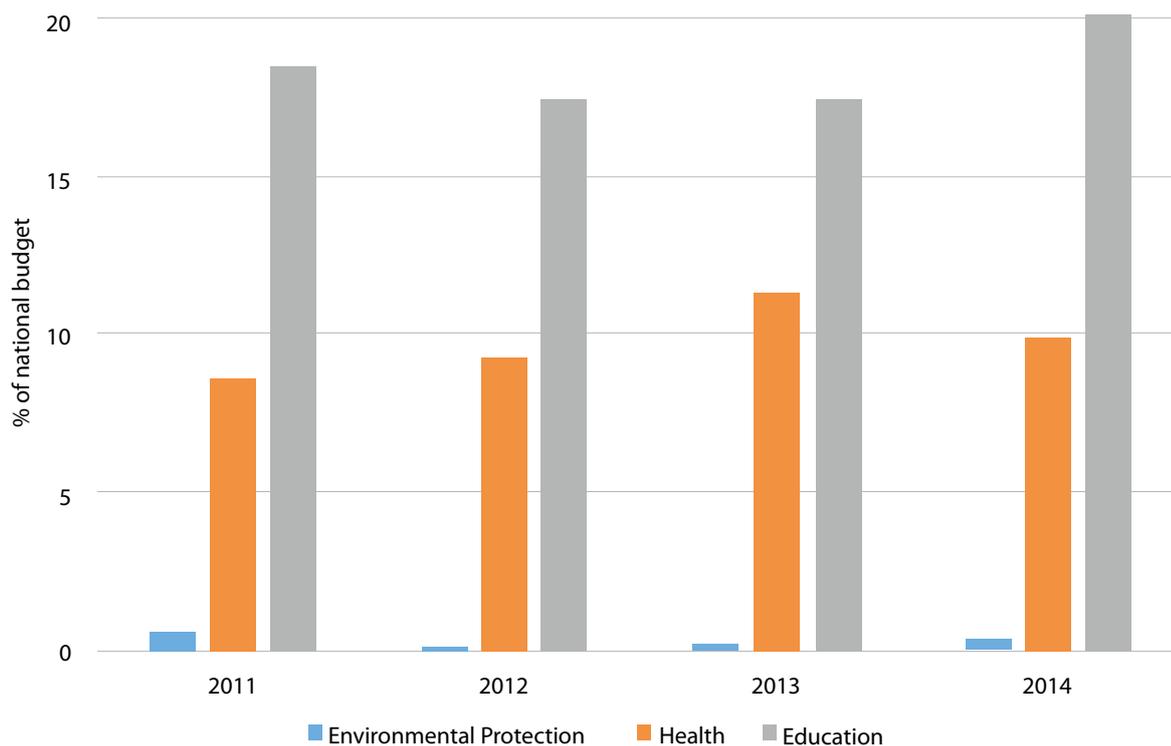
There is scope for greater coordination with other relevant ministries, such as Ministries of Water, Fisheries and Wildlife. Within the EIA

process, there is a "call for comments" by relevant government stakeholders (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013). Building coordination between ZEMA and other environmental agencies, to minimize duplication and overlap and encourage cooperation, could improve the human resource base available to regulate and monitor investments. For example, ZEMA has undertaken baseline studies for river quality, which it uses to monitor investment EIAs; the Department of Water could be involved at the baseline assessment phase by providing data and expertise.

In addition, increasing the capacity of civil society organizations and communities can provide civil oversight to investments' impact on sustainable development, holding both investors and the GOZ to account. Introducing paralegals into communities could increase communities' awareness of sustainable investment issues and thereby improve community oversight of current investments (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013). In addition, there are reportedly few civil society organizations dedicated to environmental sustainability in Zambia, especially when compared to social issues (personal communication from chairperson of environmental NGO Lusaka, 2013). Notable exceptions include Citizens for a Better Environment, the Zambia Climate Change Network and the Zambia Centre for Environment and Climate Change Dialogue. Supporting the development of more civil society groups dedicated to actively raising awareness on the issue of environmental protection, climate change and/or natural resource management could be key to more active involvement of Zambian society. Interested existing civil society organizations could be identified, trained in sustainable investment issues and assisted in the development of environmentally specific visions, objectives and strategies.

### **Political and financial independence of ZEMA**

ZEMA has long been viewed as a toothless tiger, lacking in status and political clout (HRCZ 2010; Sambo 2012, 197). This stems from its lack of financial and political independence. Annual government budget grants for environmental protection have fluctuated between 0.6% and 0.1% over the past 4 years (Figure 5).



**Figure 5. National budget allocations for environmental protection.**

Source: National budget address by Minister of Finance, 2011–2014.

The EMA seeks to provide ZEMA with greater funding and financial independence via the environment fund. The environment fund is intended to consist of money levied from investors undertaking activities that have, or are likely to have, an adverse effect on the environment, including via environmental performance bonds referenced in Section 3.1.3, as well as payments from parliament and a variety of other voluntary sources (EMA 2011, pt VIII). The environment fund is not yet operational, as modalities are still being determined.

### Accessibility of ZEMA

The accessibility of ZEMA is also limited, as the offices are quite centralized and currently operate only in Lusaka, Chirundu, Ndola and Livingstone. Honorary inspectors are also in place in other areas of Zambia, but they are not official employees of ZEMA and do not work full-time (personal communication from officer, environmental licensing unit of national government environmental body, Lusaka, 2013). Nevertheless, they have been trained by ZEMA and hold similar powers to perform the functions of ZEMA-employed environmental officers.

In seeking solutions to improve the capacity of ZEMA to effectively monitor the environmental and social impacts of investments, decentralization is often presented as a possible solution. Indeed, the overall objective of decentralization is to ensure greater service delivery, public participation, adequate monitoring and education campaigns. ZEMA's decentralization and devolution of its monitoring functions to the district councils may allow for greater decentralized oversight of investments (personal communication from a development consultant of an environmental consultant firm Lusaka, 2013). The challenge with this recommendation, however, is that the financial and human resource capacity at the council level would have to be strengthened.

In an interview with district council officials from Lusaka City Council, two major obstacles facing decentralization were identified (personal communication from a planning department officer, environmental planner, chief health inspector and legal assistant from local government, Lusaka, 2013). A primary obstacle is the speed at which financial devolution has followed the declaration of political devolution. Councils have

been asked to undertake greater responsibilities without a corresponding increase in funding. This is particularly challenging for rural councils, as they have only limited revenue streams, given the small numbers of property taxes and levies. For rural councils, financial independence is almost impossible and financial constraints have resulted in poor service delivery (personal communication from a planning department officer, environmental planner, chief health inspector and legal assistant from local government, Lusaka, 2013). Second, the human capacity of district councils is low. To remedy this, the Local Government Service Commission has been created and has implemented a program to rotate personnel from one district to another and from city councils to municipal- and district-level councils. The aim is to promote exchange of skills from councils with greater capacity (urban and municipal councils) to those with capacity shortages (rural district-level councils). However, most local authorities are created and operate under Acts of Parliament that differ from those governing municipal councils. As a result, officers who navigate multiple jurisdictional levels find it difficult to adjust. Similar challenges include variations in customary laws across the country (personal communication from a planning department officer, environmental planner, chief health inspector and legal assistant from local government, Lusaka, 2013).

Therefore, for decentralization to serve as a viable solution to capacity challenges facing ZEMA, the devolution of human capacity and financial grants to district councils should be accelerated. Capacity building for the district council-level officers is particularly important to ensure that any devolved functions are effectively undertaken.

