

**“An analysis of the change of the legal regime governing the Large Scale Mining sector”**

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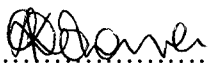
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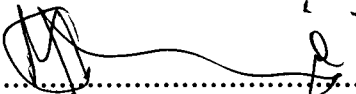
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## ABSTRACT

Throughout Zambia's history, Large scale mining has played a pivotal role in helping the country achieve its economic and social development aspirations. It is against this background that the legislature passed the Mines and Minerals Development Act, which effectively changed the legal regime governing the large scale mining sector, and gave rise to a number of issues, particularly with respect to the cancellation of the Development Agreements entered into between the government and mining companies under the repealed Mines and Minerals Act. This work analyses some of the issues that have arisen as a result of the change in the legal regime governing the large scale mining sector.

The paper begins with an overview of the policy considerations that motivated the change in the legal regime governing the large scale mining sector, and briefly discusses the legal framework of the sector. The paper then examines the legal basis of the controversial Development Agreements that were entered into under the Old legal regime. It further examines the legal consequences of the cancellation of these agreements under the New legal regime.

It also explores the nature of mining rights granted under Zambian legislation, and in doing so, assesses whether these rights have sufficient protection under Zambian law. The paper then considers the possible effects of the change in the legal regime governing the large scale mining sector, on future investment in the sector. The paper concludes with the author's observations and recommendations in the perspective of the issues discussed in the paper.

## **DEDICATION**

To my parents Joseph and Chanda for their sacrifice and invaluable contribution towards my education. To my brothers, Kalombo and Lusemuna who continue to inspire me in a special way.

## ACKNOWLEDGEMENTS

I am grateful to God for the support, hope and power he has given me to overcome every challenge faced in my academic life, especially “when the chips where down”. Further, I would like to thank a number of individuals who have contributed to the materialisation of this work, and my eventful stay on campus.

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A special thanks to the Partners and staff at Corpus Legal practitioners for having given me the opportunity undertake part of my legal training at their chambers during the course of my LLB programme, and to use their library during the period of my research.

Finally I would like to acknowledge the contribution of my friends, Bruce Mwauluka, Mulopa Ndalemtea, and the distinguished members of the “Kings Bench”, for their insightful perspectives of the challenging aspects of my research.

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## CHAPTER ONE

### OVERVIEW OF THE LARGE SCALE MINING SECTOR IN ZAMBIA

#### 1.1 Introduction

This chapter will give an overview of the legal regime governing the Large scale mining sector in Zambia. It will give an insight into the rationale for the change in the legal regime governing the large scale mining sector. In addition, the author will outline the structure of the research paper, and discuss the methodology by which the research will be conducted.

#### 1.2 Genesis of the mining legal regime in Zambia

For sometime, large scale mining has been the mainstay of the Zambian economy, contributing the bulk of the country's export earnings<sup>1</sup>. Throughout the country's history, government has relied on the mining industry to support the economic and social development of the country.

The onset of the third republic in 1991 provided the impetus for the substantive development of the mining legal regime that had experienced little change in the period between 1964 and 1991. It brought fundamental change in the government's economic policy, primarily, the need to relinquish state ownership of the declining mining industry through the privatisation of ZCCM<sup>2</sup>. This resulted in the establishment of new policy objectives for the mining industry, which culminated into legislation.

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<sup>1</sup> <http://www.zambiamining.co.zm/miningin Zambia.htm> [accessed 28 September 2008]

<sup>2</sup> N. Simutanyi, Copper Mining in Zambia, the Development of Privatisation. Institute For Security Studies Paper 165 (July 2008), 1-5

In 1995, the government prepared a mining policy based on its ambition to privatise the mining industry, which resulted in the enactment of the Mines and Minerals Act of 1995 (hereinafter referred to as the “**Old Act**”<sup>3</sup>). The main objective of the Old Act was to help facilitate the transfer of ownership of the mining industry from the Zambian Government to the private sector in accordance with Government’s privatisation programme<sup>4</sup>. From this perspective, the Old Act took cognizance of the special features of the mining industry, such as the large capital investment requirements, the sophisticated and expensive technological requirements, and the long payback period for mining investments. This led to the inclusion of special provisions aimed at attracting foreign investment in the sector, notably, the Development Agreement’s which enabled private companies wishing to invest in the large scale mining sector, to negotiate for fiscal incentives and stabilisation of the operating conditions<sup>5</sup>. As a result, most Development Agreement’s contained tax incentives and tax relief measures, which ensured that Zambia enjoyed a comparative advantage in attracting foreign direct investments in her mining sector<sup>6</sup>. This favourable policy and legislative framework resulted in considerable investment in the mining sector, during the period that copper prices were unsustainably low on the international market.

The aforementioned policy and legal initiatives severely diminished the contribution of the mining sector to the national economy. Prior to 1991, copper accounted for 95 per cent of the Country’s export earnings and approximately 33 percent of the country’s

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<sup>3</sup> Chapter 213 of the Laws of Zambia (repealed)

<sup>4</sup> Simutanyi, Copper Mining in Zambia, the Development of Privatisation. pp2-3

<sup>5</sup> Government Mineral Resource Development Policy of 2007

<sup>6</sup> [http://africanpress/Gross domestic product depends on copper \(Zambia\).wordpress.com](http://africanpress/Gross%20domestic%20product%20depends%20on%20copper%20(Zambia).wordpress.com) [accessed 28 September]

Gross Domestic Product<sup>7</sup>. However, in the years 1991 to 2000, copper's contribution to export earnings and the country's Gross Domestic Product, to 62 per cent, and 6.1 percent respectively<sup>8</sup>. This state of affairs has caused widespread dissatisfaction amongst the populous during the recent commodity price boom, leading to widespread pressure for Government to review the Development Agreements, and the tax incentives therein so as to ensure that the people of Zambia benefited from the global mining boom<sup>9</sup>. To illustrate this point, it must be noted that prior to the enactment of the Old Act, the mining industry's contribution to the treasury was \$ 200 million when copper was priced at around \$ 2280 a tonne<sup>10</sup>. Comparatively, in 2004 when the price of minerals had started to increase on the international market, the mining industry contributed just under \$ 80 million, primarily due to the government's inability to obtain sufficient revenues from the mining industry as a result of the Development Agreements.

The recent boom in commodity prices for base metals, and the desire of the government to ensure that the country benefited from the boom, motivated the policy and legal reforms regarding the mining sector that have recently been initiated and implemented by government, whose primary aim was to ensure that the country benefited more from the mining boom through a revision of the fiscal regime governing it. The new Mineral Resources Development Policy released by the Government in March 2007 culminated into the enactment of the Mines and Minerals Development Act<sup>11</sup> (hereinafter referred to

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<sup>7</sup> Fifth National Development Plan. Ministry of Finance, 2006 pg 60

<sup>8</sup> Ibid.

<sup>9</sup> Ibid. (To properly understand this, one must consider mining policy and legislation in their economic context, that is the importance of mining to the Zambian economy, which has been elaborated earlier.)

<sup>10</sup> <http://african.press.wordpress.com/2008/01/30> (Zambia's Gross Domestic Product depends on copper)[accessed 29 September]

<sup>11</sup> Act No. 7 of 2008

as “**the New Act**”), which repealed the Old Act, and introduced a new legal regime to regulate the mining sector.

In the light of the foregoing discussion, it is apparent that the mining policy and legislation must be considered in its economic context. The importance of the mining sector to the economy must be appreciated, as it is reflected by the fact that policy and legislative reform in the sector has been primarily motivated by economic considerations.

This chapter aims to outline the issues to be considered in this research paper. The Chapter will further investigate the legal structure that regulates the mining sector, and in doing so will briefly discuss the development of the legal regime governing the mining sector in order to properly understand the underlining factors that motivated the legal reform which will be the subject matter of this research.

### **1.3 Legal and Institutional Framework of the mining regime**

The legal framework of the mining sector and the issues arising therefrom should be understood in their economic context, particularly, the importance of the exploitation of minerals to the Zambian economy. It is from this premise that the policy and legal reform in the mining sector, and the legal problems that arise from them can best be understood.

The importance of the mining sector to the Zambian economy is well documented and does not need much elaboration. The Mining industry has been the economic and social backbone of Zambia, since the 1930’s when early exploration works were undertaken in

the then Northern Rhodesia<sup>12</sup> which subsequently led to large scale mining operations of a number of minerals including copper, cobalt etc. Over the years, the country's mineral production increased significantly, resulting in it becoming one of the world's largest producers of base metals such as copper and cobalt<sup>13</sup>. Despite efforts of the Government to diversify the Zambian economy by increasing the manufacturing and agricultural base of the economy, the reliance on large scale mining subsists<sup>14</sup>. Furthermore, since independence in 1964, the mining industry and its support industries have provided major employment and infrastructure backbone to areas that would otherwise lack the impetus for sustained development<sup>15</sup>.

The mining sector is primarily regulated by statute, namely, the **Mines and Minerals Development Act**<sup>16</sup>. The **Environmental Protection and Pollution Control Act**<sup>17</sup> also contains provisions that regulate the conduct of mining operations under subsisting mining legislation. The Ministry of Mines and Mineral Development is the main regulatory body for the mining sector, whilst the Environmental Council of Zambia administers the Environmental Protection and Pollution Act and deals with the issues pertaining to mining that arise therefrom<sup>18</sup>.

