# OPERATIONALIZING INTERNATIONAL LAW PRINCIPLES GOVERNING STATE SOVEREIGNTY OVER MINERAL RESOURCES: THE CASE OF ZIMBABWE AND THE DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

The thesis submitted by

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Supervisor: Associate Professor Tracy-Lynn Humby

# Declaration

I declare that this thesis is my own work and has not been submitted for any degree or examination in any institution or published in any journal, textbook or media.

This thesis is up to date as of 15 April 2015.

Signed: _____
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27 April 2015
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‘Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, [no transparency], no accountability, there is abuse, corruption, subjugation, indignation, poverty and suffering’

by Atifete Jahjaga

## Dedication

To my wife, Degma; to my parents and siblings, humble as they are, who have dedicated themselves in prayer for the good of our family; I dedicate this work to them. To Darryl or DMG. And to my grandparents, who were generous to everybody but only found disappointment in their home – brutally murdered by our maternal kin for no cause, may your souls rest in eternal peace.

## And

To all those who have been killed due to resource conflicts; to all those who have been maimed and ostracized due to the quest for social justice and beliefs in the democratic cause: What we demanded, and were deprived of, was the right to equitable sharing and benefiting from their natural resources, and the right to an environment that is conducive for humanity to express their uncensored views. Such deprivations require censure of the highest order.

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## Abstract

The well-worn paradox of the resource curse has not yet been thoroughly examined through the lens of international law principles governing state sovereignty over mineral resources, and how these principles have been operationalized in developing African states. Africa is richly endowed with an array of mineral resources but the development of the continent as a whole and of individual states has not been concomitant with this resource endowment. Although international law provides African states with the mandate to regulate and derive benefits from exploitation of their mineral resources, they do not appear to be working within this mandate in a manner that ensures the flow of benefits in a sustainable and equitable way. The international law mandate to regulate and derive benefits from mineral resources is however multi-faceted. The thesis identifies three key international law principles which support state sovereignty over mineral resources; namely, self-determination, non-interference (non-intervention) and permanent sovereignty over natural resources (PSNR). Along with the right to development, these principles provide a solid basis in international law for African states to capitalize on their mineral resources in a developmental way. The *realpolitik* of mineral extraction, however, requires that African states court investment and establish trade relations. This expands the mandate to regulate and derive benefits from mineral resources to include principles of international investment and trade law, which relate to state sovereignty over mineral resources in ambiguous ways. Additionally, various overarching issues and threats such as corruption, illegal mining and conflict situations arise and host states have to navigate them in order to assert their mandate and sovereignty over mineral resources for self-determination and development. How states navigate this complex space through their authority to determine and implement domestic mineral laws is a question worthy of consideration. Two case studies, Zimbabwe and the Democratic Republic of the Congo (DRC) illustrate the multi-faceted ways in which African states use (and fail to use) their domestic laws in a manner that allows them to benefit from the international law mandate in support of self-determination and development.

## Acronyms

| | |
|---|---|
| ADF | Allied Democratic Forces |
| AEC | African Economic Community |
| AECs | Artisanal Exploration Cards |
| AFDL | *L'Alliance des Forces Démocratiques pour la Libération du Congo* |
| AMV | Africa Mining Vision |
| BBBEE | Broad-Based Black Economic Empowerment |
| BIPPA | Bilateral Investment Promotion and Protection Agreement between South Africa and Zimbabwe |
| BIT | Bilateral Investment Treaty |
| BSAC | British South African Company |
| CNDP | National Congress for the Defense of the People |
| CNRG | Centre for Natural Resource Governance |
| COMESA | Common Market for Eastern and Southern Africa |
| CRD | Centre for Research and Development |
| DFLR | Democratic Forces for the Liberation of Rwanda |
| DRC | Democratic Republic of the Congo |
| EIA(s) | Environmental impact assessment(s) |
| EIS | Environmental Impact Study |
| EITI | Extractive Industries Transparency Initiative |
| EITO | European Information Technology Observatory |
| EMPP | Environmental Management Plan of the Project |
| EMPs | Environmental management plans |
| EPO | Exclusive Prospecting Orders |
| ESAP | Economic Structural Adjustment Programme |
| FDLR | Democratic Forces for the Liberation of Rwanda |
| FRELIMO | Liberation Front of Mozambique or Mozambique Liberation Front |
| FXC-US | Freeport McMoRan Copper and Gold Incorporation |
| GATS | General Agreements on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| GECAMINES | *La Générale des Carrières et des Mines* |
| GLEN | Glencore Xstrata Plc |

| | |
|---|---|
| GSU | Geological Survey Unit |
| HPDM | Head of the Provincial Division of Mines |
| ICC | International Chamber of Commerce |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| IMF | International Monetary Fund |
| ISO | International Standards Organization 14000 |
| KPCS | Kimberley Process Certification Scheme |
| KPMG | Klynveld, Peat, Marwick & Goerdeler (accounting firm) |
| LEP | Look East Policy |
| LRA | Lord's Resistance Army |
| MDC | Movement for Democratic Change |
| MFN | Most Favoured Nation |
| MMCZ | Minerals Marketing Corporation of Zimbabwe |
| MONUSCO | United Nations Organization Stabilization Mission in the DRC |
| MRP | Mitigation and Rehabilitation Plan |
| NEPAD | The New Partnership for Africa's Development |
| NGOs | Non-governmental organizations |
| NIEO | New International Economic Order |
| OECD | Organization for Economic Cooperation and Development |
| OKIMO | *Office des Mines d'Or de Kilo-Moto* |
| PPC | Parliamentary Portfolio Committee |
| PRADD | Property Rights and Artisanal Diamond Development |
| PRGF | Poverty Reduction and Growth Facility |
| PRGSP | Poverty Reduction and Growth Strategy Paper |
| PRSP | Poverty Reduction Strategy Paper |
| PSNR | Permanent Sovereignty over Natural Resources |
| PWYP | Publish What You Pay |
| RAID | Rights and Accountability in Development |
| RENAMO | Mozambican National Resistance Movement |
| SADC | Southern African Development Community |

| | |
|---|---|
| SAESSCAM | *Service d' Assistance et d' Encadrement de Small Scale Mining* |
| SODIMICO | *Société de Développement Industriel et Minier du Congo* |
| SOKIMO | *Société des Mines d'Or de Kilo-Moto* |
| TI-Z | Transparency International - Zimbabwe |
| UDHR | Universal Declaration of Human Rights |
| UMHK | *Union Minière du Haut-Katanga* |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCT | United Nations Country Teams |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDG | United Nations Development Group |
| UNDP | United Nations Development Programme |
| UNDRD | United Nations Declaration on the Right to Development |
| UNGA | United Nations General Assembly |
| UNITA | National Union for the Total Independence of Angola |
| UNSC | UN Security Council |
| USAID | United States Agency for International Development |
| VAT | Value Added Tax |
| WTO | World Trade Organization |
| ZANU PF | Zimbabwe African National Union Patriotic Front |
| ZDTC | Zimbabwe Diamond Technology Centre |
| ZIA | Zimbabwe Investment Authority |
| Zim-ASSET | Zimbabwe Agenda for Sustainable Socio-Economic Transformation |
| ZISCO | Zimbabwe Iron & Steel Company |
| ZMDC | Zimbabwe Mining Development Corporation |
| ZRA | Zimbabwe Revenue Authority |

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# CHAPTER 1

# GENERAL INTRODUCTION

## 1.1 Overview of Thesis

The geographical location and uneven distribution of mineral resources across the world, and their finite character, as well as their industrial demand makes competition to access them amongst foreign mining investors very competitive.[1] Fortunately, Africa is richly endowed with an array of mineral resources.[2] The economic value of minerals makes them one of the most treasured natural resources on the African continent and has been one of the major drivers of colonization.[3] Regardless of being home to various mineral resources, however, the development of Africa as a whole and of individual states has not been concomitant with this endowment, a paradox captured as the "resource curse".[4]

The paradox of the resource curse is yet to be thoroughly examined through the lens of international law principles governing state sovereignty over mineral resources, and the manner in which these principles have been operationalized in domestic mining laws of states. Although international law provides states with the mandate to regulate and derive benefits from exploitation of their mineral resources,[5] however, the operationalization of the principles does not appear to be working to promote the mandate in a manner that ensures the flow of benefits in a sustainable and equitable way. One of the contributions of this thesis is to provide a conceptual framework to view the resource curse paradox through the lens of international law.

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[1] See generally the United Nations Economic Commission for Africa, International Study Group Report on Africa's Mineral Regimes 'The Minerals and Africa's Development' 2011 at 2 & 21 – 27, available at http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf (accessed 3 March 2015).
[2] Examples of minerals found in African are; bauxite, cobalt, diamonds, phosphate rock, platinum group metals (PGMs), vermiculite, gold, chrome, copper, iron ore, coltan, manganese, titanium, zinc, asbestos, nickel, limestone, tin, tantalum, tungsten, uranium, malachites, aegirine, azurite, barite, calcite, carrollite, cassiterite, celestine, chrysocolla, columbite, cuprite, epidote, fluorite, malachite, malachite, rhodizite, emerald, sapphirine, scapolite, spinel, sturmanite, thorianite, topaz, torbernite, willemite and zircon.
[3] The Minerals and Africa's Development, supra note 1 at 12 – 13.
[4] See generally Michael L Ross 'The politics of the resource curse: A review' 2013; Ichumile Gqada 'Mining and minerals for development: Making the case for Africa' 2012, available at http://www.saiia.org.za/opinion-analysis/mining-and-minerals-for-development-making-the-case-for-africa (accessed 3 April 2015).
[5] See generally the UNGA Resolution 1803(XVIII): Permanent Sovereignty over Natural Resources of 14 December 1962.

The thesis identifies three key international law principles which support state sovereignty over mineral resources, namely, self-determination, non-interference (non-intervention) and permanent sovereignty over natural resources (PSNR). Along with the right to development, these principles provide a solid basis in international law for developing states to capitalize on the regulation and exploitation of their mineral resources in a developmental way.

The *realpolitik* of mineral exploitation, however, requires that developing states court investment and establish reliable trade relations.[6] This expands the mandate to control and regulate mineral resources to include benefits derived from principles of international investment and trade law, which relate to state sovereignty over minerals in unclear ways. In addition, various overarching issues and threats; namely, corruption, illegal mining, conditionality policies of the World bank and the IMF, and conflict situations arise and host states have to navigate them in order to assert control over domestic mineral resources.[7] The manner in which developing states, in particular African states, navigate this complex space through their authority to determine and implement domestic mining laws is a question worthy of consideration.

Two case studies, Zimbabwe and the Democratic Republic of the Congo (DRC) illustrate the multi-faceted ways in which developing states use or fail to use their domestic laws in a manner that allows them to derive benefits from the international law mandate supporting self-determination and development. Both case studies provide and illustrate threats to the outworking of sovereignty over mineral resources and the mandate to develop through exploitation of the resources.

## 1.2 Problem Statement and Questions

The problem is that many African states endowed with mineral resources have not benefited to the extent concomitant with their endowment despite the international law principles highlighted above, which give host states the mandate to assert sovereignty over domestic mineral resources and regulation. This mandate potentially has no meaning in the absence of effective legal protections that give effect to indigenous conceptions of development.

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[6] See generally Gavin Wright & Jesse Czelusta 'Mineral resources and economic development', a paper prepared for the Conference on Sector Reform in Latin America, Stanford Center for International Development, 13 – 15 November 2003.

[7] See generally Richard J Lazarus 'Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine' (1986) 71 *Iowa Law Review* 631 at 631 – 632.

As reflected earlier, one would assume that since colonialism ended, African states have gained sovereignty, political and economic self-determination, as well as full control over their mineral resources. One of the issues considered is the strengths and limitations of international law regarding the ability of African states to benefit from exploitation of their mineral resources. Although international law principles are intended to regulate and address various legal issues that affect relations among states, challenges exist on how to effectively take advantage of the international principles which support state sovereignty against the tensions and threats that affect the exercise of the mandate. The thesis considers some of these principles arguing, among other things, that they place rights and obligations on African states to exploit and benefit from their mineral resources. Against this background, there is a need to establish whether African states are taking full advantage of the mandate given by international law principles over their mineral resources and the relevant rights enshrined in the various international treaties on ownership and control of domestic mineral resources.[8]

The question for consideration is how Zimbabwe and the DRC use domestic law and policy as a strategic arena within the frame established by international law principles. There is a gap in research about the appropriate global legal response to the domestic regulation of, and safeguards for mineral resources, as well as the need for policy or institutions to counteract particular illegal activities (criminality) that disadvantage African states and prevent them from benefitting from exploitation of their resources.

This thesis therefore examines the inverse relationship between mineral wealth and development in Africa (the "resource curse" problem) from the perspective of how international law principles potentially frame host states' regulatory response to mineral resources, both in terms of how they capitalize on the mandate provided by international law, how they navigate the tensions between different categories of international law principles, and how they deal with key threats to sovereignty. The focus of the thesis is on the strategic

[8] See generally international legal instruments such as the UN GA Resolution 1803 (XVII); Article 2(1) of the UN Charter, 1945; Article 1 – 2(2)(a)-(c) of the Charter of Economic Rights and Duties of States; Article 1(2) of the International Covenant on Civil and Political Rights, 1966; Article 1(2) of the Article 1(1) of the International Covenant on Economic, Social and Cultural Rights, 1966, hereafter the ICESCR; See Principle 2 of the Rio Declaration on Environment and Development, 1992; here after the Rio Declaration; Principle 21 of the Declaration of the United Nations Conference on the Human Environment, 1972; hereafter the Stockholm Declaration; Article 3 of the CBD. See also Lord McNair *The Law of Treaties* (1961) at 100.

arena of domestic law and policy. This serves as a novel approach to the resource curse problem.

The research adds to existing knowledge of the resource curse through analysis of domestic aspects of the mining laws of the DRC and Zimbabwe. Both of these states exhibit the resource curse problem. The inability of both states to navigate the various threats to an internationally-conferred mandate to exploit and benefit from mineral resources using domestic mining law is a cause of concern. The gap highlights further the contribution of this thesis and the importance of the case studies.