### 3.3.4 Public participation in environmental impact assessments

While the regulatory framework for EIAs does provide for public participation and access to information, the established process is not always inclusive of the lowest levels of the community. Public participation mechanisms use formalized structures such as councils and traditional authorities, which can be a barrier to credible consultation with community members, as seen in Section 3.2 above (HRCZ 2010). Rural society in Zambia is quite hierarchical and it is bad etiquette for subjects of a chieftom to receive information before a chief does. Therefore, for an EIA consultant

to approach the community members of a village, the chief must first be consulted and agree to it. This hierarchy can be the source of strong conflicts of interest between the chief and his/her people and community concerns may not come to the fore (personal communication from an environmental resource mobilization specialist, Lusaka, 2013).

The methodology followed for consultations is not always adequate. For example, discussion forums with the local community are best conducted in local languages and at venues near the project areas, rather than in centers such as Lusaka (Sambo 2012, 197). The length of the EIAs and the technicality of the materials therein require translation for the layperson. However, this translation into easily understandable language and terms is often not undertaken. Separate stakeholder groups, targeting vulnerable or marginalized members of the community such as women, may be required to gain these groups' views. Therefore, even when public consultation is performed, its effectiveness cannot be assured (Manda 2008, 1-4; HRCZ 2010). *The Annual State of Human Rights Report of 2010* finds that in many investor-led public hearings, investors tend to highlight the social and economic benefits of the project without detailing its possible negative consequences (HRCZ 2010). In this way, public hearings become a quick and easy way for investors to be seen to comply with their corporate social responsibility consultation requirements.

Effective public consultation on EIAs must be undertaken at all levels of society in order to be inclusive and representative of all affected persons. The methodology followed should take situation-specific considerations into account, including but not limited to, comprehensibility of information, inclusion of vulnerable and marginalized groups, and unbiased presentation of information, language and location.

Despite the difficulties of involving communities in investments, this research study has identified a sustainable investment, which followed a very strong public participation methodology in its development, namely the Bio Carbon Partners' (BCP) Lower Zambezi REDD+ project. The design of this project is prefaced upon strong community engagement and partnership and the community consultation process applied has attained the highest level of the Climate, Community and Biodiversity Alliance international verification standard. Case study 6 provides more detail.

**Case study 6 – BioCarbon Partners’ Lower Zambezi REDD+ project** (personal communication from the director, BioCarbon Partners Trust via email in January 2014; BioCarbon Partners 2013)

BCP is a private, African-headquartered and majority African-owned “social enterprise” company (BioCarbon Partners 2014). Its Lower Zambezi REDD+ project is the first and at the time of writing, only pilot REDD+ demonstration project in Zambia. The project aims to reduce poverty and enhance forest conservation, with a vision to achieve transformational social development in Africa through REDD+. It is in its initial stages of development and therefore this case study is based on the project design documentation and does not have access to empirical data based on implementation.

REDD+ is a mechanism established under the UNFCCC, in order to reduce carbon emissions from deforestation and forest degradation. The “+” refers to transforming the methods by which forestry and forest-related activities have been traditionally undertaken via conservation, sustainable management of forests and enhancement of forest carbon stocks. Projects that adhere to the REDD+ criteria receive carbon credits for the amount of carbon emissions avoided from deforestation activities. The basic framework for REDD+ was established at the 16th UNFCCC Conference of the Parties in Cancun, but discussions continue, particularly over financial and technological support. Therefore, this case study should be prefaced with the caveat that the success of REDD+ is uncertain and another 3 to 5 years’ experience and negotiation are required before it can be determined whether REDD+ works as a mechanism to increase forest carbon stocks (Angelsen et al. 2012, xvii). Governance challenges in particular remain immense and include country ownership of REDD+ processes; coordination in multilevel governance situations, including devolution of rights and responsibilities; and effective monitoring and verification (Di Gregorio et al. 2012, 70). The Lower Zambezi REDD+ project is a positive example of a strong starting point for a sustainable investment as an example of an investment that has undergone a detailed, year-long stakeholder outreach and community engagement process.

The Lower Zambezi REDD+ project is formed by a variety of activities, based upon: (1) conservation of woodlands, wildlife and biodiversity; (2) creation of alternative, sustainable livelihood opportunities for people living in the project zone and; (3) promotion of resilience against the negative anticipated effects of climate change. As recommended by the “sustainable landscapes” methodology, the Lower Zambezi REDD+ project explicitly recognizes the interconnectedness between these three activities, with the increase of forest resources dependent upon providing communities with meaningful alternatives to deforestation and charcoal production, which will reduce the pressures currently driving them to undertake these activities.

The community-level intervention entitled “Sustainable Eco-Charcoal project” is one specific activity of the Lower Zambezi REDD+ project that will be highlighted by this case study.<sup>26</sup> The choice of this activity is due to its status as a pilot project, which has already started in a number of project communities, thus providing some initial insights. The Sustainable Eco-Charcoal project is comprised of a number of steps:

1. adoption of sustainable harvesting plans for charcoal production;
2. promotion of sustainable forest management practices, such as replanting trees and excluding livestock from the eco-charcoal forest;
3. use of higher efficiency kilns to produce charcoal;
4. establishment of new markets for this “niche” sustainable charcoal product, with the aim of receiving higher prices.

<sup>26</sup> Other activities include the Conservation Farming Training Programme, the School Support Programme, the Tree-Planting Project, small-scale forest/agricultural businesses such as honey production, and smaller community projects such as tree nurseries, village chickens, fruit orchards and vegetable gardens.

The Sustainable Eco-Charcoal project promotes the adoption of sustainable harvesting plans for charcoal, which remains a key energy source in Zambia and is critical to supporting rural and

urban livelihoods and poverty alleviation. This raises one of the biggest challenges to sustainable investments – how to balance all three dimensions of sustainable development (economic, social and environmental).

REDD+ can run the risk of eliminating livelihoods for poor rural communities, if traditional forest uses, such as charcoal, are banned from REDD+ project areas, in order to protect the trees. The adoption of a charcoal activity within the Lower Zambezi REDD+ project reflects the need to include mechanisms that reduce pressures on forests while supporting livelihoods and rural economic growth, within or alongside REDD+ projects (Pacheco et al. 2012, 65).

Charcoal production is important for the communities involved in the Lower Zambezi REDD+ project. They are dependent upon charcoal production and subsistence agriculture

as livelihood activities. The communities also face high levels of poverty, with 88% of surveyed households within the project zone reported to live below the USD 1.25-a-day poverty line. It is interesting to note that the communities involved in the project do not actually use charcoal for their personal energy needs – they use fuelwood. Instead, charcoal is produced for sale to urban markets, due to the close proximity of the project area to Lusaka. Arguably, it is therefore in the project communities' interest to improve the sustainability of charcoal production and to reduce the deforestation of their lands, if this alternative production method can guarantee a livelihood. The “niche” product price that is sought to be gained from the sale of sustainable eco-charcoal, is hoped to secure the community livelihoods.

The Sustainable Eco-Charcoal project is a partnership between the community and BCP. The project has been designed to make sustainable forest management and sustainable charcoal production beneficial to local producers, who will be employed as the primary producers of this sustainable eco-charcoal product. In return for production, BCP will provide the kilns and address the market bottlenecks, such as transportation.<sup>27</sup> Engaging with communities from the beginning of an investment, to understand their social, livelihood and environmental needs, as well as the drivers of their current lifestyles, can lead to co-design of an investment that reflects these needs. Investments built upon this type of partnership can better guarantee ownership of an investment by a community.