The Mines and Minerals Act creates the office of the Director of Mines, which is primarily responsible for administering the Act<sup>19</sup>. Under the New Act, the Minister of Mines does not play a leading role in processing and approving applications for the

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<sup>12</sup> <http://zambiamining.co.zm/mininginzambia.htm> [accessed 30 September 2008]

<sup>13</sup> Ibid.

<sup>14</sup> M. Ndulo, *Mining Rights in Zambia*. (Kenneth Kaunda foundation Lusaka, 1987) pg 7

<sup>15</sup> E.C. Chipimo jnr., "Mining in Zambia" *Getting the Deal Through* – Mining (2007) pg 153

<sup>16</sup> Act No. 7 2008

<sup>17</sup> Chapter 204 of the Laws of Zambia

<sup>18</sup> Chipimo, "Mining in Zambia" pp 154-155

<sup>19</sup> Mines and Minerals Act (repealed), Cap213, s.144

various mining rights granted under the Act. The Minister's role has been restricted to participating in the issuance of some licences<sup>20</sup>, and formulating and implementing mining policy through the Mining Advisory Committee<sup>21</sup>. Thus the office of the Director of Mines provides the institutional framework for regulating the mining sector in the country. This includes dealing with mining licence applications, and ensuring that such applications comply with the relevant statutory and legal provisions<sup>22</sup>.

#### **1.4 Discussion of the Problem**

In April this year, the Zambian Parliament enacted the Mines and Minerals Development Act, which had been anticipated for a while following calls from a cross-section of society who were keen to see the government ensure that the people of Zambia benefited from the surge in mineral commodity prices on the international market<sup>23</sup>.

Generally, the New Act has similar provisions to the Old Act, but supplementary provisions have been included to strengthen the amount of Government regulation in the sector, and to expand the scope of mining operations that may be carried out in the mining sector. However, it is the changes pertaining to the Development Agreements under the Old Act that have sparked controversy, resulting in the current standoff between most large scale mining companies and the Government.

The Old Act provided for Development Agreements that were to be entered into between large scale mining companies and the Government, which covered a number of issues

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<sup>20</sup> Under the New Act, authority to issues large scale mining, prospecting and gemstone licences has been vested with the Director of Mines.

<sup>21</sup> Mines and Minerals Development, Act No. 7 2008, s.150.

<sup>22</sup> Chipimo, "Mining in Zambia" pg 154.

<sup>23</sup> Government Mine Resources Development Policy of 2007

including; the terms on which large scale mining operations were to be conducted, and the manner in which disputes arising from the administration of the Act with respect to such operations, would be settled<sup>24</sup>. The nature and legal status of these agreements will be considered in more detail in Chapter two of this dissertation. These Development Agreements are not provided for under the New Act, which prohibits the Government from entering into such agreements<sup>25</sup>. Furthermore, under the New Act, all Development Agreements entered into between GRZ and mining companies are no longer binding on government. This position is expressed in **section 160 of the New Act** which provides that:

*“A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the republic from the commencement of this Act”.*

It is this provision of the New Act that has sparked controversy within the mining sector, in that it has effectively cancelled the fiscal stability period provided by the Development Agreements made under the Old Act, resulting in the Government introducing a new fiscal regime for the mining sector, that will enable them ensure that the country derives an equitable share of the benefits the mining companies are currently enjoying as a result of the recent boom in commodity prices. The legal issues under Zambian Law arising from this situation will be the subject of this research paper. It must be emphasised that a comprehensive analysis of all the changes envisaged by the New Act is beyond the scope of this dissertation, paper will consider a few pertinent legal issues which include:

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<sup>24</sup> Mines and Minerals Act (repealed), Cap 213, s. 9

<sup>25</sup> Mines and Minerals Act (repealed) 213, s. 159

- (a) An investigation of the legal status of the Development Agreements under the Old Act in the light of the provisions of the New Act that cancel the obligations these agreements imposed on the Government. In addition to this, whether the government can abrogate such an agreement through enactment of a new statute, and if so whether there are any legal rights that can be retained by the mining companies despite the provisions of the New Act. This will be considered in more detail in Chapter two of this dissertation
  
- (b) An investigation of the nature of the rights conferred by Mining Law. This investigation will be in the context of the rights protected under the Constitution under the Bill of Rights. This is important as if the rights conferred are protected under the Constitution, they can be enforced notwithstanding the change to the legal regime governing the mining sector. This will be considered in more detail in Chapter three of this dissertation
  
- (c) An investigation of the possible implications to foreign investment in the mining sector that the change in the legal regime could have on future investment in the sector. This will be considered in more detail in Chapter 4 of this dissertation

## **OBJECTIVE OF THE RESEARCH**

The changes in the legal regime governing the large scale mining scale raises diverse legal issues, that include aspects of Jurisprudence, Contract Law, Constitutional Law, and even International Law. However, an exhaustive analysis of the diverse legal issues raised, is beyond the scope of this paper.

In the light of the foregoing the main objective of this research is to examine the specific legal issues under the *Zambian Law*<sup>26</sup> pertaining to aspects of Contract and Constitutional Law that have arisen as a result of the enactment of the *Mines and Minerals Amendment Act 2008*. A key aspect of this examination, will be a study of the nature of the mining rights conferred under the old mining legal regime<sup>27</sup>.

Specific objectives of the study will be to:

- (a) Explain the legal framework of mining in Zambia;
- (b) Examine the status of contracts entered into by the Government, which are regulated by statute, particularly those regulating Mining Activity. This will include a consideration of the rights and obligations conferred by such a contract;
- (c) Examine the nature of the mining rights granted under mining legislation in Zambia;
- (d) Examine whether the Mining Companies have vested rights or accrued rights arising out of the Development Agreements and guaranteed under the Constitution;
- (e) Examine the legal position of players in the Large Scale Mining Sector under the Old Act (in the light of the development agreements entered into between the government and the private mining companies);
- (f) Examine the background, rational and legal status of the development agreements and the obligations taken under them;
- (g) Investigate on how the fundamental changes in the legal regime governing Large Scale Mining in Zambia could affect future investment in the country;

### **Research Questions to be answered**

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<sup>26</sup> The legal change under consideration, also raises a number of issues under International Investment Law. It must be emphasized that the author will not consider these issues, and will instead focus on the issues raised under *Zambian Law*.

<sup>27</sup> Most mining companies have claimed that the new act is in breach of the proprietary rights guaranteed under the constitution. It is anticipated that this could be one of the main legal arguments forwarded by the mining companies against the government, if legal proceedings are instituted against the government.

In the light of the foregoing discussion of the problem statement, it is apparent that the enactment of the Mines and Minerals Development Act (2008) raises a number of questions which include the following:

- (a) Does the government have the legal right to abrogate its obligations under agreements provided for by legislation? If so what are the consequences of such an action?
- (b) What was the legal status of the Development Agreements?
- (c) What are the legal consequences of the removal of the Development Agreements by the new mining legal regime?
- (d) What is the precise nature of mining rights in Zambia? Do the mining rights granted under a mining licence include proprietary rights protected under the Constitution?
- (e) What is the likely impact of the change in the legal regime governing large scale mining on future investment in the mining sector?

It must be noted that these questions will be considered primarily from the perspective of Zambian Law, and not International Law.

### **SIGNIFICANCE OF THE STUDY**

The study will provide valuable insight and understanding of the nature of the mining rights granted under Zambian mining legislation, and the effect of the acquisition of such rights by Investors in the mining sector. Secondly, the study will provide insight as to the extent to which government may be bound to its obligations as provided for under statute. Lastly, the study could give an indication of how the change in the legal regime governing large scale mining could affect prospective investment in the sector.

The study will be of practical significance, in that investors will be better placed in understanding the nature of the rights they acquire under the mining legislation, and the

extent to which they can hold the government accountable to the various legal obligations they may undertake with respect to securing investment in the mining sector. As a result investors in the large scale mining sector will make their substantial investments in the sector from a more informed legal position of the Mining Industry in Zambia.

## **OPERATIONAL DEFINITION OF TERMS**

The Following are the definitions of some of the key terms that will be used in the study:

**Development Agreements:** These were agreements entered into under the old Mines and Minerals Act, between Companies Investing in the Large Scale Mining Sector on the one hand, and the Zambian Government on the other. These Agreements were provided for under the previous Mines and Minerals Act, and had the effect of superseding the law. Under the new Mines and Minerals Act, these agreements are no longer binding on the Government.

**Licence Holder:** A person (company) in whose name a large scale mining licence is registered.

**Large Scale Mining:** This is not expressly defined under both the Old Act and the New Act, it is generally understood to mean, the type of Mining Activity for which one would require a Large Scale Mining Licence. Such a licence is granted to facilitate large scale, capital intensive mining activities which are usually supported by foreign investment.

**Large scale mining licence:** Licence required to undertake large scale mining operations, in respect of which a Development Agreement was necessary under the old Mines and Minerals Act.

**Minerals:** substances occurring naturally in or on the earth, that are the subject of large scale mining activity. Includes; copper, cobalt, gold silver, etc.

**Mining:** This refers to the process of extracting minerals by a holder of a large scale mining licence.

**Mining Right:** A right to engage in mining activity in accordance with the provisions of the relevant Mines and Minerals Act. Includes mining operations covered under a large scale mining licence.

**The Old Act:** The now repealed Mines and Minerals Act Chapter 213 of The Laws of Zambia, which provided for the Development Agreements.