The *realpolitik* of mineral resource exploitation requires investment and trade, which is governed by distinct set of international law principles that may clash with the internationally recognized mandate of states over their resources and their domestic regulation. Some African states endowed with mineral resources are not capable of exploiting them without capital which comes with foreign investment. The investments in turn come with conditions that may interfere with the exercise of sovereignty over mineral resources for self-determination.

### 1.3 Objectives of the Study

The study has been motivated by the need to assess how African states use domestic law and policy, within the frame provided by international law, to benefit from the exploitation of their mineral resources. The study has five main aims which are:

(i) To identify the general international law principles which support state sovereignty over domestic mineral resources.

(ii) To critically assess and analyze the effectiveness of aspects of the principles of international law which supports sovereignty as they manifest in domestic law.

(iii) To identify threats to the exercise of sovereignty in pursuit of self-determination and whether these constitute interference.

(iv) To examine the extent to which domestic mining law and policy assist host states to assert sovereignty over mineral resources and navigate the threats and interferences.

(v) To investigate the potential for applying domestic law and polices to curb the interferences and threats which disadvantage host countries, such as the DRC and Zimbabwe, to regulate and benefit from their domestic mineral resources.

## 1.4 Background to the Study

It is an indisputable fact that Africa is richly endowed with an array of mineral resources, which are the backbone of many economies on the continent. With such a highly treasured endowment, ideally, Africa should take advantage to exploit and export the resources, as well as use the proceeds for development.[9] Despite this endowment, however, the continent is poor and underdeveloped. To determine the extent of development, indicators take into account factors such as human capital,[10] income distribution, critical infrastructure (example, financial services, electricity generation, public health and clean water supply), inter-regional competitiveness, transportation systems and telecommunication. In light of these indicators, however, '[a] sustained improvement in African human development […] falls, nonetheless, short of those experienced in other developing [or developed] regions.'[11]

Many African states characteristically fall towards the lowest ranking of most lists measuring the extent of development activities, such as income per capita or gross domestic product (GDP), in spite of the continent being rich in mineral resources.[12] In many African states, the GDP per capita is less than US$5000 per year, with the majority of the population living below US$1.50 per day.[13] In addition, the extent of Africa's share of global income has been consistently declining over the past decades.

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[9] L C Stilwell 'Mineral endowments and developing economies' The Southern African Institute of Mining and Metallurgy Base Metals Conference, 2009 at 153.

[10] Human capital can be considered as the stock of knowledge, habits, social and personality attributes, including the creativity embodied in the ability to perform labour so as to produce economic value.

[11] See generally United Nations Development Programme (UNDP) 'Human development reports,' available at http://www.hdr.undp.org/en/data (accessed 3 December 2014); Leandro Prados de la Escosura 'Human Development in Africa: A long-run perspective' (2011) 8 *European Historical Economics Society, Working Papers in economic History* 1.

[12] See generally United Nations Department of Economic and Social Affairs Division for Sustainable Development 'Finance for sustainable development: Testing new policy approaches' 2002, Proceedings of the Fifth Expert Group Meeting on Finance for Sustainable Development, Nairobi, Kenya, 1- 4 December 1999.

[13] Ibid. See generally International Monetary Fund (IMF) 'Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative' 2014, available at https://www.imf.org/external/np/exr/facts/hipc.htm (accessed 3 December 2014); Shaohua Chen & Martin Ravallion 'The changing profile of poverty in the world' 2020 FOCUS BRIEF 'World's Poor and Hungry People' (2007); Punam Chuhan-Pole, Luc Christiaensen, Allen Dennis, Gerard Kambou, Manka Angwafo, Mapi Buitano, Vijdan Korman, Camila Galindo Pardo, Aly Sanoh *Africa's Pulse* (2013) at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol8.pdf (accessed 4 December 2013); Morton Jerven *Poor Numbers – How We are*

The causes of the paradoxical relationship between mineral wealth and underdevelopment drew my attention. The major explanations for Africa's underdevelopment typically focus on the influence of colonialism and the removal of approximately 20 million slaves, who were forcibly exported from the African continent.[14] Once considered as "no man's land", Africa was a source of cheap labour. The geographical location of the continent was ideal for commercial market access, which was highly strategic and integral to sustain convenient trade routes from Europe to Asia and the Americas.[15] Apart from these factors, the natural endowment of the continent was one of the major, central and inherent causes of the scramble for Africa and rapid colonization by the European powers.[16] The rush into Africa mainly in the 19th century was in search for various natural resources, including minerals that were required for industrial purposes and economic development, as well as military evolution in Europe.[17]

Having established their colonies in many parts of Africa, the colonial governments used gunboat diplomacy[18] in order to exploit resources. While one may argue that colonialism paved the way for the settlers to bring technological innovation in the colonies, the scramble for Africa also fundamentally obstructed internal processes of state formation and indigenous conceptions of development.[19] It could be argued that the vestiges of colonialism include corruption, greed, political instability, injustice and underdevelopment, phenomena still

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*Misled by African Development Statistics and What to Do about It* (2013); The World Bank 'Poverty Overview' 2014 at http://www.worldbank.org/en/topic/poverty/overview (accessed 4 December 2014).

[14] See generally Simon Johnson & James A Robinson 'The colonial origins of comparative development: An empirical investigation' (2001) 91 *American Economic Review* 1369; Nathan Nunn 'The long-run term effects of Africa's stave trade' (2008) 123 *Quarterly Journal of Economics* 139; Stelios Michalopoulos & Elias Papaioannou *The long-run effects of the scramble for Africa* (2011) at 1.

[15] J D Hargreaves 'The making of boundaries: Focus on West Africa' in A I Asiwaju (ed) *Partitioned Africans: Ethnic Relations Across Africa's International Boundaries 1884 – 1984* (1985) 19 at 21.

[16] Thomas Pakenham *The Scramble for Africa: White Man's Conquest of the Dark Continent 1876 – 1912 (*1991) at 2; Georges Nzongola-Ntalaja *The Congo: From Leopold to Kabila* (2002) at 227; Abiodun Alao *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (2007) at 10 – 11.

[17] See generally Ruth W Arad & Arad U B 'East-West: The scramble for the world's resources' in Ruth W Arad, Arad U B, McCulloch R, Pinera J & Hollick A L (eds) *Sharing Global Resources* (1979) 25; James Otto & John Cordes *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (2002) at 11-13; Linda Frederisksen, Margaret Bean & Heidi Nance *Global Resource Sharing* (2012).

[18] Military force was used to establish and maintain political control over the colonies.

[19] See generally Fouad Makki 'Post-colonial Africa and the world economy: The long waves of uneven development' (2015) 2 *Journal of World-Systems Research* 124 at 125 – 126. See also Joe Duke II 'The impact of colonialism on the development of management in Nigeria' (2010) 5 *International Journal of Business and Management* 64.

observed in many parts of Africa.[20] The predatory manner in which colonial governments illegally controlled Africa's mineral resources, and insatiably exploited and looted the resources, intrinsically prejudiced Africa against using its resources for economic growth and development.

The wave of decolonization that swept Africa after World War II was underpinned by complex processes that varied widely from one African country to another.[21] As the process continued to spread, the United Nations General Assembly (UNGA) adopted a landmark instrument, the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960.[22] Unswervingly, the Declaration confirmed the rights of all peoples to self-determination and declared colonialism be brought to a quick and unconditional end. To further show commitment to end colonialism in 1962, a Special Committee on Decolonization was established to monitor the implementation of the Declaration in order to speed up the decolonization process. Various international law instruments, including resolutions on permanent sovereignty over natural resources (PSNR), were enacted in order to unequivocally spell out and resolve the controversy relating to resource control in international law.[23] Concomitant with the resolution on PSNR, was a relative consensus which stressed the need to promote economic development in order to achieve universal peace. Without international peace, however, it would have been impossible to control mineral resources, as well as to exploit them for self-determination. Accordingly, it can be argued that the decolonization period marked a new international order which recognized and gave effect to the principles of self-determination, PSNR and non-intervention (non-interference) in domestic affairs of states.

[20] Tangie Nsoh Fonchingong 'The state and development in Africa' (2006) 8 *African Journal of International Affairs* 1 at 4.
[21] The Map as History 'Decolonization after 1945' available at http://www.the-map-as-history.com/maps/11-decolonization_independence.php (accessed 3 December 2014).
[22] UNGA Resolution 1514 (XV) - Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960.
[23] Some of the instruments include UNGA Resolution 626(VII) – Permanent Sovereignty over Natural Resources, 2 December 1952; UNGA Resolution 1314(XIII) - Permanent Sovereignty over Natural Resources, 12 December 1958; UNGA Resolution 1803(XVII) - Permanent Sovereignty over Natural Resources, 14 December 1962. See also Bilder R B 'International law and natural resources policies' (1980) 20 *Natural Resources Journal* 451; Jonathan I Charney 'Transnational corporations and developing public international law' (1983) 4 *Duke Law Journal* 748; Tyler S R *Co-management of Natural Resources* (2006).

Following the granting of political independence, the new states had to shape their political and economic status. Some worked against the challenges of continued political hegemony,[24] while others worked with former colonial powers or other powers in order to protect their interests and maintain control over economic resources.[25] Apparently, the ultimate goal was to promote development through exploitation of domestic mineral resources, amongst other natural resources.[26] One may give credit to the UN and international law for supporting African states' sovereignty and the mandate to control their mineral resources. As highlighted above, however, many African states rich in natural resources have not enjoyed substantial economic growth and development.[27] In particular, there have been diverging interests in the control of mineral resources, and varying conditions, threats and interferences that have negatively affected the sovereignty of African states over mineral resources.

Although international law is legally binding over the allocation and control of natural resources,[28] the international law principles that are in place do not operate in isolation. Municipal laws are used to implement the international order. At the domestic level, control of mineral resources is achieved through the relevant laws and state institutions. Therefore, it is inherently the right and duty of host states to set out the ways in which exploitation of minerals resources takes place, by enacting provisions in mining laws that set out the manner in which sovereignty over mineral resources can still be protected, even whilst exploitation of the resource takes place at the hand of third parties with the requisite technical and financial resources. However, it is disappointing that many African states appear to be unable to control their resources for self-determination.[29] As such, one of the critical issues presently is the inability of many African countries to convert their mineral endowment into economic growth and development.[30] Many academic commentators see this problem as a 'resource

[24] Benjamin Talton 'The challenge of decolonisation in Africa' 2011, available at http://exhibitions.nypl.org/africanaage/essay-challenge-of-decolonization-africa.html (accessed 15 April 2015).
[25] Ibid.
[26] Ibid.
[27] Abiodun Alao, op cit note 16 at 1 -7. See generally Rita Abrahamsen (ed) *Conflict and Security in Africa* (2013).
[28] See generally Bilder R B, op cit note 23.
[29] See generally the New Partnership for Africa's Development (NEPAD), was adopted in Abuja, Nigeria on 23 October 2001, available at http://www.nepad.org (accessed 3 December 2014).
[30] Emeka Duruigbo 'Permanent sovereignty and people's ownership of natural resources in international law' (2006) 38 *George Washington International Law Review* 33. See also Lila B 'Sovereignty over natural resources under examination: The inter-American system for human rights and natural resources allocation' (2006) 12 *Annual Survey of International & Comparative Law* 43; Fawcett J E S & Parry A *Law and International Resource Conflicts* (1981) at 3; Gulland J A 'World fisheries and fish stocks' (1977) 1 *Marine Policy* 179. See further Crowson P 'British foreign policy: Dependence on non-fuel minerals' (1978) *International Affairs* 1.

curse',[31] denoting an inverse relationship between the state's mineral resource endowment and economic growth, and development.[32]

In addition to poverty, many African states have experienced, and indeed, they are currently experiencing conflicts associated with mineral resources. For example, resource conflicts have been experienced in the DRC (including the deadly conflict of 1998-2004), which was labelled 'Africa's First World War'.[33] Apart from the DRC, conflicts have also been experienced in Zimbabwe, Sierra-Leone, Nigeria, Liberia, and Angola, amongst others.[34] At the core of the conflicts is the element of control over the resources,[35] caused by uneven distribution of the benefits or proceeds to all levels of society. Conflicts further weaken fragile state institutions, which raises concern about the appropriate locus of mineral resource regulation in the face of threats and inferences.[36] Some prominent academics including Nzongola-Ntalaja equate mineral resource conflicts to the 'scramble for Africa'.[37] The reason for the equation could be that tensions in mineral resource regulation restrict and weaken sovereignty of host states.[38] In short, the origin of protracted conflicts in many parts of Africa lies in past colonial policies that caused divisions, prejudice, manipulation and uneven distribution of wealth, and infrastructure and development exclusions. It is therefore critical to understand intractable mineral resource control conflicts and their causes in the context of the state's capacity to exercise control over exploitation of domestic mineral resources as well as the negative lingering and destructive effects of colonialism.[39]

In a nutshell, there is an interdependent relationship between international law, domestic law and state sovereign control over domestic minerals, as well as economic growth and

[31] For discussion on the concept of the resource curse, see Michael L Ross, op cit note 4. Also, see section 1.5 below.
[32] Marta Reynal-Querol 'The curse of acid' (2008) 13 *Journal of Economic Growth* 169. See generally Richard M Auty *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993).
[33] Abiodun Alao, op cit note 16 at 10 – 11. See also Holpe H 'The Great Lakes crisis: An American view' (2000) 7 *SAJIA* 2; Willie Breytenbach, Dalitso Chilemba, Thomas A Brown & Charlotte Plantive 'Conflict in the Congo: From Kivu to Kabila' (1999) 8 *African Security Review* 33.
[34] Abiodun Alao, op cit note 16 at 9 - 10. See also Ross, op cit note 4. See further Jorge Viñuales 'The resource curse: A legal perspective' (2011) 17 *Global Governance* 197.
[35] Charles Kenneth Leith 'The political control of mineral resources' (1925) 3 *Council on Foreign Affairs* 541.
[36] Abiodun Alao, op cit note 16 at ix.
[37] Georges Nzongola-Ntalaja *The Congo: From Leopold to Kabila: A People's History* (2002) at 227. See generally Abiodun Alao, op cit note 16.
[38] Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz 'Introduction: What is the problem with natural resource wealth?' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 1 at 2.
[39] Sandra Marker 'Effects of colonization' 2003 at http://www.beyondintractability.org/essay/post-colonial (accessed 3 December 2014).

development.[40] Fundamentally, how this relationship can be effectively utilized and transformed in order to ensure the control of mineral resources for self-determination and development is a significant problem.