### Community covenant

BCP has been testing a novel community engagement methodology, known as a community covenant, which formalizes the partnership between BCP and local communities. A community covenant is a signed agreement, similar to a contract, between BCP and community representatives, whereby community participants commit themselves to reducing their unsustainable forestry activities, in line with project activities, in exchange for project investment and employment.

#### **Box 5. The social benefits of charcoal** (Gumbo et al. 2013)

In sub-Saharan Africa, 79% of the population relies on traditional use of biomass for cooking (IEA 2013). Zambia follows this trend, with about 85% of urban households in Lusaka using charcoal for energy, compared to 15% in rural areas of Lusaka using charcoal (as distinct from other forms of biomass). In addition to reliance on fuelwood for energy, the poorest rural households depend upon the sale of forest products, such as charcoal, for between 30% and 32% of their incomes. The transportation and marketing of charcoal also constitute a major form of employment in rural regions. These statistics point to the importance of charcoal to both urban and rural areas; the majority of charcoal is produced in rural areas, providing income and employment and is transported for consumption in urban centers, such as Lusaka, providing the primary energy source for many urban dwellers. Therefore, sustainable production and trade of charcoal can meaningfully contribute to people's livelihoods in Zambia by providing income and reliable energy (although its safety to human health is questionable).

<sup>27</sup> BCP intends to assist producers by providing transportation “at cost” for sustainably produced charcoal (transferring savings to producers of what would have been lost to external transporters in exchange for forest protection agreements).

### **Box 6. CCBA standards of community consultation (CCBA 2013a; CCBA 2013b)**

International standards can complement and strengthen requirements in national laws and processes, including for public consultation and stakeholder engagement. In this example, BCP's efforts to adhere to the community well-being requirements of the Climate, Community and Biodiversity Alliance (CCBA) standard is analyzed (CCBA 2013a),<sup>1</sup> to show the beneficial impact that international standards had on guiding this investment's community engagement. As a mechanism of the international carbon market, international standards for REDD+ have been developed to guide projects' implementation and ensure international recognition of the quality of REDD+ projects.

BCP has achieved gold level validation of the Lower Zambezi REDD+ project (CCBA 2013a).<sup>2</sup> To reach this level on community well-being, the CCBA standard requires extensive documentation of the impact of a project on communities; investors must demonstrate exceptional community benefits, including: (i) community leadership in implementation of the project; (ii) short-term and long-term benefits of the project to the community; (iii) empowerment of community members; (iv) effective participation of community members in decision-making and implementation of the project; and (v) equitable benefit sharing among all members of the community, including the marginalized or vulnerable (CCBA 2013a, 38). For the Lower Zambezi REDD+ project to reach this gold level, BCP has ensured community engagement and documented the same, in three ways:

- baseline survey and social monitoring
- extensive community meetings, which are transcribed and minutes produced
- continued community engagement integrated into the project design

First, BCP developed a baseline community survey, in line with CCBA standards, which will form the foundation of knowledge against which the impacts of the project on the community will be monitored. The baseline survey builds upon data collected from 90 households living in the project area. Biennially throughout the life of the project, these households will be surveyed against predetermined community benefit indicators, to measure progress against community development objectives and determine the benefits that have accrued to the community from the project. Data from these 90 households will be combined with direct participants' surveys to complete the social monitoring.

Second, to satisfy the CCBA that the project design had gone through appropriate community engagement, extensive documentation of the comments received by the public and local community representatives over the 12-month community consultation period were collected. This documentation included transcripts of semi-structured interviews, minutes from village meetings and focus groups and written and oral responses to the draft project design document. BCP also obtained "letters of support" for the Lower Zambezi REDD+ project from the chief, local village headmen and headwomen and district government offices.

Finally, to meet the gold level standard, BCP is required to demonstrate that the poorest 50% of the community is likely to benefit from the Lower Zambezi REDD+ project. To attain this CCBA standard, BCP demonstrated that the project was designed with the poorest 50% of households in mind. As mentioned above, the project activities are designed both to protect forest resources and to assure community

<sup>1</sup> Well-being is defined as people's experience of the quality of their lives and may include environmental, social, economic, psychological, spiritual and medical dimensions. The improvement of well-being may include providing opportunity, ensuring and enhancing security and empowerment.

<sup>2</sup> The CCBA is a partnership of five international non-governmental organizations: Conservation International, CARE, Rainforest Alliance, The Nature Conservancy and Wildlife Conservation Society. The CCBA Standards evaluate land management projects from the early stages of development through to implementation. According to the CCBA, projects that meet the Standards adopt best practices to deliver net positive benefits for climate change mitigation, for local communities and for biodiversity.

**Box 6. Continued**

livelihoods, preventing loss of livelihoods. More specifically, its activities focus on issues reflective of “poverty” in the region, including:

- **low or no income** (improved alternative livelihood projects, such as Conservation Farming Training program, Sustainable Eco-Charcoal project and Village Chicken projects);
- **access to education** (School Support programme);
- **access to health care** (support to the Namanongo rural health centre);
- **access to clean water** (Borehole Refurbishment project);
- **access to alternative energy** (Solar Empowerment project in partnership with SunnyMoney);
- **access to markets** (Sustainable Eco-Charcoal project).

The community covenants are developed with local community input and only projects with written approval from community representatives are implemented. The covenants adopt both ‘carrot and stick incentives’: the covenant codifies the benefits and support of BCP for community-based projects, but any breach of contract by communities could lead to potential termination of the project in the noncompliant village (after negotiation). For the Sustainable Eco-Carbon project, in signing the community covenant, the communities commit themselves to stopping unsustainable charcoal production methods and promoting protection of the eco-charcoal forest, in exchange for access to improved technology (higher efficiency kiln), transportation, market access and training support (provided by BCP). Due to the short amount of time that the project has been running, the success of this model is as yet unknown. However, it is the product of a year of ongoing community consultations and reflects an attempt to build a community-investor partnership, with ownership of the sustainable investment by the community. It demonstrates that contract negotiations between land-use investors and local employees can actively involve both parties. Acknowledging that strong community input requires capacity building on behalf of the investor to build in-depth knowledge of the investment among community representatives, equal and balanced partnerships can lead to greater acceptance and adherence to contractual terms by both parties.

### 3.3.5 Political will

In Zambia, there is some momentum to mainstream environmental concerns and climate change across all ministries and a variety of social

empowerment policies, including the CEEC, have been introduced. However, examples like the Kangaluwi copper mining project (Case study 7) where political interference led to environmental concerns being sidelined in favor of economic benefits, puts the will of Zambia’s elite to achieve sustainable development into question. There remains a general bias towards quantity of investments over the ability of investments to improve the overall development of the country. Therefore, policy champions who advocate the consideration of sustainable development in investment decisions can be key for a change in Zambia’s development pathway, to low-emission growth and climate resilience.

According to the national report prepared by the Government of Zambia for the United Nations Conference on Sustainable Development (Rio+20), political interference in the decisions of ZEMA have previously resulted in frustration of staff. An earlier, similar example to Case study 7 involves the initial rejection by the Environmental Council of Zambia (ZEMA’s forerunner) of the EIA for an integrated iron and steel plant project. The Environmental Council of Zambia had conducted technical assessments and reached the decision that the project was not in the interest of the environment and nearby communities. This decision was overruled by the Minister of Lands, Environment and Natural Resources, who considered the project ability to contribute to job creation in the local community, the adverse environmental impacts notwithstanding (Nsama 2005; Nsama 2012).<sup>28</sup>

<sup>28</sup> It must be noted that the project went ahead and is presently being probed for noise pollution, unsafe working environment, not to mention that it is located in an area zoned as residential.