**The New Act:** Mines and Minerals Development Act (No.7 of 2008), which has cancelled the operation of the Development Agreements provided for by the Old Mines and Minerals Act.

The author will endeavour to define other key terms he may come across during the course of the study.

## **RESEARCH METHODOLOGY**

The major method of data collection to be deployed will be desk research. Where necessary, this will be supplemented by interviews with various personnel in the Mining sector. The data for this research will be sourced from books, Statutes, court decisions on issues related to the subject matter of the research<sup>28</sup>, relevant policy documents<sup>29</sup>, the internet, journal articles, paper presentations, student obligatory essays, reports by mandated bodies and, in a few and necessary cases, newspaper articles. Other works and statutes that I will come across during the course of the research will also be used.

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<sup>28</sup> These decisions will be from various jurisdictions, including South Africa, Australia, and Canada.

<sup>29</sup> This will include both the old and new mining policy documents

## **1.5 Conclusion**

In the light of the foregoing, it is apparent that this research paper will analyse the salient legal problems under *Zambian Law* that have arisen as a result of the changes to the legal regime governing large scale mining in Zambia, in particular, the removal of Development Agreements provided for under the Old Act. The author has also endeavoured to highlight the legal framework governing operations of the large scale mining sector.

The next chapter will examine the legal status of the Development Agreements, and the extent to which the rights and obligations therein can be abrogated by the *Zambian Government*.

## Chapter 2

### **The legal status of Development Agreements granted under the Mines and Minerals Act (1997), in the light of the change to the legal regime governing the large scale mining sector**

#### **2.1 Introduction**

This Chapter will discuss the legal status of the Development Agreements (hereinafter referred to as “**the DA’s**”), in the context of the change in the legal regime governing the larges scale mining sector. Due to the diverging content of the DA’s, this chapter will be discussed specifically in the context of the Development Agreement entered into between the **Government of the Republic of Zambia and Mopani Copper Mines Plc** (hereinafter referred to as “**the Mopani DA**”)<sup>30</sup>. It must be emphasized from the start that the cancellation of the binding effect of the DA’s raised a large number of legal issues, most of which are highly technical and beyond the scope of this paper. From this perspective, the author will undertake to discuss the legal status of the DA’s in the light of the most basic principles of law that govern the operation of these agreement namely:

- (a) An examination of the legal basis of DA’s
- (b) An examination of the key terms of DA’s
- (c) An analysis of the effect of the change in the legal regime on the legal position of the DA’s

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<sup>30</sup> The provisions of this DA differ from those contained in other DA’s

## 2.2 Legal basis of DA's

The DA's were a creature of the Mines and Minerals Act<sup>31</sup> (hereinafter referred to as "the Old Act"), which converted the prevailing policy objectives of the mining sector into legislation. The DA's were created under section 9 of the Old Act which read;

*"For the purpose of encouraging and protecting large scale investments...the Minister may, on behalf of the Republic, enter into an agreement relating to the grant of a large scale mining licence...An agreement referred to in subsection (1) shall be known as a development agreement, and may contain provisions binding on the Republic in relation to..."*

Since its conception, the Old Act has seen a number of amendments some of which had an impact on the status of these agreements at law. The most notable of these amendments came in 2000. As a result of Amendment Act No. 2 of 2000, section 9 of the Act was amended to read:

*"...An agreement referred to in subsection (1) shall be known as a development agreement, and may contain provisions "which notwithstanding the provision of any law or regulation shall be" binding on the Republic in relation to..."*

By this amendment, DA's acquired a new legal status that saw them supercede legislature. However, due to a change in Government policy primarily motivated by calls from a cross section of society for the Government to ensure that the country derived a fair return from the exploitation of the country's mineral resources<sup>32</sup>, in 2008 the Zambian Parliament passed the Mines and Minerals Development Act (hereinafter

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<sup>31</sup> Mines and Minerals Act (repealed), Cap 213.

<sup>32</sup> This was discussed in more detail in the preceding chapter

referred to as “**the New Act**”). Section 160 of the New Act provided that the DA’s made under the Old Act were no longer binding on the Republic, this effectively nullified the DA’s<sup>33</sup>.

### The DA’s as Contracts

A contract is essentially a legally binding agreement between two or more parties<sup>34</sup>. Zambian contract law is premised on the Common Law which applies to Zambia by virtue of **The English (extent of application) Act**<sup>35</sup>. At Common law, the Crown may enter into contract with ordinary persons<sup>36</sup>. Similarly in Zambia, the State has unfettered capacity to enter into contracts with private entities. **Section 3 of the State Proceedings Act**<sup>37</sup>, which states that: *“the State shall be subject to those liabilities in contract to which, if it were a private person of full capacity it would be subject, and any claim therefrom may be enforced against the State in accordance with the provisions of this Act.”* This provision supports and confirms the proposition that the state can enter into contractual relations on the same basis as private person. From this premise, the DA’s entered into between the Government and the Mining Companies, had the status of ordinary contracts and as such, the rules relating to contracts made between private parties should apply to contracts entered into between the state and other individuals. However, it must be noted that the State Proceedings Act confers some immunity on the

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<sup>33</sup> This change was discussed in the preceding chapter.

<sup>34</sup> E.A Martin et al. Oxford Dictionary of Law (5<sup>th</sup> ed.) (Oxford: Oxford University Press, 2003) pg 114

<sup>35</sup> English (Extent of Application )Act, Cap 11, s. 2

<sup>36</sup> E.G Mckendrick et al. Chitty on Contracts vol. 1: General Principles (28<sup>th</sup> ed.) (London: Sweet and Maxwell, 2002) pg 539

<sup>37</sup> State Proceedings Act, Cap 71, s.3

state in as far as enforcing a claim arising from breach of contract is concerned. In this regard, **section 21(4)** of the Act prohibits the execution of an award against the state<sup>38</sup>.

From the above analysis of the relevant legal provisions, it can be concluded that the DA's provided for under the Old Act were essentially contracts. These contracts were entered into between the mining companies and the Zambian Government, they can be conceived as an ordinary contract between private parties, as the Government was to be subject to all the liabilities of a private party with capacity to contract as stipulated by the State proceedings Act. These contracts were also subject to the Common law rules on contract in as far as they have not been amended by Zambian Law.

### **2.3 Key terms of the DA's**

In order to comprehensively appreciate the effect of the change in the legal regime governing the DA's, it is necessary to consider some of the provisions of these agreements. For the purposes of this paper, only the Mopani DA will be considered. The DA's, which superseded legislation, covered a number of issues which included the following:

- (d) *Law Applicable:* Clause 25 of the Mopani DA, provided that the DA was to be governed and construed in accordance with the laws of Zambia, supplemented where necessary by the rules of International law. This provision is important as it entails that in resolving any dispute concerning the DA or its contents, the tribunal resolving the dispute are to primarily rely on the Zambian law, and supplement it where necessary by International law.

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<sup>38</sup> A private party cannot enforce a writ of execution against the property of the state.

(e) *Dispute Resolution*: The DA provides that all disputes (which includes disputes relating to the termination of the DA and the validity thereof) would be submitted to the International Center for the Settlement of Investment Disputes for settlement by arbitration<sup>39</sup>. Further the dispute settlement process would be guided by the provisions of the “Convention on the settlement of Investment Disputes between states and nationals of other states”, and the company for the purposes of the proceedings, would be treated as a national of another state<sup>40</sup>. An award in the arbitral proceedings was to be binding on the parties<sup>41</sup>. Furthermore, Government undertook to unconditionally waive any claim to immunity from proceedings to enforce such an award, and execute an award against the property of GRZ<sup>42</sup>.

- (f) *Taxation*: The Mopani DA provided as follows with regard to taxation stability<sup>43</sup>:
- (i) the Company would pay tax, royalties, and duties subject to the provisions of the DA and in accordance with applicable legislation.
  - (ii) GRZ undertook to suspend the imposition and collection of customs duty on goods and material imported by the Company to implement mining programmes specified in the DA.
  - (iii) GRZ undertook not to take any of the following measures for a period of 15 years, if such measures would have a material adverse effect on the Company’s distributable profits or dividends received by its shareholders:

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<sup>39</sup> Clause 22 of the Mopani DA

<sup>40</sup> Ibid.

<sup>41</sup> Clause 22.8 of the Mopani DA

<sup>42</sup> Ibid.

<sup>43</sup> Clause 16 of the Mopani DA

The provisions discussed have a bearing on the legal effect of this particular DA, which will be considered in the next chapter. Of the provisions highlighted, the ones pertaining to the applicable fiscal regime were of particular importance, and it is the breach of this provision that most mining companies are unhappy about.

#### **2.4 Legal Effect of Cancellation of the DA's**

An investigation of the legal effect of cancelling the DA's must invariably begin with ascertaining the law applicable to these agreements. Clause 25 of the Mopani DA provided that the DA was to be governed by Zambian law, supplemented where necessary by International law. The effect of such a clause was discussed in detail in the landmark award of **Agip v Congo**<sup>49</sup>. In this case, the Government of Congo passed legislation under which it nationalised Agip, contrary to the provisions of a prior investment agreement entered into between the parties. The *applicable law* clause was similar to that of the Mopani Agreement. The tribunal concluded that the agreement was to be primarily construed within the framework of Congolese law, and subsequently proceeded to identify the relevant laws and legal principles of Congolese law which were to apply to the investment agreement. The tribunal further rejected the notion forwarded by Agip that the clause meant Congolese Law would be subordinated by International Law, but rather use of the word *supplemented* signified that recourse to the principles of International law can be made either to fill a lacuna in Congolese law, or to make necessary additions to it.