For the purpose of this thesis, there are a number of key international law principles that support state sovereignty over domestic mineral resources. The principles fall into two broad categories; namely, those that give states the mandate to control their mineral resources, and those that facilitate access to investment and trade of the resources. By taking advantage of both sets of principles, states would be exercising sovereignty. However, in so doing, African states face a number of difficulties. There are two kinds of difficulties; namely, (i) to secure foreign investment and market share, which often come with conditions that have a problematic and (ii) unclear relationships with the mandate to control mineral resources. There is thus an inherent tension between the categories of international law principles necessary for a state to fully benefit from their mineral endowment, with the principles supporting the mandate to control mineral resources frequently being undermined by international law principles facilitating access to investment and trade. The other set of difficulties are the threats to sovereignty[41] posed by corruption, illegal mining and smuggling, and conflicts associated with control over mineral resources. These challenges potentially restrict the state's exercise of sovereignty over mineral resources in a manner that would lead to self-determination and development. Within the space provided by the order established by the two categories of international law principles alluded to above, domestic policies and laws on mining provide an arena for the state to manoeuvre, to attempt to hold the diverse tensions swirling around the exploitation of mineral resources.[42]

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[40] After lying dormant in the post-decolonization era, the conditions inserted into the United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, which inter alia, directs sovereign nations to use resources for the benefit of their citizens, have found its way back to the fore and has taken a new shape. See Principle 2 of the Rio Declaration, supra note 8. The same principle has been contemplated in Article 3 of the Convention on Biological Diversity, 1992; hereafter the CBD.

[41] See generally Pring G & Siegele L 'International law and mineral resources development' in Bastida Elizabeth, Walde Thomas & Warden-Fernandez Janeth (eds) *International & Comparative Mineral Law and Policy, Trends and Prospects* (2005) 129. See also Sturchler N & Elsig M 'Spoiling the party? Multilateralism, participation and international cooperation' paper delivered at the Conference on the New International Law, Oslo, 15 – 18 March 2007, available at http://phase1.nccr-trade.org/images/stories/publications/IP2/SturchlerElsig_spoilingtheparty.pdf (accessed 29 November 2012).

[42] Article 2(2)(a)-(c) of the Charter of Economic Rights and Duties of States, 1974. See also Bonita Meyersfeld 'Institutional investment, human rights and international regulation' a paper presented at the Global and Governance Conference, 14 -16 October 2010, Mandela Institute, Chalsty Teaching and Conference Centre, School of Law, University of the Witwatersrand, Johannesburg, South Africa.

Accordingly, the manner in which international law principles manifest in domestic mining laws, and as a way not only to give effect to the mandate to control mineral resources but also to navigate the difficulties which come with other principles, such as investment and trade principles, and the threats of corruption, illegal mining and mineral resource conflicts, is an area of investigation that responded to my curiosity regarding the inverse relationship between Africa's mineral wealth and her development.

### 1.5 The Concept of the "Resource Curse"

Before introducing the categories of international law principles pertinent to this study, it is appropriate to dwell for a moment on the concept of the resource curse, because this concept, perhaps more than any other, has been used to capture the idea of an inverse relationship between mineral wealth and development and self-determination. To what extent has the resource curse been contextualized by relevant international law principles?

The origins of the resource curse theory lie in the work of Richard Auty[43] who set forth empirical evidence to prove that '[…] not only may resource-rich countries fail to benefit from a favourable endowment; they may actually perform worse than less well-endowed countries'.[44] From the surveyed literature, however, explanations for the inverse relationship vary, focusing on issues such as economic and political factors, with much emphasis on the economic distortions that success in natural resource exports can induce.[45]

[43] See generally Richard M Auty *Resource-based Industrialization: Sowing the Oil in Eight Developing Countries* (1990). See also See generally Jeffrey D Sachs & Andrew M Warner 'Natural resource abundance and economic growth' Center for International Development and Harvard Institute for International Development, 1997. Alan Gelb & Associates *Windfall Gains: Blessing or Curse?* (1988), Thorvaldur Gylfason, Tryggvi Thor Herbertsson & Gylfi Zoega 'A mixed blessing: Natural resources and economic growth' (1999) 3 *Macroeconomic Dynamics* 204; Paul Stevens & Evelyn Dietsche 'Resource curse: An analysis of the causes, experiences and possible ways forward' (2008) 36 *Energy Policy* 56; Chris Ballard & Glenn Banks 'Resource wars: The anthropology of mining' (2003) 32 *Annual Review Anthropology* 287; Miguel Urrutia 'The politics of economic development policies in resource rich states' in Miguel Urrutia & Setsuko Yukawa (eds) *Economic Development Policies in Resource Rich Countries* (1988) 154.

[44] Ibid, (Chris Ballard & Glenn Banks) at 295. See also Richard M Auty, op cit note 32 at 1. See also George Soros 'Foreword' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) xi; Kym Anderson 'Are resource-abundant economies disadvantaged?' CIES Seminar paper 1997-03, Department of Economics and Centre for International Economic Studies, University of Adelaide, paper presented at the 41st Annual Conference of the Australian Agricultural and Resource Economics Society, Gold Coast, Australia, 22 – 24 January 1997.

[45] Chris Ballard & Glenn Banks, note 43 at 295. See also Jeffrey D Sachs & Andrew M Warner, op cit note 43; Alan Gelb & Associates, op cit note 43; Paul Stevens & Evelyn Dietsche, op cit note 43.

Following on from Auty, the literature on the resource curse[46] has confirmed that being endowed with natural resources does not automatically translate into long-term economic development.[47] However, there is no uniform agreement on what the causes of the resource curse might be. Academic commentators put forward various explanations to justify the problem,[48] a landscape that Rosser has grouped into seven categories:

> (i) economistic perspectives that emphasize economic mechanisms; (ii) behaviouralist perspectives that emphasize emotional or irrational behaviour on the part of political actors; (iii) rational actor perspectives that emphasize self-interested behaviour on the part of political actors; (iv) state-centered perspectives that emphasize the nature of the state; (v) social-capital perspectives that emphasize the degree of social cohesion in countries; (vi) structuralist perspectives that emphasize the role of social groups or socio-economic structure; and (vii) radical perspectives that emphasize the role of foreign actors and structures of power at a global level.[49]

These categories are based on different ideologies and methodologies, however, Rosser is of the view that resource curse commentators have been asking wrong questions without focusing on why natural resource endowment has nurtured several "political pathologies" and in turn promoted poor and weak economic development performance.[50] Instead, he argues that the commentators should focus on '[…] asking what political and social factors enable some resource abundant countries to utilize their natural resources to promote development and prevent other resource abundant countries from doing the same'.[51]

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[46] Chris Ballard & Glenn Banks, op cit note 43 at 295. See generally Michael L Ross, op cit note 4; Jeffrey D Sachs & Andrew M Warner 'The curse of natural resources' (2001) 45 *European Economic Review* 827; Michael L Ross 'The political economy of the resource curse' (1999) 51 *World Politics* 297; Maiju Perälä 'Persistence of underdevelopment: Does the type of natural resource endowment matter?' 2003 United Nations University, World Institute for Development Economics Research, discussion paper No. 2003/37; Ainsley D Elbra 'The forgotten resource curse: South Africa's poor experience with mineral extraction' (2013) 38 *Resources Policy* 549.

[47] Ainsley D Elbra 'The forgotten resource curse: South Africa's poor experience with mineral extraction' (2013) 38 *Resources Policy* 549. See also Auty, op cit note 32 at 1 – 3 & 6; Michael L Ross, op cit note 4.

[48] F example, see Jeffrey D Sachs & Andrew M Warner, op cit note 43; Auty, op cit note 32; Graham A Davis 'Learning to love Dutch disease: Evidence from minerals economies' (1995) 23 *World Development* 1765; Christa N Brunneschweiler & Erwin H Bulte 'The resource curse revisited and revised: A tale of paradoxes and red herring' (2008) 55 *Journal of Environmental Economics and Management* 248; Frederick Van der Ploeg & Steven Poelhekke 'The pungent smell of red herrings: Subsoil assets, rents, volatility and resource curse' (2010) 60 *Journal of Environmental Economics and Management* 44; Giles Atkinson & Kirk Hamilton 'Savings, growth and the resource curse hypothesis' (2003) 31 World Development 1793; Sam Jones 'Sub-Saharan Africa and the "resource curse": Limitations of the conventional wisdom' 2008 Danish Institute for International Studies (DIIS) Working paper 2008/14.

[49] Andrew Rosser 'The political economy of the resource curse: A literature survey' 2006 IDS Working Paper No. 268 at 13, available at http://www.ids.ac.uk/files/WP268.pdf (accessed 2 August 2014). For the discussion of each category, see same source at 13 – 21. See further Richard M Auty, op cit note 32 at 5 – 6 & 13 – 23; Leonard Wantchekon 'Why do resource dependent countries have authoritarian governments?' (2002) 5 *Journal of African Finance and Economic Development* 57.

[50] Ibid, (Andrew Rosser) at 3.

[51] Ibid.

For purposes of this thesis, the political and economic causes of the resource curse are important. Political factors include the mismanagement and inappropriate regulation of the domestic mineral endowment that can have negative effects on the economic boom.[52] With regard to economic factors, Collier and Hoeffler argue that economic causes are constituted by bad intentions directed toward, and threats experienced by the state, due to its mineral endowment. They argue that this is one of the causes of the resource curse in that the economically sinister motive to rely on natural resource endowment, especially mineral resources, is inherently linked with conflict and threats. Thus, the motive debases good intentions and the sovereignty of the host state over the resources.[53] The aspect which links the resources to conflict can also be traced back to colonialism. From the literature, it is submitted that '[i]ncreased government revenue can lead to myopic policy formulation, greater rent-seeking behaviour by individuals, classes, sectors, or interest groups, and general weakening of state institutions, with less emphasis on accountability and transparent systems of governance'.[54] Reference shall be made to this in this thesis through the lens of domestic mining laws.

Of further relevance to this thesis is Ross' argument that the inherent cause of the resource curse can be based on failure by host states to enforce and protect property rights, including those embedded in mineral resource licences, as well as the apparent failure to curb threats such as illegal mining and smuggling. Illegal mining and smuggling unlawfully compromise the sovereignty afforded to host states over their natural resources by international law.[55] Ascher, on the other hand, argues that the causes of the resource curse include poor mineral resource governance due to state officials who abuse their position for private economic gain.[56]

[52] Chris Ballard & Glenn Banks, op cit note 43 at 295. See also Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz, op cit note 38 at 1.
[53] See generally Paul Collier & Anke Hoeffler 'Greed and grievance in civil war' CSAE WPS/2002-01 Policy Research paper 2355, World Bank, Washington DC. See also Mining, Minerals and Sustainable Development Project *Breaking New Ground: Mining, Minerals and Sustainable Development* (2002) at 192 – 193; Chris Ballard & Glenn Banks, op cit note 43 at 295.
[54] Chris Ballard & Glenn Banks, op cit note 43 at 295.
[55] Ibid. See also Michael L Ross, op cit note 46 at 319 – 320.
[56] Michael Ross, op cit note 46 at 319 - 320. See generally William Ascher *Why Governments Waste Natural Resources: Policy Failures in Developing Countries* (1999).

Although the literature on the resource curse provides substantial evidence that mineral resource endowment is associated with various negative development outcomes,[57] this evidence is by no means conclusive that the role of international law to protect African states endowed with mineral resources is not fundamental. However, the literature does not account for the role of international law in the regulation of mineral resources in developing states. This is a strategic area, and the responsibility of each African state to enact laws and policies in order to domesticate the international law principles, and to regulate domestic mineral resources for self-determination.

Taking into account the resource curse problem, considered through the lens of international law and the mandate derived from international law principles, how has the resource curse been addressed in the DRC and Zimbabwe? One of the ways is how international law principles governing state sovereignty over mineral resources have been operationalized in order to uphold the mandate to exploit the resources for self-determination and development.

Using a case study approach, the thesis investigates whether African states are taking advantage of international law principles that underlie state sovereignty to develop, through the exploitation of domestic mineral resources. Taking advantage, in this instance, should be taken to mean using the resources of domestic law and policy so as to capitalize on a mandate to control mineral resource; to navigate the difficulties posed by the inherent tensions between the principles of international law that affirm sovereignty over natural resources, and those that facilitate trade and investment; and to prevent, or manage threats to sovereignty in the form of corruption, illegal mining, and mineral resource conflicts.

## 1.6 International Law Principles Relevant to Host States Benefiting from their Mineral Resources

States' positioning over mineral resources in terms of international law is embedded in an interlocking set of principles that give host states a mandate to exploit domestic minerals for self-determination. Three international law principles are considered for the purposes of this thesis, namely, the principles of self-determination, non-intervention (non-interference) and permanent sovereignty over natural resources (PSNR). These principles have been revitalized and were given a seemingly democratic content through the joint efforts of the international

[57] Andrew Rosser, op cit note 49 at 3. See generally Jeffrey D Sachs & Andrew M Warner, op cit note 43; Eric Neumayer 'Does the resource curse hold for growth in genuine income as well?' (2004) 32 *World Development* 1627.

community through the UNGA. In addition to the three principles, the right to development is considered as the final goal that the regulation and exploitation of mineral resources is intended to achieve and with a view that African states ought to economically benefit and develop from their natural endowment. These principles are briefly introduced here for purposes of framing the thesis, and are considered in greater detail in Chapter 2.