### Case study 7 – Kangaluwi copper mining investment in the Lower Zambezi National Park (Chulu 2013)

In August 2013, ZEMA rejected the construction of the USD 494 million Kangaluwi copper mining project by Zambezi Resources in the Lower Zambezi National Park, on the grounds of the company's inadequate EIA. According to ZEMA's assessment, the EIA failed to address several long-term environmental and social costs of the project; for example, the extent to which large amounts of water required in the open-pit mine would affect groundwater levels in the vicinity (Chulu 2012). The rejection of the EIA by ZEMA resulted in the nullification of the government-granted mining license obtained by Zambezi Resources Limited in 2012 to mine in the national park. The then Minister of Environment, Wylbur Simuusa, was quoted as saying that: "the government is taking a cautious approach to sanctioning mining projects located within game management areas" (Chulu 2012).

The proposed Kangaluwi project is located in the middle of the Lower Zambezi National Park, a protected area that is renowned for being "one of the few pristine wilderness areas left in Africa" by the International Union for the Conservation of Nature (IUCN). It has been an official protected area since the 1980s and was previously preserved as a royal game reserve (Udoh 2005). In a recent submission to the Parliamentary Committee on Tourism and Arts held in February 2014, Tourism and Arts Minister Sylvia Masebo is quoted as saying: "Government risks losing safari fees amounting to over ZMW 84 million and photographic revenue amounting to over ZMW 9 million if the mine is allowed to exist." (*Lusaka Times* 2014a).

Unsatisfied with ZEMA's rejection of the mining project, Zambezi Resources appealed to the Minister of Lands, Environment and Natural Resources against the ZEMA decision, in line with the process established in the EIA regulations. Confirming receipt of lodgment of the appeal, the minister stated that: "I have received the appeal from the developers of the Kangaluwi project and we shall make a final decision over the matter within this month, but I want to assure the nation that the decision to be taken will be in the interest of the country." Simuusa is reported to have said in an interview in Lusaka. "Also the people should take a keen interest in matters of this nature, especially that most of Zambia's oil and gas reserves are found in game management areas. So how do we handle these issues? Anyway, the decision that we shall come up with will be a landmark one since we have to weigh the advantages of having an economic project against environmental protection, human and wildlife." (Chulu 2012) Environmental activists have challenged the minister not to consider overturning the decision made by ZEMA to reject construction of the mining project in the Lower Zambezi National Park.

However, in January 2014, a decision was made by the current Minister of Environment, Hon. Harry Kalaba, that the mining project would go ahead. At the time of writing, this decision is the subject of a lawsuit in the Lusaka high court. As part of the litigation, in early February 2014, an injunction was successfully lodged, halting mining prospects in the Lower Zambezi National Park (*Lusaka Times* 2014b).

#### 3.3.6 Key findings

The environmental and social safeguards incorporated into the EIA process by the EMA are sound. Nonetheless, dedicated reforms could further strengthen this mechanism, including the urgent alignment of the EIA regulations with the EMA 2011 and mandatory certification of EIA consultants. There is a dependence upon this mechanism to assess and "catch" the sustainability of investments in Zambia. This dependence is concerning, particularly given the limited human

and financial capacity of environmental agencies to undertake their mandated functions.

Increasing the number and building the capacity of civil society and community organizations dedicated to environmental advocacy and oversight can support greater accountability of both investments and government. Decentralization of environmental and social safeguard monitoring could also broaden oversight of investments. However, for decentralization to serve as a viable solution to capacity challenges facing ZEMA, the

devolution of human capacity and financial grants to district councils should be accelerated. Capacity building for the district council-level officers is particularly important to ensure that any devolved functions are able to be effectively undertaken.

Moreover, due to the technicality of the EIA documents, the affected communities often lack the capacity to understand and respond to key issues raised in the report; this is reinforced when the EIA report is not translated into local languages and when public hearings are undertaken in centralized locations, rather than in local villages. Effective public consultation on EIAs should be inclusive and representative of all affected persons. The methodology followed should take situation-specific considerations into account, including but not limited to, comprehensiveness of information, inclusion of vulnerable and marginalized groups and unbiased presentation of information, language and location. Moreover, investors' social obligation for community engagement cannot be met with only single hearings or one-off distribution of information. Engaging with communities from the beginning of an investment, to understand their social, livelihood and environmental needs, as well as the drivers of their current lifestyles is required. As demonstrated by the BCP project, investments built upon this type of partnership can better guarantee ownership of an investment by a community.

Finally, sustainable development of Zambia requires policy champions who advocate the consideration of environmental and social concerns in investment decisions. If political interference results in environmental concerns being sidelined in favor of economic benefits, the achievement of sustainable development in Zambia is severely put into question.

### 3.4 Low access to information and awareness

Facilitating public engagement and participation in decision-making is an important social safeguard. However, without information, it is challenging for citizens, including civil society and media, to actively engage in decision-making processes. Access to information is an important government function that can help to build a strong civil society that can hold investors to account. In Zambia, there are various requirements

to provide information in the legal framework, including strategic and national-level reports on the state of the environment and human rights. Freedom of information legislation is also an increasingly common method of ensuring open access to information on the investments. Sustainable investments should be transparent and accountable, with information on activities, structure, financial situation, performance, etc. available to interested persons in a clear and comprehensible form. The surrounding legal framework can promote this transparency by requiring and enforcing open access to investor information.

These two areas will be reviewed below. This section is also complemented by access to information requirements identified throughout the rest of the report, such as availability of information on land registration and civil society engagement with sustainable investments.

#### 3.4.1 Access to environmental and social information

Awareness and knowledge of sustainability in Zambia is generally quite low, particularly in rural areas. Some environmental and human rights reports are published, such as the *State of Environment Report* and *State of Human Rights Report* (HRCZ 2010), which provide overarching information on environmental and social development and degradation in Zambia. However, these are infrequent, as will be seen below.

ZEMA has been tasked with the responsibility to ensure access to environmental information (EMA 2011, s 86 and pt VI). For example, Section 90 of the EMA mandates ZEMA to create and maintain a registry of environmental information. This registry must contain references to all applicable environmental legislation in the country, as well as the international treaties to which Zambia is a party and any policies, strategies, guidelines, reports, EIA applications and EIA licenses, as well as details of all charges laid in contravention of the EMA (EMA 2011, s 90). ZEMA's website provides links to much of this required information, although the comprehensiveness of the website is limited – for example, only 28 EIAs are accessible. Environmental information is also kept in paper (hard) copy and is accessible for public viewing during ordinary business hours (ROZ MOL n.d.).

The EMA also provides for nationwide environmental information to be reported and published, including via the *State of Environment Report* and the *National Environmental Action Plan (NEAP)* (EMA 2011, ss 20 and 21). The *State of Environment Report*, which is expected to be published every 5 years, describes the quality of the environment, the results of environmental quality monitoring and any significant adverse effects that have been caused, are being caused or are likely to be caused in the foreseeable future, and where possible, identifies the causes and trends. The report further describes the monitoring, enforcement and other measures that are being taken to address the causes of the adverse effects and to improve environmental quality. The NEAP, expected to be published every 10 years, includes an assessment of both the urgency and the importance of actions that should be taken in the short-, medium- and long-term in order to prevent, eliminate and reduce adverse environmental effects in Zambia as described in the most recent *State of the Environment Report*. State of the Environment Reports were completed in 1990, 1994, 2001 and 2008 (ECZ 2008, xvii). The latest NEAP was published in 1994.

However, the infrequency of these reports somewhat limits their value. While the infrequency is understandably due to the limited financial and human resources available to the environmental institutions in Zambia, if damage is only recognized after 5 to 10 years, the ability to remedy it may be reduced.