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<sup>49</sup> Tadia Bejic, *Applicable Law in International Investment Disputes*, (London: Longman, 1999) pg 21

In the foregoing perspective, having established that the DA's were contracts, governed by Zambian contract law, it is necessary to consider some of the applicable principles of contract law to determine the legal effect of the New Act cancelling the DA's.

### Frustration

Under the doctrine of frustration, a contract may be discharged if after its formation events occur making its performance impossible or illegal. However, a party cannot rely on frustration that is due to his conduct or the conduct of those for whom he is responsible<sup>50</sup>. For the purposes of this paper, the author will only consider frustration as a result of subsequent legislation.

Subsequent change in the law or in a legal position affecting a contract is a well recognized head of frustration. Under this head of frustration, an enacted statute may render the performance of certain contracts illegal, thereby discharging the parties from their obligations under such a contract. The main effect of the doctrine of frustration is that generally at contract law, frustration does not rescind the contract *ab initio*, but rather it automatically brings the contract to an end without more, as it basically releases both parties from further performance of the contract<sup>51</sup>. However accrued rights under a contract which has been frustrated are not destroyed, as was held in **Schering Ltd v Stockholms Enskilda Bank Aktiebolag**<sup>52</sup>. In this case, the respondent a Swedish bank loaned a sum of money to a German company under a contract of debt, wherein arrangements were made to have the debt serviced in installments. As a result of the outbreak of World War 2, the contract was frustrated as the parties were considered to be

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<sup>50</sup> Treitel pg 844

<sup>51</sup> Chitty on Contracts (vol. 29) pg 1351

<sup>52</sup> (1946) ALL ER pg 35

in a state of war. The German company stopped repaying the debt on grounds that the contract had been frustrated, resulting in the Swedish bank commencing legal proceedings. The court held in favour of the Swedish bank, on grounds that abrogation of the contract by a frustrating event was without prejudice to the rights of either party in respect of the various subject matter of the contract that had been performed or ought to be performed at the time the contract was frustrated. Rights not accrued prior to the frustrating event are thus not enforceable.

### Breach of Contract

Breach of contract can be defined as an actual failure by a party to a contract to perform his obligations under that contract or an indication of his intent not to do so<sup>53</sup>. It is trite enough that the breach of a contract does not, in general, determine the contract. It is for the innocent party to decide whether he will treat the contract as at an end and seek redress by way of damages, or whether he will regard the contract as still subsisting and call for performance in accordance with the contractual terms<sup>54</sup>. Under the Mopani DA the Government undertook not to terminate the Mopani DA, for a period of 15 years, except in the circumstances prescribed by the Agreement<sup>55</sup>. On this premise, the Government had an implied obligation to refrain from any actions that would effectively contravene these agreements. It is a principle of contract law that a person cannot break a contract by incapacitating himself from performing it, and in an event that they do so, they are in breach of the particular contract<sup>56</sup>. This concept was established in the case of

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<sup>53</sup> Oxford Law Dictionary, pg 54

<sup>54</sup> **Gunton v London Borough of Richmond upon Thames (1980) 3 ALLER**

<sup>55</sup> Clause 19 of the Mopani DA

<sup>56</sup> G.H Treitel, The Law of Contract (10<sup>th</sup> edition). (London: Sweet and Maxwell 1999) pg 774

**Lovelock v. Franklyn**<sup>57</sup>, in which a seller who had contracted with a party to sell a specific thing but subsequently sold it to a third party thereby incapacitating himself from honouring his contractual obligations, was held to have committed breach of the contract. The proposition that a party is in breach of contract if it incapacitates itself from performing its contractual obligations, also applies contracts to which the state is a party. This principle has been applied in a number of by Arbitral awards which have been decided on the basis of the rules of International Investment law<sup>58</sup>. An example is the **Agip v Congo** award, in which the arbitration tribunal held that the variation of Congolese law that facilitated the expropriation of Agip by the Congolese government was lawful, but due to the fact that it effectively contravened the Investment Agreement entered into between the two parties, it amounted to a breach of contract entitling Agip to compensatory relief<sup>59</sup>.

In the light of the foregoing discussion of the law, it is apparent that the DA's were primarily governed by local law, and an analysis of their cancellation will be based on principles of Zambian law applicable to these agreements. In this perspective, it has been established that the Government can enter into a contract subject to the same liabilities as private persons in as far as these are not altered by the state proceedings act, and any failure to perform its obligations under the DA's brought about through its conduct will be considered as breach of contract. It has been further established that due to the fact that the Government has incapacitated itself from performing fundamental obligations

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<sup>57</sup> **Lovelock v. Franklyn (1846) 8 Q.B 371** cited in Treitel at pg 774

<sup>58</sup> These principles are applicable to the case at hand on the basis of clause 25 of the Mopani DA, which provides that the Zambian law governing the agreements shall be supplemented by International law.

<sup>59</sup> Discussed in: Applicable Law in International Investment Disputes, pg 21-30

under the DA's as a result of the New Act, the Mining Companies will be entitled to treat the DA's as terminated and sue for damages for breach of contract.

As consequence of the Governments effective breach of the DA's by terminating them in a manner not prescribed by the DA's and subsequently passing legislation (tax) that abrogated its obligations under the Mopani DA, Mopani is likely to institute Arbitration proceedings against the Zambian government. It is a well settled principle that the Arbitration clause of a contract, survives the termination of the contract under consideration<sup>60</sup>. The reason for this was enunciated in **Heyman v Darwins Ltd**<sup>61</sup> in which it was stated that a distinction can be made between the arbitration clause of a contract and other clauses in that unlike other contractual terms, it does not impose on one of the parties, an obligation in favour of another, but rather it embodies a mutual agreement of both parties as to how their disputes will be settled. This course of action is supported by the provisions of the **Arbitration Act**<sup>62</sup>. Section 30 of this Act recognizes arbitral awards of made outside Zambia as binding and enforceable in accordance with the provisions of the Act. It must be noted that with respect to the Government, the application of the Arbitration Act (particularly the enforcement of an Arbitral award) is subject to the provisions of the **State Proceedings Act, section 21(4)** of which prohibits execution of the award on State property. This will present a challenge to the mining companies if they are awarded compensatory relief by the arbitral tribunal, as they will face difficulties in getting the government to pay the compensatory damages for the breach.

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<sup>60</sup> Sir. M. J Mustill, *The Law and Practice of Commercial Arbitration in England*. (London: Butterworths, 1982) pg 79

<sup>61</sup> (1942) AC 356

<sup>62</sup> Arbitration Act, Act No. 19 of 2000

In the light of the foregoing discussion of the law, and the relevant provisions of the Mopani DA, it is apparent that the options available to the parties to the DA are as follows:

- (a) On the basis of the Government's breach of its obligations under the DA by enacting legislation to frustrate the DA's, Mopani will declare a dispute and submit it to Arbitration in accordance with the provisions of the DA<sup>63</sup>.
- (b) The frustration of the DA's by the change in the legal regime will not affect any of their accrued rights. The arbitral tribunal will have to determine which rights have accrued to the mining companies.
- (c) If the Government is to succeed in avoiding any liability for frustrating the DA's through legislation, they must establish that the DA's from inception, were illegal as they contravened Zambian law, particularly the Constitution.
- (d) If there are any Constitutional issues it would like to consider, the Companies will have to take out a Petition under which they will attempt to enforce their Constitutional rights. The possible Constitutional arguments will be considered in more detail in the next chapter.

## **2.5 Propositions the Government can use to avoid obligations under the DA's**

Having established the contractual basis of the DA's and the legal effect of their cancellation, it is necessary to consider the ways in which the State can unilaterally abrogate its obligations under such a contract and avoid the penalty for doing so. Under the principles of contract law as prescribed by the common law, the most likely grounds

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<sup>63</sup> For example clause 22 of the Mopani DA

under contract law on which the DA's may be considered invalid are as follows:

- (a) the contract is contrary to public policy
- (b) the contract is illegal

### DA's contrary to public policy

Generally, the enforcement of a contract is in certain circumstances against public policy, and a consequence of this is that a party may be prevented from suing on the contract at all<sup>64</sup>. Public policy which can be conceived as; "*the interests of the community*"<sup>65</sup> is a variable notion depending on changing manners, morals, and economic conditions<sup>66</sup>. A contract is contrary to public policy only if its harmful tendency is clear, and if it can be established that its injury to the public is its probable, and not merely possible consequence<sup>67</sup>. If the state refuses to honour the DA's on account of them being contrary to public policy, they must show that these agreements were from their inception, harmful to the welfare of the state. It is difficult to see how the State will establish this due to the fact that at the time these agreements were entered into, it was definitely in the interests of the public for the state to attract investment in the mining sector. Furthermore the fact that these agreements in the light of the recent mining boom seem lopsided in favour of the mining companies does not necessarily make them harmful to the Zambian public because they are not receiving a fair return of their mineral wealth.