### 1.6.1 Self-determination

The principle of self-determination refers to the right of states and their peoples to determine their own political and economic destiny, as enshrined in the Charter of the United Nations.[58] The principle was initially proclaimed in the Atlantic Charter – the Declaration of Principles of 1941.[59] Provisions of the Atlantic Charter considerably influenced the work of the San Francisco Conference of 1945 where the notion of self-determination was fashioned and firmly incorporated in the United Nations Charter.[60] Article 1(2) of the UN Charter sets out the founding purposes of the UN, which is to '[…] develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, […]'.[61] Also, the Charter outlines various goals of the UN, which include the need to promote '[…] the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination'.[62] Further the principle of self-determination was implicitly referred to in Article 73 of the Charter, and with specific reference to former colonies and other dependent territories. Accordingly, the principle of self-determination becomes a binding conventional international law principle that supports the sovereignty of states, as well as the host state's control over domestic mineral resources.[63]

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[58] Articles 1(2) & 55 of the Charter of the United Nations, 1945. See also Article 1(1) of the International Covenant on Civil and Political Rights, 1966, hereafter ICCPR; Article 1(1) of the ICESCR, supra note 8; UNGA Resolution 637 (VII): The Right of Peoples and Nations to Self-determination, 1952.

[59] See Principles 2 & 3 of the Atlantic Charter – the Declaration of Principles of 14 August 1941; hereafter the Atlantic Charter. See generally Castellino J 'Conceptual Difficulties and the Right to Indigenous Self-Determination' in Ghanea N & Xanthaki A (eds) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (2005) 55 at 74; Eagleton C 'The Excesses of Self-Determination' (1953) 31 (4) *Foreign Affairs* 557; Keal P 'Indigenous Self-Determination and the Legitimacy of Sovereign States' (2007) 44 *International Politics* 287.

[60] Daniel Thurer & Thomas Burri 'Self-determination' in Rudiger Wolfrum (ed) *Max Planck Encyclopaedia of Public International Law* (2008) 1 at 3. See also Unterberger B M 'Self-determination' available at http://www.americanforeignrelations.com/O-W/Self-Determination.html (accessed 18 October 2013).

[61] See also two major factors to consider; namely, political and economic factors; see for example, Parra A R 'Principles governing foreign investment as reflected in national investment codes' in Shihata I F I (ed) *Legal Treatment of Foreign Investment – The World Bank Guidelines* (1993) 311.

[62] See also Article 55 of the UN Charter, 1945.

[63] Daniel Thurer & Thomas Burri, op cit note 60 at 3.

### 1.6.2 Non-intervention (non-interference)

The principle of non-intervention is an international law norm whose violation is often declared under entirely varying circumstances. In common practice, international legal commentators define "intervention" as the interference by state(s) in the internal or external affairs of another state. Accordingly, the precise scope and meaning of the principle remains unclear.[64] However, interference is '[…] only prohibited when it occurs in fields of State affairs which are solely the responsibility of inner state actors, takes place though forcible or dictatorial means, and aims to impose a certain conduct of consequence on a sovereign state […]'.[65] In defining non-intervention as in the case *Concerning the Military and Paramilitary Activities in and Against Nicaragua,* the International Court of Justice (ICJ) held that intervention is unlawful on issues in which the host state is legitimately permitted by the principle of state sovereignty, to decide freely. The Court further stated that

> [O]ne of these is the choice of a political, economic, […] and formulation of policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, […] defines, and indeed forms the very essence of, prohibited intervention […].[66]

The definition restates precisely the customary international law position; however, this has not been uncontested.[67] The same principle has been summarized in the UN Charter,[68] and in essence is a restatement of the customary rule.[69] Some academic commentators argue that there are exceptions to the principle; for example, interference on humanitarian grounds.[70]

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[64] Philip Kunig 'Prohibition of intervention' in Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2008) 1 at 2.
[65] Ibid.
[66] See also the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Merits*), Judgment of 27 June 1986, para 205; hereafter *Nicaragua v United States Of America*.
[67] Philip Kunig, op cit note 64 at 2. See also UN Declaration on the Inadmissibility on Intervention in Domestic Affairs of States, A/Res/2131(XX), 21 December 1965; UNGA Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 1970.
[68] Article 2(7) of the Charter of the United Nations.
[69] See generally Ian Brownlie *Principles of Public International Law 7th ed* (2008); James Crawford *Brownlie's Principles of Public International Law 8th ed* (2012).
[70] See Fonteyne J P 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter' (1973-1974) 4 *Cal WJIL* 203 at 235; Franck T & Rodley N 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 *AJIL* 275; Lillich R B 'Forcible Self-Help by States to Protect Human Rights' (1967-1968) 53 *Iowa Law Review* 325 at 332. See also *Legality of Use of Force* (Request for the Indication of Provisional Measures), ICJ, Oral Proceedings, CR 1999/15; Lillich R B 'Humanitarian Intervention Through the United Nations: Towards the Development of Criteria' (1993) 53 *ZaoeRV* 557 at 560. In terms of Article 2(4) of the UN Charter, humanitarian intervention becomes an exception but the same article prohibits the use of force. See further Bilder R B, op cit note 23 at 453; Delbrueck J 'International protection of human rights and state sovereignty' in Frederick E Snyder & Surakiart Sathirathai (eds) *Third World Attitudes Towards International Law: An Introduction* (1987) 263 at 265.

Although the definition of non-intervention is not well-settled internationally, however, there is a degree of consensus that the original narrow scope of the definition is gradually changing to embrace a broader outlook. According to Kunig, '[t]he new and broader definition of intervention forbids not only direct military force but also indirect interference through economic, political and diplomatic means'.[71] However, this makes it difficult to distinguish between non-intervention and non-interference. For the purposes of the thesis, the term "non-interference or interference" is preferred as it fits the context of the study more directly.

### 1.6.3 Permanent Sovereignty over Natural Resources (PSNR)

The PSNR principle embodies the right of states and peoples to freely dispose of their domestic natural resources. The principle was adopted through the landmark Declaration on Permanent Sovereignty over Natural Resources in the UN General Assembly Resolution 1803(XVIII) of 14 December 1962. The Declaration lays down the basic canons upon which host states should exercise the mandate derived from the PSNR principle.[72] The PSNR principle was affirmed in a number of international legal instruments, including the most recent ICJ decision in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda).*[73]

The PSNR principle is grounded on two key concerns; namely, economic development and self-determination of developing states.[74] However, the PSNR is not a stand-alone principle. It is reinforced by the principles of non-intervention (non-interference) and self-determination highlighted above. However, the PSNR is a cardinal principle which is central to the thesis as it gives host states a mandate to regulate their mineral resources for self-determination. The thesis argues that there have to be strong regulatory institutions, as well as the ability to

[71] Philip Kunig, op cit note 64 at 3.
[72] Nico J Schrijver 'Permanent Sovereignty over Natural Resources' in Rudiger Wolfrum (ed) *Max Plank Encyclopedia of Public International Law* (2008) at 4. See also Abi-Saab George 'Permanent sovereignty over natural resources and economic activities' in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 593 at 597 – 617.
[73] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment 2005 ICJ Reports 168. Generally, see also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, ICJ, 18 September 2002. See generally Doyle J 'New models of sovereignty for contested sates: Some empirical evidence of non-Westphalian approaches' in Hansel M Howard (ed) *Sovereignty and the Global Community: The Quest for Order in the International System* (2004) 151.
[74] Articles 1 & 2 of the Charter of Economic Rights and Duties of States (1974). See also Nico J Schrijver, op cit note 72 at 2; Barrera-Hernandez Lila 'Sovereignty over natural resources under examination: The inter-American system of human rights and natural resources allocation' (2006) 12 *Annual Survey of International and Comparative Law* 43 at 45; Richard Barnes *Property Rights and Natural Resources* (2009) at 1 – 19; George Elian *The Principle of Sovereignty Over Natural Resources* (1979) at 83 – 191.

uphold the mandate derived from the three international law principles in order to regulate domestic mineral resources for economic development.

### 1.6.4 Right to Development

The UNGA Declaration on the Right to Development of 1986 defines the "right to development" as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic […] development, in which all human rights and fundamental freedoms can be fully realised'.[75] Therefore, development is considered to include a comprehensive economic, social and political process, intended as the constant enhancement of the welfare of the citizens of host states as provided for in the UN Commission on Human Rights or the UN Human Rights Council.[76] Marong also argues that the development process should entail complete and meaningful participation of all citizens of a state and equitable distribution of the benefits of development.[77]

Generally, the exploitation of mineral resources in Africa is driven by economic interests and the need to use the proceeds for development as well as to enhance standards of living. In order to contribute to a legitimate, indigenous conception of development through exploitation of domestic mineral resources, the three international law principles highlighted above are important pillars, which support the right to development. Accordingly, the cumulative effect of the three principles is an important driver to realize the right to development.

## 1.7 International Economic Principles Relevant to the Study

The three international principles highlighted above, and the right to development, are not sufficient to ensure that African states benefit from their mineral resource endowment. Whilst many African states once sponsored state-owned mining companies,[78] today most African states are reliant on private investment to exploit their mineral resources. Private investment allows for technical and financial resources to be applied to win the minerals from the

[75] Article 1 of the UNGA Resolution 41/128 - Declaration on the Right to Development of 4 December 1986.
[76] Article 2(3) of the UN Commission on Human Rights – Resolution 1999/79 on the Right to Development of 28 April 1999. UN Doc E/CN.41999/167.
[77] Alhagi Marong 'Development, right to international protection' in Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2010) 1.
[78] See generally Bonnie Campbell 'Introduction' in Bonnie Campbell (ed) *Mining in Africa: Regulation and Development* (2009) 1 at 1 – 2.

ground, and refine them to a point where they can find a market. Principles of international law dealing with investment and trade are accordingly also relevant for purposes of the study.

### 1.7.1 Principles of Foreign Investment and Investment Liberalization

The Havana Charter and the OECD[79] lay down the lowest common international denominators for investment protection and will be further considered in chapter 2.[80] The OECD Guidelines for Multilateral Enterprises, though not binding, are be considered, in particular, the extent to which the Guidelines encroach on state sovereignty in order to protect the interests of foreign investors. There are no international minimum conditions on bilateral investment treaties (BITs) and the content of these depend on the intentions of the contracting states. Two non-discrimination principles, namely, the most favoured nation (MFN) and national treatment are relevant to international trade and investment law[81] and will be discussed in chapter 2. Also, compensation for expropriation and repatriation of profits will be considered as far as they affects sovereignty.

Host states want foreign investment for economic development but simultaneously fear losing sovereignty over natural resources.[82] Balancing these two competing interests can be challenging.[83] Conflict of interests may arise, for example, Zimbabwe's indigenization policy[84] (and the South African Broad-Based Black Economic Empowerment).[85] These problems are among those associated with foreign investment and sovereignty,[86] and it could be difficult to balance host state and investors' interests, as well as navigate interferences and threats.[87]

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[79] OECD Guidelines for Multilateral Enterprises available at http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 20 August 2012).
[80] Surya P Subedi *International Investment Law: Reconciling Policy and Principle* 2nd (2012) at 55-80. See also Schachter Oscar 'The Evolving International Law of Development' (1976) 15 *Columbia Journal of Transnational Law* 1.
[81] Ibid.
[82] Ibid. See also Isaiah A Litvak & Christopher Maule 'The issues of direct foreign investment' in Isaiah A Litvak & Christopher Maule (eds) *Foreign Investment: The Experience of Host Countries* (1970) 3 at 23.
[83] Woolsey L H 'The problem of foreign investment' (1948) 4 *The American Journal of International Law* 121.
[84] Indigenization and Economic Empowerment Law Act 14 of 2007. See also Statutory Instrument Indigenization and Economic Empowerment (General) Regulations 21 of 2010 (Chapter 14:33).
[85] Broad-Based Black Economic Empowerment; hereafter the BBBEE. The Broad-Based Black Economic Empowerment Act 53 of 2003 (of South Africa).
[86] Surya P Subedi, op cit note 80 at 72. Sornarajah M *The Investment Law on Foreign Investment* (2010) at 3.
[87] Biswajit Dhar & Sachin Chaturvedi 'Multilateral agreement on investment: An analysis' (1998) 33 *Economic and Political Weekly* 837 at 837 - 849.

### 1.7.2 International Trade Principles

Two non-discrimination trade principles; namely, MFN[88] and national treatment[89] are important for purposes of this study, as they affect sovereignty over the choice of trade (or investment) partners in the mineral value chain.[90] According to the MFN principle, each trading state treats other states as equally as "most-favoured" trading members. If a state improves the benefits that it gives to one trading state, it has to give the same "best" treatment to all other members of the World Trade Organization (WTO) so that they all remain "most-favoured".[91] With regard to the national treatment principle, it compels host states to accord the same treatment to foreign products as accorded to domestic products. The two principles prohibit unfair discriminatory treatment in international trade by providing that any trade concessions extended to any GATT/WTO member state should unconditionally be extended to all member states. Regardless of what BITs may say, however, the thesis will argue that the two principles restrict sovereignty of the host state to freely choose with whom it wishes to trade its mineral resources.

However, host states cannot do without international trade, which includes market access of domestic minerals and mineral products. Most African economies are too small and international trade can stimulate revenue inflow, economic growth and development. The pursuit for better access to international markets and access on better terms is an important component of Africa's development strategy[92] but strategic access remains a concern.[93] Therefore market access conditions are most likely to be a barrier for African states.[94]

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[88] Article I of the General Agreement on Tariffs and Trade of 1947 as amended, hereafter the GATT.

[89] Article III of the GATT. In terms of this principle, imported and locally-produced goods should be treated equally — at least after imported goods have entered the market. The 'national treatment' is also contemplated in the three main WTO agreements; namely, Article 3 of GATT; Article 17 of General Agreements on Trade in Services, 1995 (GATS), and Article 3 of Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994; hereafter TRIPS. See also Low P 'Is the WTO doing enough for developing countries?' in George A Bermann & Petros C Mavroidis (eds) *WTO Law and Developing Countries* (2007) 324; Shaffer G 'Can WTO technical assistance and capacity-building serve developing countries?' in Petersmann Ernst-Ulrich & Harrison James (eds) *Reforming the World Trade System: Legitimacy, Efficiency, and Democratic Governance* (2005) 245 at 245 – 274.

[90] Howse R & Teitel R G 'Beyond the divide: The International Convention on Economic, Social and Political Rights and the World Trade Organization' in Sarah Joseph, David Kinley & Jeff Waincymer (eds) *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (2009) 39.

[91] Low P, op cit note 89 at 324. See also Kessie E 'The legal status of special and differential treatment provisions under the WTO Agreements' in Bermann A George & Mavroidis C Petros (eds) *WTO Law and Developing Countries* (2007) 12.

[92] Lowensfield A F *International Economic Law* (2002) at 3 - 8.