A free online portal is being developed on the extent and form of climate change in Zambia. This information will be available for use by everyone, though urban communities with reliable Internet access will likely make greater use of it (personal communication from the chairperson of an environmental NGO, Lusaka, 2013).

Similarly to the role of ZEMA in providing environmental information, Zambia's Human Rights Commission provides information on human rights standards in Zambia. The Commission was established in 1997 (Constitution 1996, art 125), and has a mandate to investigate human rights violations and maladministration of justice, as well as to undertake "a programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights." (HRC

Act, ss 125(2) and (3)) As part of this research, it has produced four *State of Human Rights Reports*, which research into specific topics. The 2010 *State of Human Rights Report* was the last one produced by the Commission (HRCZ 2010). Similarly to ZEMA, the Commission also suffers from lack of funding and human resources to continue producing this information. The infrequency of these reports limits the utility of this information.

Therefore, further funding and technical assistance to ZEMA and the Human Rights Commission could result in more frequent reports on the environmental and social state of Zambia, improving the overall information available.

### 3.4.2 Freedom of information laws

In Zambia, despite more than 10 years of proposals, no freedom of information legislation exists (Matibini 2009; Nyirenda 2013). The Access to Information Bill is the most recent version of freedom of information legislation that is passing through parliament; it is currently being reviewed by a parliamentary commission to ensure consistency with other legislation (Nyirenda 2013).

Freedom of information legislation would, in particular, improve open access to investor information by requiring noncommercial, confidential information to be provided upon request from citizens. Zambia is compliant with the EITI, a body aiming to improve openness and accountable management of revenues from natural resources (EITI 2014). Two nationwide reports have been developed that table financial and mining sector information and show that Zambia is EITI-compliant. This means that Zambia "has an effective process for annual disclosure and reconciliation of all revenues from its extractive sector, allowing citizens to see how much their country receives from oil, gas and mining companies." (EITI 2012) In the absence of freedom of information legislation, Zambia's compliance with the Extractive Industries Transparency Initiative is a positive example of international standards complementing and strengthening national laws.

Freedom of information legislation would further improve access to land information. Without this legislation, it is difficult to know how land-related investments decisions are made, how problems

affecting the settlement of displaced people in natural resource-rich areas are resolved, what land reforms are in place and what progress, if any, is taking place (personal communication from the executive director of a land NGO Lusaka, 2013). Efforts to develop freedom of information legislation should therefore continue.

### **3.4.3 Key findings**

Greater publically available information and strengthened capacity of civil society to scrutinize investments could empower the citizens of Zambia to hold investors and decision-makers to account for their actions. Government bodies currently responsible for producing information about the environmental and social state of Zambia – ZEMA and the Human Rights Commission – are

underfunded. Civil society could play an important role in boosting the information available, particularly in rural areas, on the sustainability of Zambia's current development pathway. Further funding and technical assistance could result in more frequent reports on the environmental and social state of Zambia, improving the overall information available.

Efforts to develop freedom of information legislation should continue and should ensure that access to information on investment-related land acquisitions is included in its scope. In the absence of freedom of information legislation, Zambia's compliance with the Extractive Industries Transparency Initiative is a positive step towards openly available information on mining and mineral investments.

# 4 Conclusions

Legal and institutional frameworks can have a strong impact on investments in land use. In particular, this research demonstrates that laws, policies and institutions can have a very notable effect on whether investments entering Zambia are sustainable, in that they create jobs, wealth and benefits for the socioeconomic development of the country and support the growth of a green economy. Overall, Zambia could benefit from a number of legal reforms to improve the effectiveness of its legal and institutional frameworks to effectively attract and regulate sustainable investments. Rule of law considerations, such as equity, good governance and citizen engagement have been identified as enablers of sustainable development and should underpin all legal reform efforts to achieve lasting change.

Zambia has a liberal legal framework to attract investments, including incentive measures. However, there are only very few provisions that specifically seek to attract sustainable investments. In addition, environmental oversight of investments is limited to environmental institutions only – environmental institutions that are provided with limited funding and political independence. The ability of sectoral or investment institutions, such as the ZDA, to identify and promote sustainable investments is limited by an ignorance of sustainability concerns and the lack of a mandate to consider them. A coherent mainstreaming of sustainability concerns across all ministries, including mandates to specifically address sustainability, could redirect government emphasis towards the sustainability of investments, over the quantity of investments.

In addition to government mainstreaming, Zambia's focus should be on building citizen awareness, accountability and equity, to improve the ability of the country as a whole to embrace sustainability. This research study has shown an

ongoing preference among Zambia's elite to attract investments to the country, with only minimal oversight of how these investments could benefit the country. Opaque and individualized investor contracts reduce the contribution of investments to Zambia's development, as taxation breaks and other financial incentives reduce the amount that investors return to the country. However, these financial incentives are not extended to domestic MSME investors, who have been overlooked by the legal framework. The development of MSMEs can reduce poverty, improve livelihoods and contribute to the sustainable development of Zambia, through wealth and job creation; these investors therefore constitute a key investment opportunity.

The two sustainable investments in Zambia highlighted in this study demonstrate that partnerships with MSMEs, smallholders or local communities are possible, but require sustained engagement. Government has a key role to play in mandating this engagement by investors, but guidance is also available from established international standards, such as the CCBA sustainability standards that have informed our analysis.

Customary land laws in Zambia grant a lot of discretion to traditional leaders to ensure public participation and uphold the land rights of community members. Given the personal benefits that can accrue to traditional leaders from investments on their land, this discretionary power is arguably not well placed. This leads to insecure customary land tenure and the emergence of an informal market in customary land between traditional authorities and investors. This is disempowering for rural communities. Greater provisions in the law regarding how to attain and document community involvement in transfers of land, including on issues of compensation and resettlement, would provide a forum to start changing the process of land acquisition to

acknowledge community concerns and needs. Embedding trained paralegals into communities, to provide information on community land rights and to negotiate with potential investors and traditional authorities in an informed manner is another suggestion to address this information asymmetry. Current proposals in Zambia to improve access to land information through certification of customary land title and accessible land registries are commendable, if they can improve the publically available information on land-related investment decisions.

In addition, access to information on the impact of investment activities on the local community and environment and their contributions to national revenue are limited in Zambia. This lack of information limits the ability of citizens to engage with investors in Zambia, specifically the communities' capacity to secure equitable co-benefits from investments, such as employment and local infrastructure. Limited access to information also limits civil society's ability to advocate for greater environmental and social safeguards and to hold investors and decision-makers to account. Improving access

to information requirements in legislation is another method by which Zambia could improve transparency and accountability with regard to investments.

While this paper places a lot of emphasis on the role of government to regulate sustainable investments through strengthening legal incentive mechanisms, improving institutional capacities and embracing sustainable development principles across government departments. However, responsibility does not stop here. Civil society and communities, strengthened by capacity building and paralegal support, have a role to play in campaigning for change. However, competing concerns such as financial uncertainty, security of basic needs and service requirements also play a big part in decision-making by citizens. In contributing to Zambia's development, investments can be key to achieving development needs, but if left unregulated, can instead increase inequalities and reverse any gains made. This paper provides key findings on how to achieve the former, with the conviction that the time is now to build an enabling legal framework to activate sustainable development in Zambia.