### DA's illegal

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<sup>64</sup> E.G Mckendrick et al. Chitty on Contracts vol. 1: General Principles (29<sup>th</sup> ed.) (London: Sweet and Maxwell, 2005) pg 938

<sup>65</sup> Oxford Law Dictionary pg 396

<sup>66</sup> G.H Treitel, The Law of Contract (10<sup>th</sup> edition). (London: Sweet and Maxwell 1999) pg 439

<sup>67</sup> Treitel pg 403

Where a statute prohibits or regulates the performance of a contract, breach of the statute may make the contract illegal, void or unenforceable<sup>68</sup>. However, where a statute changes the nature of what was previously a legally enforceable contract to one that lacks legal effect, then such a statute would *frustrate* the existing contracts and possibly make future contracts illegal<sup>69</sup>.

One argument that could be advanced by the Government under this heading is that of Constitutional illegality. In this perspective, section 9 of the Old Act presents a peculiar problem. This section effectively elevated the DA's to the status of superior statutory law to which other statutory law, including the Old Act was subordinated.

The Zambian Constitution exclusively vests legislative power in Parliament, which consists of the President and the National Assembly<sup>70</sup>. The Constitution does not expressly provided restrictions by which parliament may exercise its powers to make law<sup>71</sup>, though it is well settled that all laws made by Parliament must not contain provisions that conflict with the provisions of the Constitution<sup>72</sup>. The Constitution also provides that Parliament may make laws with retrospective effect<sup>73</sup>. The implication of this is that under Zambian law, the legislature is empowered to pass laws that may affect legal rights that have accrued to an individual prior to the enactment of the retrospective law. On this basis, it could be argued that the Government is justified in cancelling the DA's through legislation.

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<sup>68</sup> Treitel pg 473

<sup>69</sup> Trietel pg 401

<sup>70</sup> Constitution of Zambia, Cap.1, Art.62

<sup>71</sup> Except in situations in which parliament seeks to amend the Constitution itself, in which case Article 79 provides appropriate guidelines.

<sup>72</sup> **Mumba v The People** (1984), ZR 38

<sup>73</sup> Constitution of Zambia, Cap. 1, Art.62

Under British system, it has been postulated that the Constitution<sup>74</sup> does not assign limits on the authority of Parliament over matters and persons within its jurisdiction<sup>75</sup>. It is a settled principle in the English Parliamentary system that Parliament is not controlled in its discretion to legislate, and when it errs, its errors can only be corrected by itself<sup>76</sup>.

In the American legal system<sup>77</sup>, like all organs of government in the United States, the Legislature is vested only with powers granted expressly or impliedly by the United Constitution<sup>78</sup>. Legislative power is derivative from the Constitution and is exclusive to the legislature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which they will move.

In considering the position of the nature of the Zambian Parliament's legislative mandate, with respect to passing law that elevated the DA's to the status of a statute, two approaches may be taken. On the one hand, it can be argued that the Constitution does not block Parliament from enacting legislation it wishes and on this basis, Parliament has the power to pass legislation that elevates a particular type of contract to the status of legislation, in so long as such a contract is not in contravention of the Constitution. On the other hand, it can be argued that by making the DA's, which are essentially contracts acquire the status of statutory law, the Old Act essentially contravened the Constitution which confers the exclusive power to make law on the legislature. Making a contract entered into between the government and a private entity acquire the status of statutory

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<sup>74</sup> It must be noted that the British Constitution is unwritten, and subordinate to the legislature.

<sup>75</sup> E. May. *Treatise on The Law, Privileges, Proceedings and usage of Parliament* (18<sup>th</sup> ed). (Butterworth:London, 1983) pg51

<sup>76</sup> *Ibid.*

<sup>77</sup> Which like Zambia has a Constitution that is superior to all other law

<sup>78</sup> Bernard Schwartz, *A Commentary on the Constitution of the United States*. (Boston: Penn. Press 1980) pg 87

law is illegal as this contravenes the exclusive power granted to Parliament by Article 62 of the Constitution.

It can further be argued that certain provisions of the DA's contravened the Constitution, in particular, the stability clauses contained in the DA's that sought to *freeze* Parliament's ability to pass certain types of legislation<sup>79</sup>. Under the British system, Parliament cannot be bound by its successors and therefore it can ignore any legal provision whose effect is to fetter the legislative power of a future Parliament on a particular issue<sup>80</sup>. This position applies to legal systems where a written Constitution exists, subject of course to the express provisions of such a written Constitution. From this premise, can be argued that the proposed stability clauses in the DA's where nullity as any fetter on the Constitutional mandate of the legislature must be provided by the Constitution itself.

## 2.6 Conclusion

In this chapter, the author has endeavoured to highlight and discussed some of the basic legal issues concerning the DA's, particularly in the context of the change to the legal regime governing the large scale mining sector. Firstly, it established the legal basis of the DA's and identified the applicability of contract law principles as developed under the English Common law. Secondly, the author discussed the legal effect of the New Act on the DA's, and in doing so, established the frustration of the DA's by the New Act, effectively amounted to the Government breaching its obligations and possibly attracting compensatory damages in favour of the mining companies. In this perspective, it was

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<sup>79</sup> Namely those pertaining to the stability of the fiscal regime

<sup>80</sup> O. Hood Phillips, *Constitutional and Administrative Law* (5<sup>th</sup> ed.), (London: Sweet and Maxwell 1973) pg 54-55

noted that as the DA's were primarily governed by Zambian law, it is possible for the Government to justify the breach on the basis of Constitutional provisions that allow it to pass legislation with retrospective effect, or by challenging the Constitutionality of the stability provisions contained in the DA's. Furthermore, even if the mining companies can successfully establish the government's breach in the light of the Constitutional challenges discussed, the provisions of the State Proceedings Act could pose a challenge to the mining companies, as any damages awarded to them will be paid at Government's convenience.

In the next chapter, the author will examine the Constitutional nature of the rights enjoyed by the mining companies with respect to their operations under the provisions of a Large Scale mining licence.

## Chapter Three

### The Nature of mining rights conferred under **Zambian Mining Legislation.**

#### 3.1 Introduction

Though it is generally appreciated that mining rights are granted by the state, the precise nature of the rights conferred has been a source of misunderstanding. This controversy regarding the nature of the rights conferred has come to the fore in the light of the recent change to the legal regime governing large scale mining in Zambia, with some of the stakeholders arguing that the rights enjoyed under the Old Mining legislation conferred amounted to property rights protected under the Constitution<sup>81</sup>. This chapter will specifically consider the nature of the rights granted to the holder of a large scale mining licence (hereinafter referred to as “**the Licence Holder**”).

#### 3.2 The Nature of the rights conferred under mining legislation in Zambia.

It must be noted that other than the statutory provisions that govern mining in Zambia, very little in terms of judicial pronouncement and scholarly articles have been written on the nature of these rights. From this perspective, an assessment of the nature of mining rights in Zambia will primarily focus on an examination of the relevant provisions under **Zambian mining law**, supplemented where necessary by available information on the subject.

It has been postulated that the character of a mining right conferred by a mining licence depends not on the name of the instrument, but upon the intention of the state as expressed in the relevant mining legislation when considered as a whole<sup>82</sup>. This

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<sup>81</sup>Times of Zambia, Thursday 12<sup>th</sup> June 2008

<sup>82</sup>Ndulo, Mining Rights in Zambia. pg 146

proposition suggests that a consideration of the rights granted under a Large Scale Mining Licence will primarily focus on the provisions of the relevant mining legislation.

The Old Act defines a mining right as a *licence* or *permit* granted under the Act<sup>83</sup>.

**Section 3** of the Old Act vests in the President, all rights of ownership in searching for, mining and disposing of minerals. **Section 6** of the Old Act lists the type of rights granted under the Act, which include a *large scale mining licence* (hereinafter referred to as “**The Licence**”). **Section 23** of the Old Act deals with the rights conferred by The Licence. In this regard, the section provides that The Licence generally confers on the Licence Holder, the exclusive right to carry on mining<sup>84</sup> and prospecting operations in the mining area. Specific rights conferred by The Licence include the right to *dispose of any mineral product recovered*<sup>85</sup>.

In the light of the foregoing provisions, it can be deduced that The Licence granted under the Old Act **does not** confer ownership of the unmined minerals in the mining area on the Licence Holder. The Old Act expressly states that the rights of the Licence Holder are restricted to mining and prospecting for minerals in the mining area, and grants the Licence Holder the right to dispose of minerals recovered. On this premise, the Licence Holder will assume only assume ownership of minerals recovered and not minerals that are yet to be mined.