[93] Hoekman B 'Operationalizing the concept of policy special and differential treatment' in Petersmann Ernst-Ulrich & Harrison James (eds) *Reforming the World Trade System: Legitimacy, Efficiency, and Democratic Governance* (2005) 223 at 227 – 228.

[94] The International Bank for Reconstruction and Development (World Bank), 'Standards and global trade: A voice for Africa' 2003, available at

## 1.8 Threats to the Exercise of Sovereignty over Mineral Resources

The criteria for identifying and selecting threats to sovereignty over mineral resources over others were based on the significance and salience of the threats in restricting PSNR. The thesis identified the three most notable threats as corruption, illegal mining, and mineral resource conflicts. Apart from these, however, interferences such as World Bank and International Monetary Fund (IMF) conditionalities potentially compromise sovereignty over mineral resources in the DRC and Zimbabwe.[95] Regardless of the mandate given to host states by international law to regulate domestic mineral resources, the question is; are African states endowed with the resources able to navigate the threats and interferences?

Threats to PSNR also interfere with the objectives of the Africa Mining Vision (AMV).[96] In terms of AMV, factors such as transparency and accountability, as well as equitable and optimal exploitation of Africa's mineral resources are the springboard for economic growth and development.[97] The threats interfere with the central premise of the AMV, which hinges on the structural transformation of the economies of Africa as a whole and of individual states through sound mineral resource exploitation and utilization.

## 1.9 The Strategic Arena of Domestic Law and Policy

The inception of international law limited itself wholly to the international arena and developing alongside municipal laws. The tensions between the two systems of law were thus likely.[98] The aftermath of World War I and World War II, the League of Nations and its succession by the UN, and the granting of political independence to former colonies marked an end to colonialism: The emergence of multiple political independent states, the increased

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http://www.unido.org/fileadmin/import/12960_WorldBank_StandardsGlobalTrade_voiceForAfrica.pdf (accessed 29 October 2012). See also Isaiah A Litvak & Christopher Maule, op cit note 82 at 3; Lowenfield F A *International Economic Law* (2002) at 3 – 8; Gerhard Loibl 'International economic law' in Malcolm D Evans (ed) *International Law 2nd ed* (2006) 689; David Ricardo *The Principle of Political Economy and Taxation 3rd* (2001).

[95] See generally sections 4.5.4 and 5.5.4 in chapters 4 and 5, respectively - the IMF and the World Bank conditionality policy.

[96] See generally the Africa Mining Vision, adopted by Heads of State and Government in February 2009.

[97] Ibid. See also Minerals and Africa's development, supra note 1 at xiii. See also the United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Development Programme 'Assessing progress in Africa toward the Millennium Development Goals Analysis of the Common African Position on the post-2015 Development Agenda' 2014 Millennium Development Goals report, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/MDG_Report_2014_11_2014.pdf (accessed 21 January 2015); David E Sahn & David C Stifel 'Progress toward the Millennium Development Goals in Africa' (2003) 31 *World Development* 23.

[98] A O Enabulele & C O Imoedemhe 'Unification of the application of international law in municipal realm: A challenge for contemporary international law' (2008) 12 *Electronic Journal of Comparative Law* 1.

recognition and demand for mineral resources for industrial development all contributed to complexities in the application of international law in the modern-day community of states.[99] The manner in which aspects of international law become part of municipal law is always important. The need to always domesticate these aspects is an important factor to determine how state sovereignty can be exercised in order to navigate tensions and threats over control and regulation of mineral resources.

To understand how international law principles become part of a domestic legal system, there are two key theories or schools of law, namely, dualism and monism.[100] These theories provide contrasting views regarding the relationship between international law and domestic law, and how aspects of international law become part of municipal law.[101] The monist approach maintains that international law and municipal law are far from being essentially different but should be considered as manifestations of a single conception of law.[102] This theory considers '[…] all law as part of the same universal normative order,'[103] regarding international and domestic law as part of the *corpus* of rules.[104] Further this theory submits that domestic courts should apply rules of international law directly in their municipal legal systems without acts of adoption, parliamentary or judicial incorporation.[105] For this reason, this theory can be described as lending support to the "doctrine of incorporation".[106] Furthermore, the theory acknowledges that international law binds states, but cannot be directly applied by municipal courts where it is in conflict with domestic law.[107] This is also

[99] Ibid.
[100] Ian Brownlie, op cit note 69 at 31 – 35. See also J G Starke *Introduction to International Law* 10th ed (1989) at 72 – 77; J G Collier 'Is international law really part of the law of England' (1989) 38 *ICLQ* 924; Hersch Lauterpacht 'International law and municipal law' in Elihu Lauterpacht (ed) *International Law: Collected Papers Vol 1: The General Works* (1970) 216 at 217; Edwin M Borchard 'The relation between international law and municipal law' (1940) 27 *Virginia Law Review* 137. Further, see Mahesh Tandon & Rajesh Tandon 'The relationship between international law and municipal law or state law' 2007, available at http://www.shvoong.com/law-and-politics/international-law/499254-relation-international-law-municipal-law/#ixzz1zQHFOahf (accessed 2 July 2012); Jane Stratton 'International Law: Overview' 2009 at 3, available at http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/international_69.pdf (accessed 1 July 2013);
[101] Detailed discussion of the two theories, see standard treaties or conventions on international law, and the literature which includes J G Starke, op cit note 100 at 72 – 77; Ian Brownlie, op cit note 69 at 31 – 35; J G Collier 'Is international law really part of the law of England' (1989) 38 *ICLQ* 924; Walter Rudolf 'Incorporation of customary international law into municipal law' in Grigory I Tunkin & Rudiger Wolfrum (eds) *International Law and Municipal Law: Proceedings of German-Soviet Colloquy on International Law* (1988) 24;
[102] Hersch Lauterpacht, op cit note 100 at 217.
[103] R Balkin 'International law and domestic law' in S Blay, R Piotrowicz & M Tsamenyi (eds) *Public International Law: An Australian Perspective* (1997) 119 at 120.
[104] Tiyanjana Maluwa *International Law in Post-Colonial Africa* (1999) at 34.
[105] Hersch Lauterpacht, op cit note 100 at 217.
[106] John Dugard *International Law: A South African Perspective* 4rd ed (2011) at 147.
[107] Ibid, at 42. See also D P O'Connell *International Law 2nd ed, Vol 1* (1970) at 44 – 45.

the view of the dualism (positivist) theory which maintains that international law cannot be applied directly in the municipal system unless it has been domesticated.[108]

While the monist theory favours an automatic adoption of international law, the dualists supports the necessity to transform international law into domestic law.[109] The dualists maintains that while it is the state which has sovereignty, international law is a manifestation of sovereign will, and the two systems are separate, not only in origin but in their purpose as well.[110] Both schools represent two distinct systems with a different intrinsic character.[111] It is not my focus to discuss in detail the jurisprudence of the two theories except to make brief comments as stated. Regardless of this, however, there are complexities and conflicts between international law and state sovereignty,[112] which potentially restrict the latter and deprive it of its original logic, which is characterized by non-derivability, originality, and indivisibility of its exercise. What is more important is the manner in which domestic law and policy can be used by states to benefit from aspects of the international law principles that govern state sovereignty over mineral resources and to navigate tensions and threats, as well as the mandate to exploit the resources for self-determination and development.

Irrespective of which theory a state may use, both nonetheless fall short in facilitating thinking about domestic law and policy as a strategic arena in which host states navigate tensions and threats toward sovereignty over mineral resources. The manner in which a state can navigate the tensions and threats is fundamental in order to assert sovereignty over domestic mineral resources and the mandate to derive benefits from the exploitation of the resources. It can be argued that,

> [e]fforts to regulate domestic problems need to address international affairs in order to be comprehensive and effective. Correspondingly, policy solutions have come to rely upon new types of international agreements that include multiple parties, [often from different legal systems] that create independent international organizations, and that pierce the veil of the nation-state and seek to regulate [or impose conditions]. While perhaps necessary to meet international goals, these novel arrangements and institutions create difficulties because they intrude into what was once controlled by the domestic political and legal system.[113]

[108] J G Starke, op cit note 100 at 72. See also Walter Rudolf, op cit note 101 at 25 – 26; Eileen Denza 'The relationship between international law and national law' in Malcolm D Evans (ed) *International Law* 2nd ed (2006) 123 at 425.
[109] Walter Rudolf, op cit note 100 at 25.
[110] J G Starke, op cit note 100 at 72.
[111] Ibid. See also Tiyanjana Maluwa, op cit note 104 at 35.
[112] Ibid.
[113] John C Yoo 'Globalism and the constitution: treaties, Non-self-execution, and the original understanding' (1999) 99 *Columbia Law Review* 1955 at 1967- 1968. See also Phanor J Eder 'Some restrictions abroad affecting corporations' (1946) 11 *International Law Trade Barriers* 713. See generally Carlos Jose Gutierrez 'Conflicts between domestic and international law' (1981) 30 *The American University Law Review* 147.

The assumption is that when a state domesticates aspects of international law principles, it intends to be consistent with,[114] and the extent that international law permits.[115] The question is how African states can use international law principles to their advantage in order to strengthen their sovereignty over mineral resources?[116]

### 1.10 A Case Study Approach

Case study is an inquiry that investigates an experience within a real-life context, especially when the boundaries between the phenomenon and the context are not clearly evident.[117]

Taking into account the threats identified above, the DRC and Zimbabwe were chosen as the two case studies.[118] The reason for choosing both countries is that they are richly endowed with various mineral resources but are poor, and have experienced or are experiencing mineral resource associated problems. The DRC had been in the spotlight for recurrent conflict associated with the control of domestic mineral resources. Zimbabwe has also stood out on the basis of its economic indigenization policy. Since both countries are endowed with mineral resources, ideally, the prospects for economic development are very high. Sadly, both countries are poor, seemingly unable to translate their mineral endowment into economic prosperity. Accordingly, the choice of both countries meets the requirements that make them ideal to study for the purposes of this thesis.

Zimbabwe's sovereignty claims over domestic natural resources, including minerals has potentially stirred controversies and divisions among states. In the DRC, conflicts over the

[114] Malcolm N Shaw *International Law* 6th ed (2008) at 130. See also Jason Riegert 'The irony of international law; how international law limits state sovereignty' 2010 *Albany Government Law Review* 1.
[115] Mehrdad Payandeh 'The concept of international law in the jurisprudence of H. L. A. Hart' (2010) 21 *The European Journal of International Law* 967 at 975. See also Malcolm N Shaw, op cit note 114 at 130; Jason Riegert, op cit note 114.
[116] A O Enabulele & C O Imoedemhe, op cit note 98 at 5.
[117] Yin R K *Case Study Research: Design and Methods* 4thed (2009) at 15. See also Robson Colin *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (1995) at 153; Martin Terre Blanche & Kevin Durrheim 'Histories of the present: Social science research in context' in Martin Terre Blanche, Kevin Durrheim & Desmond Painter (eds) *Research in Practice: Applied Methods for the Social Sciences* 2nd ed (2006) 1 at 4 – 7.
[118] Southern Africa Development Community; hereafter SADC, it becomes desirable to consider a regional and international approaches to the issue in order to give a complete picture. See generally Leonard Cargan *Doing Social Research* (2007); Uwe Flick *Introducing Research Methodology: A Beginner's Guide to Doing a Research Project* (2011); Therese L Baker *Doing Social Research 3rd ed* (1998) at 3.

control and regulation of mineral resources between government and the militants have contributed to instability and poverty.

### 1.10.1 The Case of Zimbabwe

The Zimbabwe case illustrates how international law principles governing state sovereignty over mineral resources have been operationalized. Two issues are of concern; namely, how Zimbabwe asserts sovereignty over domestic mineral resources, on the one hand, and the manner in which the threats discussed in chapter 3 are navigated. Further this apparent clash can be inferred from the manner in which Zimbabwe exercises the mandate through implementing conditions provided for in mining laws and its indigenization policy. A key assumption is the manner and extent to which Zimbabwe is capable to navigate the threats against the background of its colonial history. These issues are among those considered, including whether Zimbabwe has managed to exercise the mandate in order to derive maximum benefits from exploitation of its mineral resources. The case is an experience that resembles the struggle African states endowed with mineral resources are facing.[119]

### 1.10.2 The Case of the DRC

Just like the Zimbabwe case highlighted above, the study of the DRC is a microcosm in order to investigate the extent to which African states can use the strategic arena of domestic law and policy to benefit from international law principles relating to their mandate to control mineral resources, and to navigate tensions and threats. The DRC is endowed with an array of mineral resources. On the assumption that the endowment is exploited for economic benefit, it is capable of being translated into economic development. Regardless of this, however, it is well-known that the DRC is one of the poorest states in Africa.[120] The case study investigates the manner in which the DRC exercises the mandate it derives from the PSNR principle and also how it navigates tensions and threats as it regulates domestic mineral resources with a view to derive economic benefits and ultimately mining revenues into development.

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[119] Global Witness Limited 'Return the blood diamond: The deadly race to control Zimbabwe's new-found wealth' 2010 at http://www.swradioafrica.com/Documents/return_of_blood_diamond.pdf (accessed 23 September 2012).

[120] African Development Bank 'Democratic Republic of Congo: 2013 – 2017 country strategy paper' 2013 available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Democratic%20Republic%20of%20Congo%20-%202013-2017%20-%20Country%20Strategy%20Paper.pdf (accessed 2 October 2014).

Like Zimbabwe, the DRC domestic mining laws are considered with a view to determine the manner in which assertion of sovereignty over domestic mineral resources is effected. Also, the tensions and threats involved in the assertion of sovereignty over domestic mineral resources are considered. The manner in which the DRC exercises it mandate in terms of the PSNR principle for self-determination will be considered to ensure whether the country is capable of navigating the tensions and threats in the regulation of domestic mineral resources. Whether the DRC takes advantage of the mandate it derives from international law, the focus is on how sovereignty manifests in domestic mining laws and policies. Here, the focus is to determine whether the DRC is making use of the good intentions of the international law principles, highlighted above, to derive economic benefits from exploitation of domestic mineral resources, which can transform the country to achieve the indigenous conception of development.