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## INTERVIEWS

- Interview/Personal communication from executive director of land NGO (Lusaka, 6 December 2013).
- Interview/Personal communication from chairperson of environmental NGO (Lusaka, 2 December 2013).
- Interview/Personal communication from Planning Department Officer, Environmental Planner, Chief Health Inspector and Legal Assistant from Local Government Office (Lusaka, 5 December 2013).
- Interview/Personal communication from director of national government environmental body (Lusaka, 6 December 2013).
- Interview/Personal communication from manager of planning and policy, national government department (Lusaka, 3 December 2013).
- Interview/Personal communication from development consultant of Environmental Consultant Firm (Lusaka, 5 December 2013).

Interview/Personal communication from environmental resource mobilization specialist (Lusaka, 2 December 2013).

Interview/Personal communication from legal researcher, University of Massey (Lusaka, 3 December 2013).

Interview/Personal communication from manager of agricultural company (phone interview, 4 December 2014).

Interview/Personal communication from National REDD+ Coordinator of national government environmental body (Lusaka, 13 May 2013).

Interview/Personal communication from environmental resource mobilization specialist (Lusaka, 2 December 2013)

Interview/Personal communication from senior environmental management officer of national governmental Department (Lusaka, 18 June 2013).

Interview/Personal communication from officer, environmental licensing unit of national government environmental body (Lusaka, 3 December 2013).

Interview with Director, BioCarbon Partners Trust via email in January 2014.

# Annexes

## Annex 1. International standards for sustainability related to sustainable land use and sustainable investments.

Sustainability standards	Viable financial investment	Equitable distribution of wealth	Uphold human rights	Provide co-benefits to local communities	Promote public participation	Follow resettlement and compensation procedures	Open access to information	Environmental management and assessment	Internalize negative externalities	Low-emission and climate resilient pathway
Post 2015-sustainable development agenda <sup>a</sup>	X	X	X	X	X		X	X	X	X
OECD guidelines for multinational enterprises	X		X	X	X		X	X		X
UN guiding principles on business and human rights			X		X					
Aarhus Convention on Access to Information Public Participation in Decision-Making and Access to Justice in Environmental Matters					X		X	X		X
UN Global Compact			X						X	X
UN Framework Convention on Climate Change			X	X	X	X		X		X
Winnipeg Trade and Sustainable Development Principles		X			X		X	X	X	
IFC Sustainability Standards	X		X	X	X	X	X	X		X
Forest Stewardship Council		X	X	X				X		
Extractive Industries Transparency Initiative					X		X			

<sup>a</sup> Open Working Group on Sustainable Development Goals, Outcome Document (July 2014).

## Annex 2. Key informants consulted in Zambia.

Ms. Elsie Attafuah, Technical Advisor UN-REDD+, UNDP/Forestry Department, Ministry of Lands, Natural Resources and Environmental Protection

Ms. Molly Crystal, Director, BioCarbon Partners Trust

Ms. Angela Kabuswe, Senior Environmental Officer (Low Carbon), Ministry of Lands, Natural Resources and Environmental Protection

Ms. Tapiwa Kaemba, Legal Assistant, Lusaka City Council

Mr. Trophius Kafunga, Environmental Planner, Lusaka City Council

Mr. David Kaluba, Director, Inter-Ministerial Secretariat for Climate Change

Mr. Deuteronomy Kasaro, National REDD+ Coordinator, Forestry Department, Ministry of Lands, Natural Resources and Environmental Protection

Mr. Mathias Lungu, Export Promotion and Sector Development, Zambia Development Agency

Mr. Henry Machina, Executive Director, Zambia Land Alliance

Mr. Robert Mlanzi, City Planning Department, Lusaka City Council

Mr. Charles Mulenga, Zambia Institute of Environmental Management

Ms. Sepiso Mungandi, former Researcher at Massey University on KASCOL/Ministry of Agriculture

Ms. Cassandra Musonda, Ministry of Justice

Ms. Lillian Mutesu, Chief/Chieftainess Health Inspector, Lusaka City Council

Mr. Chola Mwitwa, Manager, Planning and Policy, Zambia Development Agency

Mr. Hassan Sachedina – Managing Director, BioCarbon Partners

Mr. R. Sialwindi, Manager, KASCOL

Ms. Chembo Sichinga, Zambia Environmental Management Agency

Mr. Stephen Tembo, CEO, RuralNet Associates Ltd

Mr. Noah Zimba, Zambia Climate Change Network

## Annex 3. Legal frameworks in the energy, forestry, mining and agriculture sectors.

### The constitution

All laws in Zambia derive their authority from the Constitution of the Republic of Zambia (Constitution 1996, art 1(3)). The constitution explicitly outlines the GOZ's responsibility to "promote sustenance, development and public awareness of the need to manage the land, air and water resources in a balanced and suitable manner for the present and future generation..." (Constitution 1996, art 1(3) and 112(i)). Further, it requires the GOZ to "strive to provide a clean and healthy environment for all." (Constitution 1996, art 1(3) and 112(h)). Though these are non-enforceable general principles, they nonetheless provide direction to the GOZ in how to manage their natural resources.

From 2011 to 2014, a constitutional review process was undertaken. The Technical Committee assigned to spearhead this process completed the final draft constitution in January 2014 (Lumba 2013). Although the final draft of the constitution had not yet been made public at the time of writing (Chellah 2014), it is likely that proposals to enhance the Bill of Rights to include environmental, land, property and natural resource protection have been incorporated (Technical Committee on Drafting the Zambian Constitution 2012). Finalization of the constitution-making process was however stalled in December 2013, with indications that enacting a new constitution may not be an immediate GOZ priority.

### Long-term development plan – Vision 2030

Zambia's long-term development planning strategy is to become a prosperous middle-income nation by 2030. The strategy is based upon expansion in the core economic sectors of agriculture, energy, mining and forestry, as well as infrastructure, tourism and manufacturing (ROZ 2010a).<sup>29</sup> Such expansion must be founded upon seven basic principles: (i) gender

responsive sustainable development; (ii) upholding democratic principles; (iii) respect for human rights; (iv) good traditional and family values; (v) a positive attitude to work; (vi) peaceful coexistence; and (vii) public-private partnerships (ROZ 2006, 2). The Vision is operationalized through the implementation of national development plans. The current plan is the *Sixth National Development Plan*, covering the period 2011–2015 (ROZ 2011).

In addition to the goals, Vision 2030 also describes a number of challenges that Zambia must overcome in order to achieve its aims, including building a macroeconomic environment and investment climate conducive to attracting and retaining high levels of foreign and domestic investment; encouraging foreign direct investment that entrenches knowledge and technology among the local people; improving access to capital by nationals for investment needs; achieving efficiency and effectiveness in the local and central administration system; ensuring corporate social responsibility by the private sector; ensuring equitable distribution of wealth in the society; and maintaining a safe, sustainable and secure environment.

### Climate change governance

The longer-term goal of Zambia's National Climate Change Response Strategy 2010, echoed in the Sixth National Development Plan, is to ensure climate change is mainstreamed in all substantial and vulnerable sectors of the economy by 2030 (ROZ 2010a, 38). Therefore, Zambia's legal method to address climate change involves strengthening sectoral legislation rather than creating a specific law on climate change. These priority sectors include, among others (ROZ 2010a, i-ii):

1. Land use (Agriculture and Forestry): Develop sustainable land use systems to enhance agricultural production and ensure food security under the changing climate.
2. Energy: Develop a less carbon-intensive and climate change-resilient energy infrastructure and grow using low carbon path.
3. Mining: Develop a less carbon-intensive and climate change-resilient mining industry.
4. Governance: Develop a climate change governance (policy, legal and institutional) framework.