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<sup>83</sup> Mines and Minerals Act (repealed), Cap. 213, s.2

<sup>84</sup> Mining is defined under the Act as *the extraction of material from beneath the surface of the earth to obtain minerals*

<sup>85</sup> Mines and Minerals Act (repealed), Cap. 213, s.23(2)(c)

This view is supported by the work of Ndulo<sup>86</sup>, in which he attempted a comprehensive analysis of Mining Rights in Zambia. In his analysis of the nature of mineral rights, Ndulo cited a number of court decisions made under South African mining law<sup>87</sup> that support the proposition that a mining licence does not confer on the holder, rights of ownership with respect to the minerals covered by the licence<sup>88</sup>. In **Neebe v. Registrar Mining Rights**<sup>89</sup>, the Plaintiff applied for an order compelling the defendant to effect and register a transfer of certain prospecting claims as prospecting claims as property rights. In rejecting the application, the court held the nature of a mining licence was to be determined from the mining statute that created the rights under consideration. In this case, like Zambian mining legislation, the relevant statute latently and patently provided for the continued ownership of minerals by the state, notwithstanding the creation of a particular interest by the statute. In another South African case, **Rocher v Registrar of Deeds**<sup>90</sup> the court commented that though the exact nature of mining rights was difficult to define, suggesting that they conferred the right to go on the soil of another person and extract the minerals for one owners benefit, it was clear that *until the minerals where extracted from the soil, they remained the property of another party*". In **Osborne v Morgan and Others**<sup>91</sup>, the court had the opportunity to consider the nature of a mining right granted under a statute which was based on the same principle of ownership as Zambian Mining Laws. The court observed that the nature of the mineral rights in dispute where to be ascertained from the written instruments conferring the interest,

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<sup>86</sup> M. Ndulo, Mining Rights in Zambia. (Kenneth Kaunda foundation Lusaka, 1987) pg

<sup>87</sup> Ndulo contended that the legislative framework for mining in Zambia was largely influenced by the South African mining law. Pg 119-121

<sup>88</sup> He contended that the South African decisions cited where of persuasive value, based on the influence South African mining law had in shaping our own mining laws.

<sup>89</sup> Cited in Ndulo

<sup>90</sup> (1911), T.P.311 cited Ndulo

<sup>91</sup> (1888), 13 App. Cas. 227

namely the statute, and the mining licence, neither of which created a legal or equitable ownership interest in the minerals to be mined.

According to Ndulo the possessory interests in a mining licence do not fall within standard classification of property interests under common law<sup>92</sup>. In this perspective, Ndulo contends that the licence holder possesses all attributes of free title against all persons except the state. However under the Old Act the, although the right of mining and disposal of all minerals was vested in the state, the terms on which the licence was held and the rights of the licence holder were fixed primarily by the Development Agreements which were deemed to supercede legislation<sup>93</sup>.

It must be noted that the foregoing analysis on the nature of the rights granted under Zambian mineral legislation, is supplemented by the provisions of the Old Act, which required the holders of certain mining rights to pay the prescribed mineral royalty<sup>94</sup>. A royalty can be defined as a sum payable for the right to use *someone else's property for the purpose of gain*<sup>95</sup>. Royalties are usually paid on wasting assets which have a limited lifespan<sup>96</sup>.

In conclusion of his analysis, Ndulo observes that mining laws in Zambia only grant a possessory interest in minerals subject of a licence, and no title to the minerals accrued to the licence holder until the minerals were from the ground. Ndulo further observes that because of their dependence on the mining statutes, the exercise of mining rights can be

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<sup>92</sup> Ndulo pg 146

<sup>93</sup> This issue has been discussed under chapter 2

<sup>94</sup> Section 66(1) of the Old Act

<sup>95</sup> Oxford Dictionary of Law pg 440

<sup>96</sup> Ibid.

unilaterally restrained or subjected to new obligations imposed on them, regardless of the rules that were in existence when the rights were acquired<sup>97</sup>. He further states the state can pass statutes to affect the rights of licence holders, except legislation that provides for the expropriation of minerals extracted (which from the above analysis are the property of the licence holders), without provision of compensation.

### **3.3 The nature of Property rights, protected under the Zambian Constitution.**

Part III of the Zambian Constitution<sup>98</sup> (hereinafter referred to as “**the Constitution**”) provides for protection of fundamental rights and freedoms. These rights and freedoms enjoy special protection under Zambian Law as is illustrated by the fact that unlike other parts of the constitution, part III requires a referendum for any of its provisions to be amended or repealed<sup>99</sup>. This means that for any Constitutional protection sought by an individual to be effective, it should fall within the rights protected under part III of the Constitution, as this protection cannot be tampered with by Parliament, unless proposed amendments are subjected to a national referendum.

One of the fundamental rights and freedoms protected under Part III of the Constitution is the right to property. Article 16(1) of the Constitution provides for the general rule regarding protection of property rights under the Constitution (hereinafter referred to as “**The General Rule**”). To this effect, it provides that property or any interest in or right over property, will only be involuntarily acquired under the authority of an Act of Parliament which provides for the payment of adequate compensation except in the

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<sup>97</sup> An illustration is the recent change in the legal regime governing large scale. (which is incidentally, the subject matter of this dissertation.

<sup>98</sup> Constitution of Zambia, Cap 1

<sup>99</sup> Constitution of Zambia, Cap 1 Art. 79(3)

situations outlined under the article<sup>100</sup>. Article 16(2) then proceeds to outline the exceptions under The General Rule. The article provides for 27 situations in which the protection of property under Article 16(1) may be abrogated.

Though it is apparent that the Constitution does provide for the protection of property, it does not define what property is. From this premise, a number of approaches to the concept of property will be considered in order to assess which is the most suitable definition of property in as far as the Constitution is concerned.

At law, property may broadly be defined as anything capable of ownership<sup>101</sup>. With regard to personal property a distinction is made between tangible property and intangible property. Tangible property includes property that has physical existence and is capable of being enjoyed by immediate possession<sup>102</sup>. Intangible property on the other hand refers to property that does not have physical existence, such as choses in action<sup>103</sup>. From this premise, if a mining right can be classified as a chose in action it can be correctly described as property.

With respect to the Zambian situation, one approach to the concept of property involves a consideration of the **Interpretation and General Provisions Act**<sup>104</sup>. This Act consolidates the law relating to the construction, application and interpretation of the Zambian written law. This Act applies to every written law passed in Zambia, unless a

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<sup>100</sup> In which case it may be acquired without the provision of an Act of Parliament or payment of compensation.

<sup>101</sup> Oxford Dictionary of Law

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Interpretation and General Provisions Act, Cap.2

contrary intention appears in the Act or the written law concerned<sup>105</sup>. The Act has provisions outlining the meaning of various terms used in Zambian written law and includes a definition of personal property, which it states as including money, bonds, bills, notes, deeds, chattels real, and *mining rights in or under any land*<sup>106</sup>.

From the above discussion of the various approaches as to whether mining rights confer property rights on the holder subject to Constitutional protection, it is apparent that the position is ambiguous. From this premise, the author perceives that rules of statutory interpretation may help resolve this ambiguity, and in this perspective, supports Ndulo's analysis of the nature of mineral rights.

### **3.4 Assessment of whether mining rights may be protected by the constitution of Zambia .**

Having discussed the protection of property under the Constitution, it is necessary to examine the relevant provisions of the Constitution in order to ascertain whether mining rights fall within the protected property rights.

Article 16(1) outlines the General Rule<sup>107</sup>. Article 16(2) then outlines situations in which the General Rule may be derogated. For the purposes of this study, only the exceptions relevant to the topic under discussion will be considered, namely articles; 16(2)(o), 16(2)(u), and 16(2)(x).

Article 16(2)(o) provides that the General Rule may be abrogated for the purpose of or in connection with the prospecting for or exploitation of minerals belonging to the Republic

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<sup>105</sup> Interpretation and General Provisions Act, Cap.2, s.2

<sup>106</sup> Interpretation and General Provisions Act, Cap.2, s.3

<sup>107</sup> Defined under the preceding heading

on terms providing for the respective interests of persons affected. This exception appears to deal with the issue of mining rights superceding the property rights of the owner of the surface rights (land), under which the particular mining rights fall under. Hence, it is of little relevance to the subject matter of this dissertation.

Article 16(2)(u) provides that the General Rule may be abrogated where the property consists of a *licence* or permit. This exception could pose a challenge to holders of mining rights encapsulated in various licences obtained from the State and issued under the Old Act. Unfortunately the Constitution, Case law, or the **Interpretation and General Provisions Act** do not give guidance as to the possible meaning of licence or permit under the Constitution. From this premise, it would be appropriate to consider the meaning of these words in common parlance. In common parlance, a licence can be defined as an official document that shows that permission has been given to do or own something<sup>108</sup>. This definition is not too different from the legal approach to the concept of a licence. **The Oxford Dictionary of Law** defines a licence as *formal authority to do something that would otherwise be unlawful*. Using this approach to understand the nature of licence, it is apparent that the large scale mining licence issued under the Old Act could fall under the exception to the Constitutional protection of property, as its primary feature was that it gave the licence holder authority to mine minerals in Zambia.

In the light of the foregoing discussion, it can be deduced that if we take the approach that mining rights can properly be described as property rights protected under the Constitution, they may still not enjoy the protection offered by Article 16(1), on the basis that they are rights that consist of a licence (in this case, a large scale mining licence)

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<sup>108</sup> Oxford Advanced Learner's Dictionary pg 682

issued by the State, and therefore, they may be compulsorily acquired without compensation under the provisions of Article 16(2)(u).

Lastly, Article 16(2)(x) provides that the General Rule may be derogated where the property is a mineral, or any rights (property rights) accruing by virtue of any title or licence for the purpose of searching for or mining a mineral in the following situations:

- (a) *where the licence holder fails to comply with the provisions of the mining legislation conferring the Large Scale Mining Licence.* This non compliance would include breach of the Development Agreements (by the Investors) and subsidiary legislation made pursuant to the Old Act.
- (b) *On the terms of any law vesting any such property (minerals) or rights in the president.* On the face of it, this means that minerals and the rights accruing to a Large Scale Mining Licence Holder acquired under the provisions of Zambian mining legislation (which vests minerals and related rights in the President), may be compulsorily acquired by the state under the provisions of the Old Act, and presumably subsequent legislation such as the New Act<sup>109</sup>. Such Compulsory acquisition is on the basis that these statutes vest property in minerals, and the rights to minerals in the president.