### 1.11 Methodology

The research involved desktop study and where possible primary sources were used. The relevant international instruments such as treaties, declarations, conventions, agreements, UN Resolutions, Protocols and major domestic mining statutes as well as other legal materials were used. Westlaw was used and other secondary sources in the fields of international law, as well as international investment and trade law. Some reliance was placed on print and electronic media reports, and news releases albeit in factual matters only. These sources were not used in as far as they attempt to draw conclusions in law, or give legal opinions on the basis of the information they would have gathered.[121]

The study adopts the country study approach.[122] Yin defines this as involving a qualitative enquiry that investigates a contemporary phenomenon in-depth and in its real-life context.[123] As a research technique, case study enables the researcher to examine mining regimes of the DRC and Zimbabwe at the micro level.[124] Notwithstanding criticism of this method,[125] it has

[121] Stark S & Torrance H 'Case study' in Somekh B & Lewin C (eds) *Research Methods in the Social Sciences* (2006) 33. See also Robert R Bargar & James K Duncan 'Cultivating creative endeavour in doctoral research' (1982) 53 *Journal of Higher Education* 1. See also Dobson I & Johns F 'Qualitative legal research' in McConville M & Hong Chui W (eds) *Research Methods for Law* (2007) 21.
[122] Yin, op cit note 117 at 18. See also Robson Colin, op cit note 116 at 146. See further Campbell C M & Wiles P 'The study of law in Great Britain' (1976) 10 *Law and Society Review* 547 at 578.
[123] Ibid.
[124] Zaidah Zainal 'Case study as a research method' (2007) 9 *Journal Kemanusiaan* 1 at 5.
[125] Gunn Sara Enli 'Comparative analysis and case studies' 2010, Oslo University, Norway. The main lines of criticism put forward by the author includes: (i) the difficulty facing the comparative method is that it must

been used for this research because it gives the reader easy understanding of the issues and problems in the operationalization of PSNR. Also, this method is a preferred strategy when 'how' or 'why' questions are being posed, when the researcher has little control over events, and when the focus is on present-day regulation of mineral resources for self-determination.[126] Further, the case study method has distinct advantages, which enable the researcher to investigate and challenge aspects of theoretical assumptions in international law principles governing state sovereignty over mineral resources. It is also an appropriate technique for generating innovative ideas about the conduct of, and insights on the states being investigated.[127]

Finally, where appropriate, comparative legal scholarship was applied to compare and contrast legal structures, jurisprudence and outcomes of different legal regimes.[128] The comparative law methodology focuses on similarities and the differences[129] in the manner in which the DRC and Zimbabwe assert sovereignty and operationalize the international law principles framing this research. To a certain extent, this research method was used in order to assess how PSNR is operationalized as well as how it breaks down in the DRC and Zimbabwe's mineral value chain. The methodology also plays a role in assessing which mining laws are better in providing for protection of property rights, the ease of doing business and creating a sound investment environment.[130] As such, the importance of comparative research is vital not only for the purposes of this thesis (where the focus is

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generalize on the basis of relatively few empirical cases; (ii) the problem of selection bias; common problems arising from the choice of selection is that it may over-represent cases at one or the other end of the distribution on a key variable.

[126] Yin, op cit note 117 at 1.

[127] Zaidah Zainal, op cit note 122 at 5. See also Else Oyen (ed) *Comparative Methodology: Theory and Practice in International Social Research* (1990).

[128] Wilson G 'Comparative legal scholarship' in McConville M & Hog Chui W (eds) *Research Methods for Law* (2007) 87. See also Atkinson P & Delamont S 'Bread and dreams or bread and circuses: A critique of case study research in education' in Shipman S (ed) *Educational Research, Principles, Policies and Practice* (1985) 26.

[129] Jaakko Husa 'About the methodology of comparative law – Some comments concerning the wonderland' 2007, Working Paper series, the Faculty of Law, University of Maastricht, The Netherlands. See also Jaakko Husa 'Methodology of comparative law today: From paradoxes to flexibility?' (2006) 57 *Revue Internationale de Droit Comparé* 1095; See generally David J Gerber 'Sculpting the agenda of comparative law: Ernst rabel and the façade of Language' in Annelise Riles (ed) *Rethinking the Masters of Comparative Law* (2001) 190.

[130] James Gordley 'Comparative legal research: Its function in the development of harmonized law' (1995) 43 *The American Journal of Comparative Law* 555; John C Reitz 'How to do comparative law' (1998) 46 *American Journal of Comparative Law* 617 at 626; Jaakko Husa 'Melodies on comparative law: A review essay' (2005) 74 *Nordic Journal of International Law* 161; Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law 3rd ed* (1998).

usually on methodology), but also for Africa as a continent in order to have robust and unified ways of operationalizing PSNR.[131]

## 1.12 Limitations

Due to bureaucracy during the research and withholding of primary information, secondary sources were used as a last resort. Also reasonable inferences were used to come to certain conclusions. The absence of actual detail such as the budgets of the Ministry of Mines, the total number of inspectors employed by the DRC and Zimbabwe's mines Ministry, adversely affects my ability to assess the enforcement and monitoring capacity. For example, in the absence of primary information, it was difficult to adequately answer these questions; reliance was placed on reasonable inferences. However, the limitations affect the outcome or the conclusion to the study to a certain extent.

## 1.13 Structure of the Thesis (Chapter outline)

Chapter 1 introduces the study and the overview of the entire thesis. The chapter sets out the basis of the study, the problem formulation and the objectives, as well as the methodological approaches. Chapter 2 examines three core international law principles relevant to the regulation of mineral resources and the right to development, as well as principles relating to investment and trade. The chapter gives a brief overview of the historical origin of each principle and its legal status, as well as the interrelationship of the principles. The chapter also discusses the right development and its relevance to the study. Chapter 3 discusses threats to the outworking of sovereignty over mineral resources. Four categories of threat are considered, namely, conditionalities of the IMF and the World Bank, illegal mining, corruption and mineral resource conflicts.

Chapters 4 and 5 contain the main thrust of the thesis. Chapter 4 focuses on Zimbabwe's potential to develop through exploitation of mineral resources. In the process, the chapter discusses the ways in which Zimbabwe asserts sovereignty over its minerals resources and the nature of the threats it faces which restrict sovereignty and the realization of the right to development through exploitation of mineral resources. Chapter 5 discusses the DRC and the mineral resources landscape against the background of the scramble for the resources and

[131] See generally Geoffrey Samuel 'Epistemology of comparative law: Contributions from the sciences and social sciences' in Mark Van Hoecke (ed) *Epistemology and Methodology of Comparative Law* (2004) 35.

resultant conflicts. The chapter examines the extent to which international law has helped to stop the threats. The chapter also provides the way in which the DRC asserts sovereignty and the threats to that sovereignty. The extent of the problems affecting or weakening the regulation of the DRC's mineral resources is exacerbated by institutional failure.

Chapter 6 analysis the overarching issues raised in chapters 2, 3, 4 and 5. The problems affecting regulation of mineral resources and the sectoral implications for mineral resource development are analyzed. The chapter uses inter-country comparison between the DRC and Zimbabwe to determine whether the two states are benefiting their operationalizing of international law principles governing state sovereignty over mineral resources discussed in chapter 2. Chapter 7 summarizes the findings of the thesis. A summary of the recommendations for Zimbabwe and the DRC are broadly couched with a view to curb and navigate threats to PSNR, by strengthening the central authority and, regulatory institutions and their structures. Both states a need to guard jealously the mandate to exploit mineral resources for self-determination and development, by operationalizing international law principles governing state sovereignty over mineral resources through proactive regulatory measures and strategic planning.

# CHAPTER 2

# INTERNATIONAL LAW PRINCIPLES SUPPORTING THE EXPLOITATION OF MINERALS FOR SELF-DETERMINATION

## 2.1 Introduction

International law recognizes the rights of states to benefit from their mineral resources and provides a legal framework to control the resources but leaves domestic implementation and enforcement to host states. The objectives are to ensure that host states have the opportunity to work out how they can exercise the mandate and sovereignty over their mineral resources.

The chapter discusses key international law principles that support sovereignty of developing states to control and derive benefits from their mineral resources. As highlighted in chapter 1, there are essentially two categories of principles: Those that give states the mandate to control their mineral resources and those that facilitate access to investment and trade of the resources. In addition to an introductory section on the concept of sovereignty, this chapter considers the principles of permanent sovereignty over natural resources (PSNR), self-determination, non-intervention (non-interference), the right to development, and salient principles governing investment and trade. The principles are interrelated in their support of states' mandate to exploit domestic mineral resources for self-determination. The extent to which sovereignty is worked out at the domestic level and how these principles promote or affect sovereignty is also considered.

## 2.2 The Concept of Sovereignty

The principle of sovereignty is a supreme authority within a state as defined in the Charter of the United Nations, it is a fundamental norm of contemporary international law.[1] Also, sovereignty could mean ultimate authority within a country.[2] Another conception of sovereignty refers to absolute independence or freedom and takes into account aspects of

[1] Article 2(1) of the Charter of the United Nations, 1945; hereafter the UN Charter. See also Jens Bartelson 'The concept of sovereignty revisited' (2006) 17 *The European Journal of International Law* 463; Janice E Thomson 'State sovereignty in international relations: Bridging the gap between theory and empirical research' (1995) 39 *International Studies Quarterly* 213; Hendrik Spruyt *The Sovereign State and its Competitors: An Analysis of Systems Change* (1994); Jens Bartelson *A Genealogy of Sovereignty* (1995).

[2] *Case Concerning Customs Regime between Germany and Austria (Protocol of 31 March 1931) (Advisory Opinion)* Judgment of 5 September 1931 (Individual Opinion of Judge Dionisio Anilotti – former President of the International Court of Justice) 55 at 57. See generally Jose Maria Ruda 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice' (1992) 3 *European Journal of International Law* 100.

internal and external sovereignty (discussed further below).[3] The definitions refer to different facets of sovereignty, which also correspond to various practical dimensions of the principle. Accordingly, the concept of sovereignty cannot be absolutely or freely independent but expresses and integrates values that it seeks to implement in practice, and against which political situations have to be evaluated.[4] It therefore means sovereignty can, essentially, be distinguished based on the values it entails and various discussions that prevail around it, and from the values that make for a good country including the manner in which a state controls its mineral resources. Since the values underpinning sovereignty are many, the concept of sovereignty is multi-dimensional, and includes self-determination, non-interference, the right to development and state control over mineral resources. These values are important in as much as they enhance state control over domestic mineral resources for development.

As a principle, sovereignty is a founding aspect and fountainhead of the international law order, the continued existence of which is largely dependent upon international law subjects' general approach to its validity, legitimacy and reciprocity. Thus, '[…] the discourse and practice of sovereignty are as a result closely intertwined, an accurate and complete presentation of the legal institution of sovereignty requires including some international law theory.'[5] Consequently, sovereignty is a central principle of international law, which gives states legal competence to exercise supreme authority and most institutions, if not all, as well as international law principles depend on sovereignty, whether directly or indirectly, in their functions and implementation.[6] Although the thesis is not about the concept of sovereignty *per se*, the principle is nevertheless central to the core-aspects of the arguments which support African states' control of domestic mineral resources.

Ideally, states cannot be legally equal without the principle of sovereignty and international law giving effect.[7] As stated in UNGA Resolution 375 (IV):

> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that sovereignty of each State is subject to the supremacy of international law.[8]

[3] *The Island of Palmas Case (or Miangas) (United States of America v the Netherlands*), Permanent Court of Arbitration, Award of the Tribunal of 4 April 1928; hereafter the *Island of Palmas Case*.
[4] Samantha Besson 'Sovereignty' in Rudiger Wofrum (ed) *Max Planck Encyclopaedia of Public International Law* (2011) 1 at 9.
[5] Ibid, at 2.
[6] Ibid.
[7] Hans Kelsen *Principles of International Law* (2003) at 401.
[8] Article 14 of UNGA Resolution 375 (IV) - the Declaration on the Rights and Duties of States, 1949.

It therefore means that sovereignty is not absolute. Nevertheless the provision raises questions in relation to the qualification and use of the term 'sovereignty'. As can be inferred from the relevant UN Resolutions on state sovereignty the term "sovereignty" originally referred to, inter alia, the prerogative of states to exercise their unlimited supreme authority. It is more likely that in practice, states do not have such unlimited and supreme powers. Hans Kelsen submits that if 'sovereignty' does not mean supreme authority as provided in the international law instruments, then it would be a fallacy that it is supreme power. He adds that against the restricted sovereignty, the power of a state in international law cannot then be equated to the original meaning of 'sovereignty'.[9] In the context of the study, however, 'sovereignty' refers to the rights of states over control of domestic mineral resources and to derive benefits from their exploitation. However, a state's prerogative powers may be defined in its municipal law but limited by international law principles such as investment and trade principles, as well as the conditions that come with international investment.[10] Accordingly, the relationship between international law and municipal law has always not been equal; sovereignty is subject to a superior law.[11]

There are four broad categorizations of sovereignty which are paired as follows: Political or legal sovereignty, internal or external sovereignty, absolute or limited sovereignty, and unitary or divided sovereignty.[12] Political and legal sovereignty have been closely linked, and are inextricably connected to the contemporary claim of sovereignty.[13] Besson argues that '[p]olitical sovereignty is difficult to conceive without rules to exercise and constrain that sovereignty, but legal sovereignty is hard to fathom without a political power to establish its legal rules […].'[14] Accordingly, legal and political sovereignty are inherently inseparable and therefore are important for the purposes of the thesis in order to support the manner in which sovereignty over mineral resources is worked out at the domestic level.

[9] Hans Kelsen 'The Draft Declaration on the Rights and Duties of States' (1950) 44 *The American Journal of International Law* 259 at 276.
[10] UNGA Resolution 1803 (XVII) - Permanent Sovereignty Over Natural Resources, 14 December 1962. See also Nico Schrijver *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) at 11 - 12.
[11] Such a fundamental superior law can be equated to a *Grundnorm* - a Germany word which refers to a fundamental norm. A legal system is made of a hierarchy of norms and each norm is derived from its superior norm. Therefore a norm is legally valid only because it is established according to a definite rule. See Hans Kelsen *The General Theory of Law and State* (1945) at 56. See generally Michael Doherty (ed) *Jurisprudence: The Philosophy of Law 3rd edition* (2003).
[12] For more detail, see generally Samantha Besson, op cit note 4 at 10 – 14.
[13] Ibid, at 10.
[14] Ibid.