29 National Climate Change Response Strategy 2010. (Republic of Zambia), i-iii: In the National Long Term Vision (NLTV) and Sixth National Development Plan (SNDP), the Government of the Republic of Zambia sees agriculture as the "engine of income expansion in the economy" since the sector "offers the best opportunities for improving livelihoods" to about 60% of the total population and 70% of the poor who live in rural areas. Infrastructure, tourism, manufacturing, mining and energy are also prioritized as sectors that constitute the core economic sub-themes of the SNDP and NLTV.

In spite of the stated goals, the legal and institutional framework on climate change in Zambia remains at a nascent stage. For example and as will be discussed in more detail in Sections 3 and 4, climate change concerns and adaptation plans are not well mainstreamed in sectoral policies or legislation on the energy, mining, forestry and agriculture sectors.

Complementing the National Climate Change Response Strategy, a process to design and adopt a specific National Climate Change Policy was started in 2011. The aim of the policy is to build an enabling environment for climate change-related activities, as established in the strategy. At the time of writing, the process of designing and adopting a specific national climate change policy is still underway and is yet to pass through cabinet.

In 2011, Zambia established a dedicated climate change institution, the Inter-Ministerial Secretariat on Climate Change (IMSCC). Situated within the Ministry of Finance and with strong support from the Ministry of Lands, Natural Resources and Environmental Protection, the IMSCC coordinates the institutional arrangements for Zambia's response to climate change and builds consensus around priority areas for climate change mitigation and adaptation (personal communication from director of national government environmental body, 2013). However, it is not mandated to assist sectoral ministries to mainstream climate change in their laws and policies.

Zambia is a signatory to the UNFCCC, the primary international convention forming a framework for States to cooperatively consider how to limit average GHG emissions and resulting climate change and how to adapt to their inevitable impacts (UNFCCC 2013). As a non-Annex I Party, Zambia has no obligation to meet any GHG emission reduction targets. However, it is required to report in more general terms on its actions both to address climate change and to adapt to its impacts.

## Forestry

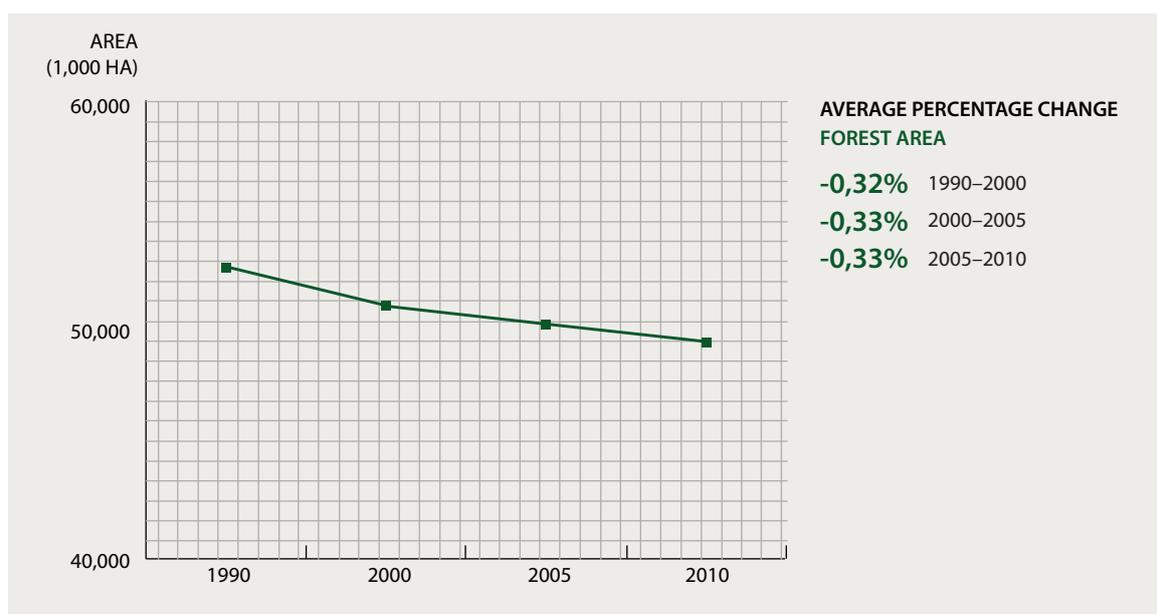
Zambia has approximately 49.9 million ha of forest, representing approximately 60% of its total land mass and is subsequently one of the most forested countries in southern Africa (Aregheore 2010, UN-REDD 2010a). However, deforestation is a major problem, with annual rates

generally estimated around 250,000 to 300,000 ha, or between 0.5 to 0.6% of total forest cover (Vinya et al. 2011).<sup>30</sup> The Food and Agriculture Organization of the United Nations (FAO) estimated average annual rates of deforestation between 2000 and 2010 to be 167,000 ha per annum or 0.33% of total forest cover (FAO 2011). Such numbers amount to the potential loss of 10 million ha of forest in the next 30 years (ROZ FD et al., 2008). The major causes of deforestation in Zambia include charcoal and fuelwood use, timber production and unsustainable agricultural methods, such as *chitimene* (slash and burn) (UN-REDD 2010b).

Zambia's forest sector is regulated by the Forests Act 1973 (Forests Act 1973), which gives the central government exclusive ability to establish, control and manage protected forests, through the Forestry Department within the Ministry of Lands, Environment and Natural Resources (Forests Act 1973, pt II). It should be noted that a new piece of legislation, the Forests Act 1999, was also enacted but has not commenced application, due to a number of financial and institutional barriers (Forests Act 1999). Therefore, the 1973 legislation remains the applicable law.

Under the Forests Act 1973, all powers of control over forests in the State are vested in the Forest Department. The minister responsible for forests may prescribe licenses and regulations for forestry activities and investments, which are required for any person who deals with forest produce (Forests Act 1973, s 31). As well as the payment of fees, there is a requirement to produce a plan of operations in order to gain a license (Whiteman n.d.). The Act further provides for the sharing of costs and benefits of forest resources management, with particular uses of the forest restricted to certain designated areas. For example, major forest produce and goods on customary land are conserved for the use and benefit of the inhabitants of such lands (Forests Act 1973, s 27(1)).

30 However, it should be noted that there are continued difficulties in estimating rates of deforestation. See e.g. Grainger A and Matthews E. 2002. *Evaluation of FAO's Global Forest Resources Assessment from the user perspective*. Rome: FAO, 42 "Many respondents doubted that the current approach [to global monitoring of forest area and forest are change], based primarily on national data sources, can adequately serve the needs of global scientific research and policy-making."



**Figure 6. Change in forest cover in Zambia.**

Source: FAO (2010) The global forests resources assessment

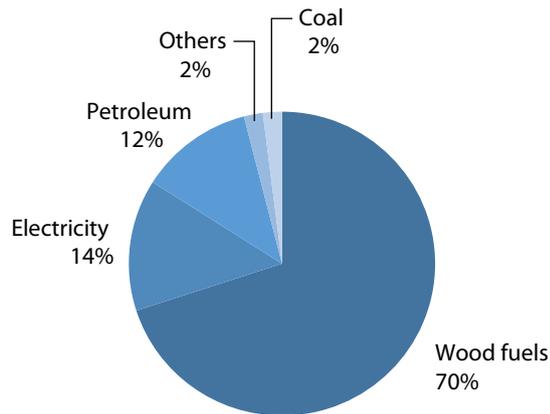
The Forests Act also establishes procedures for licensing charcoal production and conveyance permits (Forests Act 1973, s 28). However, according to prior research by CIFOR, regulation of charcoal production declined in the 1990s (Gumbo et al. 2013, 21). This is suggested to be partly a reaction to drastic increases in fees for charcoal production and conveyancing permits. More significantly, it is attributed to ineffective methods of enforcement adopted by forest officers, who perform highway patrols to collect fees and confiscate illegal charcoal, which is seen to promote rent-seeking behavior rather than adherence to licensing requirements (Gumbo et al. 2013).