From the above analysis of the relevant provisions of the Constitution regarding the protection of property rights it is apparent that even if it is argued that a Large Scale Mining Licence confers on the holder property rights that are protected under the

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<sup>109</sup> This position holds regardless of whether the Development Agreements (which were conferred with a legal status superior to that of statutory law) provided something to the contrary, as they are subordinate to the provisions of the Constitution.

Constitution, there are exceptions to the General Rule which allow the State to derogate from certain property rights, which include mining rights.

### **3.5 Conclusion**

In this chapter, the author has discussed the nature of mineral rights under Zambian Law. Firstly it established that the nature of mining rights as determined from the provisions of the Old Act, is that they do not grant ownership of unmined minerals to the right holder. This position is supported by the statutory requirement placed on right holders, to pay a mineral royalty. From this premise, it can be argued that the Constitution conceives minerals in their *natural state* as being the property of the government, and not capable of ownership by private persons. Secondly, the author considered the nature of property rights protected under the Constitution and in this vein, it was established the nature of property to which this protection applied was not clear. However, notwithstanding the apparent ambiguity the author outlined the possible situations in which the protection conferred on property rights that may be classified as mining rights may be derogated.

## **Chapter Four**

### **The possible effect of the change in the legal regime on investment in the Large scale mining sector.**

#### **4.1 Introduction**

It was established in the earlier part of this paper, that the large scale mining sector plays a fundamental role in shaping the country's lofty developmental aspirations. Due to the fact that the large scale mining sector is heavily reliant on foreign investment for its development, it is necessary to have an appreciation of the likely impact of the change in the legal regime governing large scale mining, on foreign investment in the sector. This will be achieved by ascertaining some of the factors that foreign investors take into consideration before investing in the mining sector of a particular country. It is against this background that the paper will assess how these factors were addressed by the legal framework provided under the Old Act, and the subsequent position under the New Act.

#### **4.2 General concerns of Foreign Investors Investing in a Developing Country**

Mining is a high risk and capital intensive industry<sup>110</sup>. The Zambian government does not have the funds to invest in mineral development, and it is therefore necessary to attract private investment from domestic and foreign sources in order to develop the country's mineral resources.

Generally, Mining investment decisions are made after economic and profitability prospects are assessed, having weighed potential rewards against possible risks<sup>111</sup>. From

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<sup>110</sup> "Mining as a Source of Growth". World Bank Report on Mining in Afghanistan, March 2004

<sup>111</sup> World Bank report on Mining in Afghanistan

a legal perspective, an investor in the mining sector of a developing country is likely to consider the following issues<sup>112</sup>:

- (a) *Mining statutes*: the relevant mining legislation should address general concerns of the mining industry such as: a clear and transparent mining registry; whether mining rights can be pledged or assigned; whether mineral rights override surface rights.
- (b) *Foreign investment laws*: whether the host country's investment laws provide for Investment protection and Investment Agreements which contain stability clauses. In some cases, whether the host country is a signatory to bilateral investment protection treaties.
- (c) *Taxation law*: Generally refers to the fiscal regime<sup>113</sup> that the host government will apply during the period of the mining operation. Stability of the tax system is important as it helps the investor properly plan their operations.

In Zambia, the legal framework that dealt with the legal concerns outlined above was provided by a number of statutes which included; the Mines and Minerals Act (the Old Act), the repealed Investment Act, and the Income Tax Act. The Constitutional protection of property<sup>114</sup> provides protection for foreign investment in as far as the assets purchased to facilitate the investment are concerned.

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<sup>112</sup> Ibid.

<sup>113</sup> the tax and royalties payable to the government for the mining operations

<sup>114</sup> As prescribed under Article 16 of the Constitution

### **4.3 The rationale of the DA's from an investor's perspective especially with regard to investment in the largescale mining sector.**

Under the old legal regime governing the Large Scale most of the salient concerns pertaining to investment were dealt with in the Old Act<sup>115</sup>, which provided for Development Agreements to be entered into between the Government and the Investors in the Large scale mining sector.

One of the most important concerns to most investors who acquired an interest in Zambian mining operations as after the privatization programme of the late 1990's, was a stable fiscal regime. It was against this background that fiscal stability provisions were encapsulated in most of the Development Agreements. An example is the Mopani DA (which was discussed in more detail earlier in this paper), which had provisions that comprehensively dealt with investor concerns of the fiscal regime that would be applied to their mining operations. In this regard clause 16 of the Mopani DA, provided that the Zambian Government was not to alter the royalties and tax payable by Mopani for a period of 15 years<sup>116</sup>. Similar provisions are to be found in the Development Agreements entered into between the Zambian Government and other mining companies such as; Konkola Copper Mines, Kansanshi Copper Mines, and Lumwana Copper Mines.

### **4.4 the legal situation after the cancellation of the DA's**

From an examination of the investment considerations that mining companies make before investing in a developing country like Zambia, it is apparent that the change in the legal regime is likely to adversely affect investment in the mining sector. This is based on the fact that the Old Act, through the mechanism of the DA's allowed the investors to

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<sup>115</sup> Mines and Minerals Act (repealed)

<sup>116</sup> The specific provisions were discussed in more detail under the second chapter.

negotiate the nature and duration of the fiscal regime that governed large scale mining operations<sup>117</sup>. Fiscal stability is important from the investor's perspective, especially those that incur huge loans in order to facilitate the investment<sup>118</sup>. These investors have an obligation to service the loans, and therefore, it is critical that they have a precise idea of their financial obligations over a period of time.

Under the New Act, Investor's can no longer enter into Development Agreements with the Zambian Government<sup>119</sup>. The fiscal regime applicable to the large scale mining sector will be determined by government and parliament through the Income Tax Act. This means any fiscal concessions sought by the mining companies will have to be sought from the Government, either by the mechanisms provided for under the Income Tax Act, or by amendment of the fiscal provisions outlined in the Mines and Minerals Development Act, and the Income Tax Act. The New Act imposes an obligation on all large scale mining licence holders to pay mineral royalties at various rates for the different types of minerals mined under the licence<sup>120</sup>. Royalties for base metals such as copper and cobalt, which are the subject of most large scale mining operations, are charged at the rate of three per cent of their normal value.

Furthermore, the Development Agreements provided for a fixed taxation regime. Corporate tax for Large scale mining licence holders was fixed at the rate of 25 percent per annum. The DA's contained a stability clause that prevented the government from altering this rate. As a result of the removal of the DA's, the tax obligations of Mining

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<sup>117</sup> Section 9 of the Old Act

<sup>118</sup> For example Lumwana has a reported debt facility of over \$ 800 million

<sup>119</sup> Section 159 of the Mines and Minerals Development Act

<sup>120</sup> Section 133 of the Mines and Minerals Act

Companies will largely be determined by the provisions of the Income Tax Act and the yearly amendments thereto. In this perspective, The Income Tax Amendment Act No. 1 of 2008, provides that income of mining companies that does not exceed 8 per cent of its gross sales shall be taxed at 30 per cent per annum<sup>121</sup>. It also provides for the introduction of a “windfall” tax in respect of income from the sale of minerals above a specific price threshold level.

In the light of the foregoing, Investor’s in the mining sector can no longer be certain of the extent of the fiscal obligations with respect mining investment in Zambia. This has the effect of increasing the risk of the investor failing to get a return on his investment and this would subsequently discourage investment in the mining sector, especially in times when the global economy is depressed and commodity prices are low. In addition to this, it must be appreciated that different mining companies have different operation costs any tax regime that applies universally to the mining sector should take into account these differences<sup>122</sup>. However from the perspective of the Zambia people, the change in the legal fiscal regime governing the Large Scale mining sector will have a positive effect, as it will enable the Government collect more revenues, especially when the commodity prices are high. In this regard, the Government has introduced a tax structure for mining Companies that hopes to ensure the equitable distribution of the wealth realized by the country’s mineral resources.

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<sup>121</sup> Section 22 (c)

<sup>122</sup> Dr. S. Kambani, The Post Tuesday 20<sup>th</sup> January 2009

#### **4.5 Promotion of mining investments under Zambian Law in light of the changes to the legal regime governing large scale mining.**

It is apparent that the Development Agreements were incorporated into the Old legal regime governing large scale mining in order to promote investment in the sector, as they provided a mechanism through which the government could be made to address some of the concerns of the investors in the sector.

The New Act has removed the power of the Minister to enter into Development Agreements<sup>123</sup>. Furthermore, the New Act has cancelled the agreements entered into under the Old Act, which are now deemed to be no longer binding on government<sup>124</sup>. Despite undertakings by Government the New Act will incorporate the positive aspects of the Development Agreements, one of the issues that has clearly been overlooked are the provisions that sought to protect and promote investment in the Large scale mining sector. The negative implications of this oversight, may not be felt during a period in which commodity prices are high, resulting in a boom to the mining sector, however, it would become a major stumbling block in attracting investment when the mining industry experiences a depression.