Internal and external sovereignty relate to a state's internal affairs as well as external relations. The former can be referred to as internal state sovereignty and the latter as external state sovereignty.[15] However, the differences between internal and external sovereignty should not be conflated with "domestic and international sovereignty".[16] Domestic sovereignty is both internal and external, since domestic law regulates internal affairs of a state as well as its external relations, and the same can be the case for international sovereignty.[17] Domestic sovereignty empowers a state to control its domestic mineral resources, source investment and trade mineral products with other states. With regard to the other two categories of sovereignty; namely, absolute and limited sovereignty,[18] and unitary and divided sovereignty,[19] neither group is relevant for the purposes of this thesis. The distinction is crucial for the purposes of the thesis as it focuses on the strategic arena of domestic mining law and policy.

Although sovereignty is the supreme authority within a state, it primarily entails rights and duties.[20] Three sovereign rights are relevant for the purposes of this thesis; namely, the presumption that all state's acts are legal in order to secure its independence and territorial integrity; right to constitutional or organizational autonomy, which is equated with self-determination, and the right to protect sovereignty, integrity and freedom from external interference or intervention.[21] The sovereign rights fundamentally underpin state control over domestic mineral resources; the rights are reinforced as part of the entitlements of states from international law against any party. Apart from the sovereign rights, there are various sovereign duties as well. Three duties are important for the purposes of this thesis; namely, to abide by the dictates of international law and to cooperate with other international law subjects in implementing international law. The other duty prohibits interventions in another states' affairs, whether direct or in directly, through the use of force or not.[22] The last duty is to amicably settle any dispute through enquiry or mediation, conciliation, arbitration or

[15] Ibid.
[16] International sovereignty can either be internal or external, and international internal sovereignty refers to international rights and duties of a state with regard to that state's ultimate authority and competence over its peoples and domestic affairs, as well as territorial and personal jurisdiction, integrity and non-interference. Further, international external sovereignty relates to equal rights and duties of states in their relations to other states. For more detail, see Samantha Besson, op cit note 4 at 11 – 12.
[17] Samantha Besson, op cit note 4 at 10.
[18] Ibid, at 12 – 13.
[19] Ibid, at 13.
[20] Article 2(1) of the UN Charter.
[21] Ibid, at Article 2(7). See also Samantha Besson, op cit note 4 at 18 – 19.
[22] Ibid, at 20.

judicial settlement or resort to regional agencies or arrangements.[23] This duty also includes settlement of disputes that may arise from mining investments or trade in mineral resources.

Regardless of the above, however, observation of the concept of sovereignty shows that its content and implication have constantly evolved.[24] Falk notes that the principle of sovereignty is one of 'conceptual migration'[25] in that different periods of history have caused different challenges which in turn have contributed to shape the legal responses sought to the political challenges of each era, and conditioned the functions granted to sovereignty.[26] Another reason for the difficulties or challenges associated with sovereignty is linked to the subject-matter itself. For example, sovereignty touches on highly and politically controversial issues such as the standard treatment of foreign investors (the national standard versus the international minimum standard), state control over natural resources, expropriation of investors or alien property and the standard of compensation, and the choice of investors to grant mining licences.[27] As such, sovereignty can be described as '[…] the most glittering and controversial [concept] in the history, doctrine and practice of international law'.[28] Regardless of the observation and the status of sovereignty, however, Schrijver noted various terms have been used to emphasize the status of "sovereignty". In addition to giving sovereignty a 'permanent status', adjectives such as 'absolute', 'inalienable', and 'free and full' are also used in the literature, which are pointers that sovereignty is the backbone of the state.[29] Accordingly, one cannot deny that the concept of sovereignty is inherently connected with the principles of non-interference in the domestic affairs of the state and self-determination (discussed further below) which give host states the right to decide on their mineral resource policies and the manner in which to implement them with a view to, inter alia, promoting economic growth and development from exploitation of the resources.[30]

The issues highlighted in the above paragraph are central to official relations among states and therefore potentially too sensitive for African states to exercise their sovereignty contrary

[23] Article 33(1) of the UN Charter.
[24] Ibid, at 3 – 9. See also Nico Schrijver, op cit note 10 at 1 – 19.
[25] Samantha Besson, op cit note 4 at 3. See also Richard Falk 'Sovereignty' in Joel Krieger (ed) *The Oxford Companion to Politics in the World 2nd ed* (2001) 789.
[26] Ibid.
[27] Nico Schrijver, op cit note 10 at 3 – 4.
[28] Steinberger H 'Sovereignty' in Bernhardt R (ed) *Encyclopedia of Public International Law, 10 Instalment* (1987) 397. See also Nico Schrijver, op cit note 10 at 1 – 2.
[29] Ibid.
[30] Ibid.

to the general or minimum expectations of foreign investors (discussed further below). Regardless of the sensitive nature of the issues which are at the centre of international law and domestic politics, as well as dispute settlement, however, the manner in which sovereignty is worked out at the domestic level in the control of mineral resources (discussed in chapters 4 and 5) is inherently fundamental.

Sovereignty is very important as it is the basis upon which a state assumes control over domestic affairs and the manner in which mineral resources are regulated. The principle underpins almost all international law principles discussed in this thesis that support state control over mineral resources.

## 2.3 Principles Mandating State Exploitation of Mineral Resources

The three international law principles outlined in the introduction; namely, PSNR, non-intervention (non-interference) and self-determination are inter-related and fundamental to the control of mineral resources in Africa. The principles are analyzed with a view to ascertain the extent to which each supports the mandate and assertion of sovereignty over mineral resources with a view to self-determination, and the potential problems that may be encountered in the process.

### 2.3.1 The Principle of Self-determination

Self-determination is a principle that refers to self-assertion or the claim of states and peoples to control their political and economic destiny.[31] The principle also refers to the autonomy of the state and its political separation from foreign national bodies,[32] and the right to separate state existence.[33] Self-determination is a core principle of international law, arising from

[31] James Crawford *The Creation of States in International Law 2nd ed* (2006) at 107 – 116. See also Malcolm N Shaw *International Law 6th ed* (2008) at 251; Hurst Hannum *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (1990) at 27 – 49; Margaret Moore 'Introduction: The self-determination principle and the ethics of secession' in Margaret Moore (ed) *National Self-Determination and Secession* (1998) 1.

[32] See generally Allan Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004) at 401 – 424.

[33] Vladimir Ilich Lenin *The Right of Nations to Self-determination* (1947) at 9 – 10. See also Morton H Halperin, David J Scheffer &Patricia L Small *Self-Determination in the New World Order* (1992) at xiii – xiv. There are exceptions to the right of self-determination in modern society; for more detail, see Alfred Cobban *National Self-Determination* (1945) at 46 – 48; Allan Buchanan *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004) at 331 – 333.

customary international law, recognized and enshrined in various international treaties.[34] For the purposes of this thesis, the focus is on state self-determination in order for a state to derive economic benefits from its mineral resources.

#### *2.3.1.1 Substantive Development of the Principle of Self-determination*

The literature on the evolution of the principle of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution.[35] In the context of the French Revolution, self-determination evolved as a democratic ideal valid for all humankind, and an assertion against tyranny, but with a focus on promoting the wishes of the people. Also, focus was on 'the right[s] of a people of an existing State to choose freely their own political system and to pursue their own economic [...] development'.[36] From its inception, the concept of self-determination had '[…] the character of a threat to the legitimacy of the established order and also tried to substitute for it one with more equality'.[37] Similarly, self-determination as a corollary of democracy supported the concept of nationality and the objective right of states to independent statehood. The Rights of Man envisaged by the French Revolution were transferred to nations.[38] The principle was related to the concept of peaceful change, and that territorial transfer between sovereigns should not be carried out unless the affected parties agreed to a way of settling their disputes amicably.[39]

In the early 1900's, international support grew for the right of all peoples to self-determination.[40] However, the literature shows that the principle of self-determination was further developed and expounded by a number of UNGA resolutions. Through the UNGA, the self-determination of peoples became an established and well-known principle of international law.[41]

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[34] Malcolm N Shaw, op cit note 31 at 251 – 257. See also Alfred Cobban, op cit note 33 at 1 – 9; Daniel Thurer & Thomas Burri, 'Self-determination' in Rudiger Wolfrum (ed) *Max Plank Encyclopedia of Public International Law* (2008) 2.
[35] A Rigo Sureda *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (1973) at 17.
[36] Daniel Thurer & Thomas Burri, op cit note 34 at 5.
[37] A Rigo Sureda, op cit note 35 at 17.
[38] E H Carr *The Bolshevik Revolution 1917 – 1923, Vol 1* (1969) at 417.
[39] Alfred Cobban, op cit note 33 at 46 – 48. See also Alozie Ndubisi Wachuku *Self-Determination and World Order* (1977) at 11.
[40] Malcolm N Shaw, op cit note 31 at 151 – 154.
[41] The principle is embodied in many international instruments including the UN Charter, the ICCPR and the ICESCR.

The UN Charter enunciates the principle of self-determination and its purposes, which are, to develop friendly relations among nations based on respect for the principle of equal rights and peoples' self-determination.[42] The scope and content of the principle is based on respect for the principle of equal rights and opportunities. Ideally, this entails recognizing a state's inherent right to freely assert sovereignty over domestic affairs and the regulation of its mineral resources in a manner that gives effect to the wishes of the peoples.[43] The principle is conceived as one among the possible measures to strengthen universal peace and co-existence.[44] Accordingly, states have unwavering rights to political and economic self-determination, as well as to their natural endowment, which include domestic mineral resources.

The principle of self-determination is a constituent entity of political order and it is inherently linked to the decolonization process.[45] Legally, the principle gives host states rights to exercise their mandate in order to pursue their visions. Ideally, self-determination springs from the need or the process of decolonization because peoples who were under the colonial regimes were not in control of their political and economic destiny.[46] Reference is made to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, which is a restatement of the establishment of sovereign or independent states, and free association with other states. The Declaration also refers to equal rights of the peoples to freely constitute ways to implement the principle.[47] From the Declaration, it is clear that self-determination has to be exercised within a state as well as in the external affairs of the state.[48] In this regard, however, it can be argued that the principle of self-determination ardently promoted the end of colonialism in all its manifestations.[49] This

[42] Articles 1 & 55 of the UN Charter. See also Article 1(1) of the ICCPR and Article 1 of the ICESCR. The replication of "self-determination" in these international instruments may be an indication that the right is a non-derogable and therefore remains one of the fundamentals for international peace.
[43] Article 1 of the UN Charter.
[44] Ibid, Article 55(c). See also Daniel Thurer 'Self-determination' in Bernhardt R (ed) *Encyclopaedia of Public International Law Volume IV* (2000) 365; Starushenko G (translated from the Russian to English by Ivanov-Mumjiev) *The Principle of Self-determination in Soviet Foreign Policy* (1963) at 221.
[45] Daniel Thurer & Thomas Burri, op cit note 34 at 7 & 13 – 14.
[46] Karen Parker 'Understanding self-determination: The basics' Presentation to First International Conference on the Right to Self-Determination, United Nations, Geneva, August 2000.
[47] Principle 5 of the UNGA Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, 1970. See also the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by UNGA Resolution 1514(XV) of 14 December 1960.
[48] Daniel Thurer & Thomas Burri, op cit note 34 at 7. See also M K Nawaz 'The meaning and range of the principle of self-determination' 1965 *Duke Law Journal* 82 at 88 – 101.
[49] Para 6 of the Preamble to the Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 47.

suggestion is legally based on the fact that all peoples and their states have inalienable rights to freedom and political independence, as well as their sovereignty and territorial integrity.[50] However, the host state being the rights holder has a mandate, as a duty-bearer to realize the benefits of self-determination. Accordingly, decolonization was a process that provided host states with a mandate to control domestic mineral resources for self-determination.

The decolonization process was also affirmed in 1952 by the UNGA, which also affirmed that the right of states to self-determination was prerequisite to the full enjoyment of fundamental rights.[51] Resolution 637A (VII) stated that:

> […] the UN practice surrounding self-determination, including defining the content and subject of the right, has been consistent on certain central tenets. These tenets are preserving territorial integrity; granting self-determination only to independent, external colonial peoples and defining the subject of self-determination based on territory rather than ethnic criteria. Further, the political imperative of decolonization and the effort to clarify and define the trusteeship system in the early 1950s served as the driving forces behind the shift from the Charter [and self-determination as] expressed in the international human rights covenants drafted during the 1950s and 1960s.[52]

UNGA Resolution 1514(XV) of 14 December 1960[53] contributed to the development of the principle of self-determination. The Declaration set out seven Articles that confirm the need for self-determination and an end to all forms of colonialism.[54] The realization of political and economic self-determination suggests that the process of introducing and establishing them was far from easy.[55]

The principle of self-determination consequently covers not only political independence but complements state sovereignty and non-interference in the domestic affairs of states. Therefore self-determination does not necessarily mean a unique event or phase occurring only at the moment when a state obtains its political independence but a principle of continuous action for the peoples to decide their political and economic destiny. As a result,

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[50] Ibid, at para 11.
[51] UNGA Resolution 637A (VII): The Right of Peoples and Nations to Self-determination, adopted during the 403 Plenary Meeting on 16 December 1952. See also Rosenne S 'Codification of international law' in Bernhardt R (ed) *Encyclopaedia of Public International Law Volume V* (1992) 633.
[52] Javier J Leon Diaz 'Minority rights, status and scope' 2002, available at http://www.javier-leon-diaz.com /docs/Minority _Status1.htm (assessed 10 March 2012).
[53] UNGA Resolution 1514(XV), supra note 47.
[54] Ibid. See also para 1(a) of Article 13 of the UN Charter. See further Edward McWhinney 'Declaration on the Granting of Independence to Colonial Countries and Peoples' 2008, available at http://untreaty.un.org/cod/avl/ha/dicc/dicc.html (accessed 12 April 2013).
[55] Ara Papian 'On the Principle of Self-determination and Territorial Integrity in Public International Law (*The Case of Nagorno-Karabakh*)' (2010) at1, available at http://www.azad-hye.net/media/k1/self-determination-territorial-integrity.pdf (assessed 10 July 2014). See, for example, the UN Charter, the Atlantic Charter, 1941; the Washington Declaration, 1942 and the Moscow Declaration, 1943.

the principle has been transformed substantially to fit the changing international order. In the context of the study, self-determination translates to a state having the capacity to make and enforce municipal laws and policies, and to regulate domestic mineral resources in a manner that achieves the economic aspirations of its people and in a way that successfully navigates the potential for interference and other threats to sovereignty.