## Energy

Zambia's energy generation sources include electricity (from coal and renewable energy), petroleum and biomass (ZDA 2013a, 3). The largest source of energy in Zambia is biomass, with 70% of the country's energy supply derived from charcoal and fuelwood (National Energy Policy 2008, s 2.1.1.1). The majority of Zambia's electricity derives from hydropower (1788 MW out of a total installed generation capacity of 1970 MW) (ZDA 2013a, 4). However, only 25% of the population has access to electricity (UN-REDD 2010b). Demand is rising at about 3% per annum, mainly due to the increased economic activity in the country especially in the agriculture, manufacturing and mining sectors (ZDA 2013a, 3).

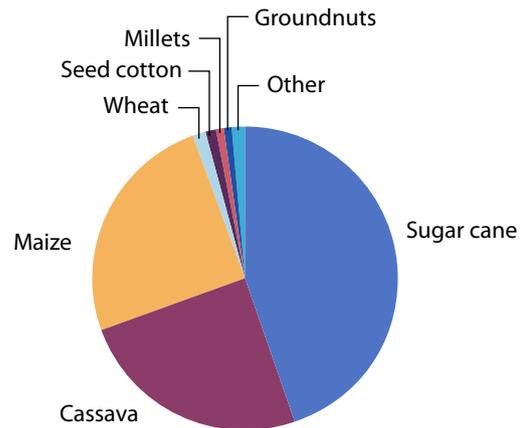
The legal framework for energy should also be recognized to include the Forests Act 1973, due to the abovementioned reliance on biomass as a primary energy source. In fact, the Energy Policy specifically refers to charcoal production, focusing on increasing the efficiency of charcoal production and calls for the adoption of fuel-efficient cooking stoves (National Energy Policy 2008, 7).

The energy sector is governed by the Energy Regulation Act 1995, which provides guidelines as to how the energy sector should be regulated and includes provisions for the licensing of energy investments (Energy Regulation Act 1995, pt III). Applications for an investment license to operate an energy project are determined by the Energy Regulation Board (ERB). The ERB also holds the function of formulating measures to minimize the environmental impact of the energy sector and enforce such measures by attaching appropriate conditions to investment licenses, in conjunction with other government agencies (Energy Regulation Act 1995, s 6(f)). The Energy Regulation Act also requires that all proposed licenses for energy projects be presented for public comment for a duration of 30 days and that the merits of any objections made to the grant of a license be considered by the ERB (Energy Regulation Act 1995, s 12(2)).



**Figure 7. Energy use in Zambia by source.**

Source: United Nations Statistics (2008)



**Figure 8. Production of major crops in Zambia, 2001.**

Source: Zambia Agriculture Dataset: Department for International Development (DFID) 2002

## Agriculture

Agriculture employs 92% of the rural and 20% of the urban working populations, totaling 70% of Zambia's total economically active population (ZDA 2011c). Farming is dominated by smallholder farmers, although their overall output to farming production is limited by the small size of farms, reliance on rain-fed cultivation and lack of access to markets, among other challenges (ROZ 2006, 23). This means that poverty levels and susceptibility to adverse climate change effects are disproportionately high for smallholders. For example, due to heavy reliance on rainfall for small-scale agriculture, the extreme droughts of 1991 to 1992, 1994 to 1995 and 2004 to 2005 led to complete or near-complete crop failures in several parts of the country, with derivative effects on well-being (Funder et al. 2013, 9-10).

The most important agricultural products for Zambia are sugarcane, cassava, maize, wheat, cotton, millet, rice, tobacco, peanuts, sunflower seed, coffee, vegetables and flowers, as well as livestock (Figure 4) (Aregheore 2010).

The GOZ places a major focus on increasing the strength of the agriculture sector to improve the national economy, heralding agriculture as the "engine of income expansion in the economy" (ROZ 2006; ROZ 2011). The contribution of the broad agricultural sector (which includes agriculture, forestry and fishing combined) to the country's national GDP fluctuated from 1.9% in 2007 to 12% in 2008 (ROZ 2010a, 20). The push for new investments in this sector is also due to the

boom in food prices and the consequential relative increase in prices for agricultural land worldwide (Nolte 2013, 13).

The Agricultural Lands Act 1960 is the principal legal instrument for agricultural management in Zambia and focuses on the alienation of land for agriculture purposes (Agricultural Lands Act 1960). It also creates the Agricultural Lands Board that, *inter alia*, reviews the use of leasehold land outside urban and peri-urban areas and makes appropriate recommendations for its future use (Agricultural Lands Act 1960, s 8(1)).

## Mining and minerals

The most important mining sector in Zambia is the copper-cobalt industry, with the country being Africa's largest producer of copper and cobalt (Hart Group 2013, 19). There is also industrial mineral production, including coal and a nascent oil and gas sector. In 2010, the mining sector made a direct contribution of 11% to GDP and an indirect contribution of up to 50% (EITI 2013). The country's real GDP increased by 7.6% in 2010; mining and quarrying accounted for 18% of the increase (Hart Group 2013, 19). However, due to a heavy reliance on copper mining, the Zambian economy has been exposed to hazards deriving from the rise and fall of the copper price (World Bank 2012, 3). Efforts to diversify the economy are underway, including the diversification of the mining and minerals sector.

The Mines and Minerals Development Act 2008 establishes the procedure for the acquisition of mining rights (Mines and Minerals Development Act 2008). There are a number of different mining licenses available, granted by the Mines Development Department, including a prospecting license, large-scale mining license and a small-scale mining license (Mines and Minerals Development Act 2008, pt III and IV). A procedure for environmental assessment specific to the mining sector accompanies the granting of licenses (Mines and Minerals Development Act 2008, pt IX).

Section 75 of the Mines and Minerals Development Act provides that in deciding whether or not to grant mining rights, the minister responsible must take into account the need to conserve and protect the air, water and soil, in or on the land over which the right is sought. The minister is also responsible for ensuring that environmental impact studies and other studies necessary to the protection of the environment from the negative effects of mining are carried out.



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The International Development Law Organization (IDLO) and the Center for International Forestry Research (CIFOR) assessed the legal frameworks that govern land-use activities and investments in Zambia. The economy of Zambia relies significantly on land and natural resource capital. The Government of Zambia has identified land-use investments as essential to the development of key economic sectors – energy, forestry, mining and agriculture. Land-use investments are increasing in Zambia, led by both foreign and domestic private investors. The Constitution explicitly recognizes the importance of balancing the need to attract investments to develop the country with the need to ensure their environmental and social sustainability.

This Legal Assessment report for Zambia examines policy, institutional and legal frameworks and identifies four key challenges to the attainment of sustainable land-use investments, viz.

- There are very few incentives that support sustainable land-use investments.
- Customary land tenure remains insecure, with limited processes enshrined in the legal framework to uphold social safeguards, such as consultation with land users.
- There is low institutional capacity to enforce the social and environmental safeguards that are established in law.
- Access to information on investments is limited in Zambia, which reduces the potential for public scrutiny and participation.

The report further notes that any strategy to improve the sustainability of investments in Zambia will have to respond to the jurisdictional requirements of decentralized administration. The authors conclude that Zambia's legal and institutional framework, particularly its implementation and enforcement, should be strengthened to more effectively regulate sustainable investments that adhere to social and environmental safeguards.



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