One way that mining investments may be protected and promoted, is by the mining companies negotiating with the Zambian Government and getting them to grant some of the concessions they enjoyed under the DA's using the subsisting legal framework. This may be done through various legislative provisions of the Income Tax Act, and the Zambia Development Agency Act. This initiative has been taken up by Lumwana Mining Company, who have reportedly been working closely with the Zambian

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<sup>123</sup> Mines and Minerals Development, Act No. 7 of 2008. s 159

<sup>124</sup> Mines and Minerals Development, Act No. 7 of 2008. s 160

government to secure relevant incentives to ensure that their investment remained economically viable<sup>125</sup>. Furthermore, in the 2009 Budget address, the Government introduced fiscal measures that were a result of extensive consultations amongst the stakeholders in the large scale mining sector<sup>126</sup>. These measures, which included the removal of the windfall tax and retention of the variable profit tax system, will be incorporated in the tax legislation and effected on 1<sup>st</sup> April 2009. In this perspective, it must be noted that the removal of the DA's by the Government has provided a platform for the Government to regulate the applicable fiscal regime in a manner that is fair and considerate to both parties.

#### **4.6 Conclusion**

In the light of the foregoing discussion, it can be deduced that the change in the legal regime governing the large scale mining sector is likely to have a negative impact in attracting mining investments in Zambia, especially when commodity prices on the international market are low. However, it is unlikely that the change to the legal regime will adversely affect future investors to invest in the large scale mining sector, particularly when commodity prices are high.

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<sup>125</sup> The Post Newspaper, Friday January 9 2009

<sup>126</sup> 2009 Budget address pg 22

## **CHAPTER FIVE**

### **General Conclusions and Recommendations**

#### **5.1 Introduction**

This chapter concludes the analysis of the change in the legal regime governing the Large Scale mining sector. It summarizes the preceding chapters, highlighting the salient observations made by the author therein. It further provides commentary and the author's recommendations on some of the issues discussed in the preceding chapters.

#### **5.2 Summary**

Chapter one discussed the importance of the mining sector to the Zambian economy. It illustrated that copper is the mainstay of the Zambian economy, and accounts for the majority of the country's export earnings and gross domestic product.

Against this background the chapter outlined the legal and institutional framework that governed the Large scale mining sector. It discussed the policy objectives behind the Old Act<sup>127</sup>, and the underlying policy and economic considerations that motivated the change in the legal regime governing the large scale mining sector through the enactment of the New Act. Then chapter then highlighted the salient issues that the change brought about, which where the subject of examination in this research paper namely.

Chapter two examined the legal status of the DA's and the possible consequences of the unilateral cancellation of the DA's by the Zambian government under the New Act. It established the DA's where essentially contracts, and where governed by the common law rules of contract in as far as these rules were not altered by Zambian law. The

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<sup>127</sup> Legislation that previously governed the largescale mining sector

chapter established that for the *Zambian* government to cancel the DA's without having to compensate the government for doing so, they will have to show that the DA's were illegal or contrary to public policy in which case they would be void ab initio. In this regard the author assessed that the best chance of the government doing this is if they succeeded in advancing an argument in which they established that the DA's were unconstitutional as their salient provisions<sup>128</sup> amounted to a fetter which was not sanctioned by the Constitution on the Legislature's power to legislate.

The chapter further discussed the principles of frustration and breach and their applicability to the DA's. In this perspective, it established that the DA's had been frustrated by subsequent legislation (the New Act), and this effectively amounted to breach of the Government's obligation not to terminate the DA's in manner not prescribed by them, and subsequently the breach of the Governments obligations in respect of applying a predetermined fiscal regime to the mining sector. Lastly the chapter considered the arbitration proceedings that are likely to be invoked by the mining companies as a result of the government's breach of the DA's.

Chapter 3 investigated the nature of the rights conferred by *Zambian* mineral legislation, and whether these rights are protected by the Constitution. In this respect it established the nature of the mining rights as ascertained by a comprehensive consideration of the conferring legislation. It was established that the Old Act did not confer rights of ownership to the licence holder in respect of unmined minerals, as rights of ownership would only apply to minerals that are recovered (mined) by the licence holder. The

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<sup>128</sup> Those relating to the stability of the fiscal regime. This effectively restricted Parliament from passing tax legislation that contravened the provisions of the DA's.

Chapter further investigated the nature of the property rights protected under the Zambian Constitution. It established that there is uncertainty as to whether mining rights can be considered as property rights. Notwithstanding this ambiguity, it was established that the protection of property rights provided for by the Constitution would possibly not apply to mining rights in two situations. In the first instance, the Constitutional protection of property may be derogated in situations in which the property consists of a licence or permit<sup>129</sup>. In the second instance the Constitution derogates from the protection of property rights, in situations in which a new law subsequently vests in the president any property rights accruing from a mining right held by a private person. In the final analysis, the Chapter concludes that the argument for categorizing mining rights as property rights is a weak one, and even if it was successful, the Constitution provides a mechanism by which such rights may be derogated without the payment of compensation to the right holder.

Chapter four discussed the possible implication of the change in the legal regime to investment in the mining sector. In this perspective, the chapter outlined some of the considerations taken by investors in the mining sector, prior to making their investment. It elaborated on the importance of fiscal stability to prospective investors in the mining sector and how this was guaranteed by the DA's. From this premise, the chapter gives an insight as to how the change in the legal regime governing large scale mining could adversely affect future mining operations, especially in times of economic difficulty.

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<sup>129</sup> It can be argued that this is the nature of a large scale mining licence granted under the Old Act

### 5.3 Recommendations

From the investigation of the nature of mining rights, it was apparent that there is a bit of uncertainty as to whether mining rights confer property rights. In this respect, an appraisal the relevant provisions of the Old Act gives the impression that mineral rights do not grant rights of ownership with respect to unmined minerals and can therefore not be considered as conferring property rights on the right holder. This position is supported by the fact that large scale mining companies are required by law to pay a mineral royalty, buttressing the presumption that ownership of minerals remains with state notwithstanding the fact that a company has been granted a licence to exploit the minerals within a given area. On this premise, the provisions of legislation such as the **Interpretation and General Provisions Act**, which classify personal property (to which property rights attach) as including mineral rights, should be clarified and amended accordingly in order to reflect the true position of the law.

It was further revealed that the Constitutional framework for the protection of mining rights is very weak in the light of the fact that mining rights of whatever nature may compulsorily acquired by the state without the need to pay compensation, through the mechanism of a statute that subsequently vests such rights in the president<sup>130</sup>. In the light of this, it is apparent that investors could easily be deprived of their legally acquired mining rights. Even though such an action is unlikely under the current regime, this Constitutional provision is likely to scare aware any investor who can fully appreciate the scope of the provision. It would be in the best interests of the government to review this part of the Constitution, especially in the context of the ongoing Constitutional reforms.

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<sup>130</sup> Constitution of Zambia, Cap 1, Art 16(2) (x)

In the light of all the controversy arising from the unilateral cancellation of the DA's by the Zambian Government, it is necessary to remove the uncertainty surrounding the scope of a Government's authority to enter into certain contracts, especially those that will have the effect of fettering future government action<sup>131</sup>. Due to the fact the Zambia's legal framework is based on the Constitution, it would be prudent to include in the Constitution, any provisions that have the effect fettering the Constitutional mandate of an organ of the Government, so as to give such fettering provisions constitutional legitimacy.

Though the possible impact of the change in the legal regime on investment in the sector has already been discussed in the preceding chapter, it is necessary to emphasize the importance of a stable legal regime to govern the large scale mining sector in general, and its applicable fiscal regime in particular. In this perspective it is important for the Government to fully appreciate the capital intensive nature of mining activity, and the financial risks associated with investment in the mining sector, in particular, the fact that the cost of minerals mined is determined by the international market, and as such costs incurred during production, cannot be passed on to the entities that buy the minerals from the mining companies. As a result of this, Government should also be sensitive and cautious in coming up with taxes that will apply to the mining enterprises under the new legal regime, especially during the times when commodity prices on the international market are low. During such times, Government will do well to apply a favourable fiscal regime to the mining companies, even though it will be at the expense of projected government revenue from mining activities. Similarly, when prices of mineral

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<sup>131</sup> For example the stability clauses in the DA's effectively fettered Parliament's legislative mandate

commodities are high on the international market, the Government may accordingly apply a less favourable fiscal regime to the mining enterprises. If such an approach is taken, it would go a long way in winning the confidence of prospective investors in the mining sector as the lack of a mechanism for fiscal stability (which was previously provided by the DA's) would be alleviated by a fair regulation of the fiscal regime by the Government.

#### **5.4 Conclusion**

The change in the legal regime governing the Large scale mining sector has brought to light a number of legal issues connected to large scale mining in Zambia. The paper investigated the legal status of the Development Agreements entered into between the Zambian Government and the mining companies. Upon establishing the legality of these agreements, the paper established that the New Act had the effect of terminating these agreements by frustration, and effectively amounted to breach of the Governments obligations under the agreement.

The paper also investigated the precise nature of the mining rights granted under Zambian law, and though there is a bit of uncertainty as to whether these mining rights qualify as property rights, the paper revealed the frailty of these rights under Zambian law, based on the provisions of the Constitution under which the Government may compulsorily acquire these rights.

Lastly, the paper discussed the possible effect of the legal change on investment in the large scale mining sector, and to this end, made some suggestions as to how investment

in the sector may be promoted and protected in spite of the change in the legal regime governing the sector. In this perspective, there is need for investors to understand the law concerning large scale mining in a more comprehensive manner. To do this they need to look beyond the laws, and consider the underlying political and economic factors that affect the large scale mining legal regime. By doing so, they will be able to understand and appreciate the motivating factors for some of the changes to the legal regime governing the large scale mining sector.

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