A bridge had been established from self-determination as a process of decolonization to self-determination as a non-derogatory right.[56] In the ICCPR and the ICESCR, the right of the peoples to self-determination is a free standing principle, which is no longer confined to colonization but continuous action.[57] Further the principle of self-determination is intertwined with the PSNR and non-interference, which implores states and other subjects of international law to honour the internal affairs of a state and to refrain from interfering in them, including the regulation of mineral resources.

#### *2.3.1.2 Origin and Legal Status of the Principle of Self-determination*

The discussion of the substantive development of self-determination as a principle shows how it originated, gradually developed and acquired international law recognition.[58] The principle is

> […] considered as a form of self-assertion against any kind of [influence and] domination, its content is as varied as ways of domination are varied. Due to these circumstances, self-determination has been considered a concept of political rather than legal character.[59]

The quote shows the principle of self-determination carries normative weight that can be applied in various contexts. The term "normative" describes broader ways in which self-determination can manifest, contrary to the assertion that the principle was limited to decolonization.[60] Arguably, the principle applies to and can be used to justify the manner in which states may navigate interferences in order to realize economic benefits through

[56] Ibid, (Ara Papian) at 50.
[57] Article 1of the ICCPR& Article 1 of the ICESCR. The DRC and Zimbabwe ratified both Conventions on 1 November 1976 and 13 May 1991, respectively.
[58] The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations and the Vienna Declaration of 1993 are two examples of international instruments that endorse the principle of self-determination. See Paras 14 & 17 (e) of the Preamble to the UNGA Resolution 2625 (XXV) - Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 1970. See also provisions on self-determination in this Declaration at 123 – 124. See also Para 9 of the Vienna Declaration and Programme of Action of 1993, adopted by the Conference in Vienna on 25 June 1993.
[59] A Rigo Sureda, op cit note 35 at 25. See generally Alexandra Xanthaki *Indigenous Rights and United Nations Standards* (2007) at 131 – 176.
[60] Ibid, (Alexandra Xanthaki) at 146 – 159.

regulation and exploitation of mineral resources. Therefore, the principle has a broader meaning and accordingly, its application and implementation extend beyond the decolonization process. Irrespective of the content of the principle, regarded as too vague and imprecise to be considered a legal right or principle,[61] it is argued, however, that the confusion surrounding the meaning of the principle originates from the diverse and conflicting interpretations.[62] The principle is inter-connected with the principle of non-interference.[63] Ideally, self-determination, non-interference and PSNR (discussed below) are cardinal principles which have a deterrence component in international law.[64] These three principles support host states to control their mineral resources by deterring other states from interfering in domestic affairs.[65] Nevertheless, the principle has crystalized into customary international law albeit being considered relatively new to international law.

In a nutshell, the principle of self-determination has been transformed substantially in its content and scope; it is one of the principles of international law that is relevant to the assertion of sovereignty over domestic natural resources. It cements the relationship among states and plays a cardinal role in supporting the PSNR and non-interference in the regulation of mineral resources in African states.

#### *2.3.1.3 The Relevance of the Principle to the Study*

There is close nexus between the principles of self-determination and sovereignty since the former supports the latter. By virtue of application of the principle of self-determination, African states should be able to pursue their economic or development goals, by exploiting their mineral resources. Although in theory there should be no interferences in the manner in

[61] A Rigo Sureda, op cit note 35 at 26.
[62] Hellen Quane 'The United Nations and the evolving right to self-determination' (1998) 47 *International & Comparative Law Quarterly* 537 at 538.
[63] Ved V Nanda 'Revising self-determination as an international law concept: A major challenge in post-cold war era' (1997) 3 *ILSA Journal of International & Comparative Law* 443 at 445. See generally D W Bowett 'Self-determination and political rights in the developing countries' (1966) *PASIL* 130.
[64] See generally James Summers *Peoples and International Law: How the Right of Self-Determination and Nationalism Shape a Contemporary La of Nations* (2007) at 372 – 374. See generally Dr Michael C Walt van Praag & Onno Seroo (eds) 'The implementation of the right to self-determination as a contribution to conflict prevention' a report of the International Conference of Experts held in Barcelona, 21 – 27 November 1998.
[65] A Rigo Sureda, op cit note 35 at 26. See generally Aureliu Cristescu 'Sub-Commission on Prevention of Discrimination and Protection of Minorities: The right to self-determination - historical and current development on the basis of the United Nations instruments' 1981, para 14 – 25. See also James Summers 'The status of self-determination in international law: A question of legal significance or political importance' (2003) 14 *Finnish Yearbook of International Law* 271 at 283; Matthew Saul 'The normative status of self-determination in international law: A formula for uncertainty in the scope and content of the right?' (2011) 11 *Human Rights Law Review* 609 at 610 – 612.

which a state asserts sovereignty over its mineral resources, since self-determination and non-interference may imply no influence in the regulation of domestic mineral resources (depending on what meaning is ascribed to "interference" and "influence"); however, in practice this is the opposite. For that reason, it becomes imperative that host states should navigate tensions and threats associated with the regulation of their mineral resources for self-determination. The principle of self-determination enables host states to frame their economic visions in ways that can translate their exploitation into national economic growth and development.

Theoretically, the principle of self-determination has the potential to curb conflict because a state is free to choose its development interests pursuant to domestic policies. A state should have the final decision over the regulation of its domestic mineral resources;[66] the right to self-determination must be exercised freely.[67] Self-determination as a principle empowers African states to be the agents of their own development through indigenization policies, transparency and accountability in control and regulation of their minerals, as well as revenue use management. The principle is also relevant to planning for the use of mineral resources, as well curbing threats to the domestic regulation of the resources.

### 2.3.2 The Principle of Non-intervention (Non–interference)

As highlighted in part 1.3.2 of chapter 1, non-intervention is a common term in the literature on international law, but non-interference appears to suggest a broader prohibition '[…] though in most contexts the two terms seem to be used interchangeably'.[68] In the literature, non-interference is used interchangeably with non-intervention, denoting non-dictatorial interventions.[69] However, Oppenheim submits that;

> […] the interference must be forcible or dictatorial or coercive and otherwise depriving the state intervened against of control over the matter in question. Interference [that is] pure and simple is not intervention.[70]

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[66] King's College, London 'Clean trade in natural resources: A policy framework for importing states and multinationals in the extractive industries,' available at http://www.wenar.info/Clean.Trade.html (assessed 3 May 2012).
[67] Claire Charters 'Indigenous peoples and international law and policy' in Benjamin J Richardson, Shin Imai & Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009) 161. See also Shin Imai 'Indigenous self-determination and the state' in Benjamin J Richardson, Shin Imai & Kent McNeil (eds) *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009) 285. See further Article 3 of the UN Declaration on the Rights of Indigenous Peoples, 2007.
[68] Michael Wood 'Non-intervention (non-interference in domestic affairs)' available at http://pesd.princeton.edu/?q=node/258 (accessed 1 June 2013).
[69] R J Vincent *Nonintervention and International Order* (1974) at 7.
[70] Lassa Oppenheim *International Law 8th ed* (1955) at 432.

From the literature, however, non-interference is a post-World War II development in international law that requires states to refrain from interfering in domestic affairs of another state.[71] There are various definitions of this principle in the literature. According to Duc Tuyen;

> [t]he concept of state sovereignty defines that no sovereign may exercise authority in the domain of another. That means within the territory of a political entity, the state is the supreme power, and as such no state from without the territory can intervene, militarily or otherwise, in the internal politics of that state.[72]

Apart from Duc Tuyen's view, Ramsbotham and Woodhouse, claim that;

> [i]nstead of the unbridled exercise of power in pursuit of interests characteristic of the free for all of international anarchy, [the principle of non-interference] introduces the concept of mutually respected order characteristic of international society.[73]

In other words, the two definitions suggest that sovereignty is supreme and interference in domestic affairs of another state is illegal.

#### *2.3.2.1 The Substantive Development of the Principle of Non-intervention/interference*

Since the establishment of the UN in 1945, the principle of non-interference gradually shifted from its narrow focus (non-intervention) to its present broader form. Among other factors that influenced its current form was the inherent need to protect the sovereignty of states, international peace and security. When the principle of non-interference found space in international law, its development was influenced by various factors, as Alshammari notes:

> The chaotic and teeming world situation that unfolded in the period that preceded the creation of contemporary international law, which was rife with wars and permanent conflicts that led to human catastrophes, particularly in the form of the first and second world wars. This historical era has contributed to the development of the concept of global peace and security. There is no doubt that this concept seeks to restrict international disputes and has played a direct role in the development of the concept of sovereignty and the principle of non-intervention through the establishment of the rules of law on which this principle is based.[74]

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[71] Steven Wheatley 'The non-intervention doctrine and the protection of the basic needs of the human person in contemporary international law' (1993) XV *The Liverpool Law Review* 189. See also Lassa Oppenheim, op cit note 70 para 134. States are required by international law to avoid interferences either in domestic affairs of another state or in another state's external affairs. This distinction is sensitive to the differences between an 'external act' which addresses itself to another state's foreign relations and an 'internal act' which seeks to penetrate and meddle in the domestic affairs of the state, including the regulation of mineral resources. See generally R J Vincent, op cit note 69 at 3 – 16.

[72] Nguyen Duc Tuyen 'The future evolvement of the principle of non-interference' the 8th Asian Economic Forum - the ASEAN in the Evolving Regional Architecture: Opportunities, Challenges and Future Direction, 16 - 18 March 2012, Hotel Sofitel, Phnom Penh, Kingdom of Cambodia, available at www.aef.org.kh (accessed 2 March 2013).

[73] Oliver Ramsbotham & Tom Woodhouse *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (1996) at 35.

[74] Yahya Alshammari 'The right of political self-determination and shifting in the principle of non-interference' (2013) 3 *Westminster Law Review* 1.

This quotation highlights some of the concerns that led to the shift and development of the principle from non-intervention to non-interference. In line with the purposes of the UN, non-interference in the affairs of another state developed with a view to influence friendly relations among states, which is underpinned by the principle of self-determination (discussed above) and equality of states,[75] as well as international peace and security.[76]

The need to end colonialism further influenced the development of non-interference in order to support the UNGA Resolution 1514(XV), which contained the Declaration on Granting of Independence to Colonial Countries.[77] As international law developed, so did the terms "territorial integrity" and "political independence" which are commonly referred to as '[…] the totality of legal rights which a state has'.[78] As the world order developed in its current form, and in order to protect the rights of all states, the scope of the principle of non-interference broadened as well. The principle '[…] was considered as the most significant means to cope with the logic of anarchy that lies at the heart of international politics, and thus becomes the main governing rule of state relations'.[79]

As highlighted in section 1.3.2 of chapter 1, what constitutes "interference" is not set out clearly and this failure goes a long way towards explaining the uncertainties surrounding this principle.[80] However, Woods redefines what constitutes interference as what is outlawed and dictatorial interference. Unfortunately, he seems to ignore the threats or interferences that infringe the sovereignty of host states.[81] Nevertheless, non-interference requires that a state does not interfere in domestic affairs of another state in a "coercive way". For example, states or corporations making payments to political parties in another state, and conditionalities

[75] Article 2(1) of the UN Charter.
[76] Ibid, Article 2(3).
[77] UNGA Resolution 1514 (XV) - Declaration on the Granting of Independence to Colonial Countries and Peoples, of 14 December 1960.
[78] Ian Brownlie *Principles of Public International Law* 7th ed (2008) at 268. See also Muge Kinacioglu 'The principle of non-intervention at the United Nations: The Charter framework and the legal debate' 2005 *Perceptions* 15 at 22.
[79] Ibid, (Muge Kinacioglu) at 15.
[80] Maziar Jammejad & Michael Wood 'The principle of non-intervention' 2009 *Leiden Journal of International Law* 345 at 347.
[81] Sir Michael Woods 'The principle of non-intervention in contemporary international law: Non-interference in a state's internal affairs used to be a rule of international law: is it still?' a summary paper of the Chatham House International Law Discussion Group Meeting held on 28 February 2007.

incorporated in loan agreements[82] (though not a key subject of this thesis), may constitute interference. Interferences which are opposed by host states are also unlawful.[83]

For the purposes of this thesis, non-interference refers to direct or disguised interference with a view to restrict or weaken sovereignty over domestic mineral resources. Non-interference also includes non-enforceable influence, which can be in the form of mining investments that come with conditions that the host state is compelled to accept without exercising its discretion.[84] Another example is the use of various forms of economic leverage (as when mining companies threaten job cuts or capital flight when host states propose new mining policies or laws) and policies which affect investment or trade in particular, where the major objective is to negatively affect the outcome of the host state's internal affairs, as well as its mineral resource policies.[85] From the literature, some states compete for influence and access to mineral resources in Africa, and through the fortunes of force, they understand that host states will be without options but to accept their conditions.[86] Regardless of non-forcible influence not directly falling within the purview of Article 2(4) of the UN Charter, however, this thesis submits that the conduct amounts to interference.

Whether there is an exception to the principle in support of peoples seeking to exercise their lawful right to self-determination remains controversial in the sense that some peoples may be used in order to coerce the government of the state to implement or to undo certain laws that potentially interfere or influence certain outcomes in order to control domestic mineral resources. The reason is that some states and non-state actors have debased the principle to suit their needs and to control natural resources in host states. For example, the calls for regime change in Zimbabwe and the DRC might be an indirect influence by other powers to use the oppositions as proxies in order to access domestic mineral resources.

[82] For discussion of conditionality policy, see sections 3.2 of chapter 3; 4.5.4 of chapter 4 & 5.5.4 of chapter 5.
[83] Lillich R B 'Humanitarian intervention through the United Nations: Towards the development of criteria' (1993) 53 *Zaoe RV* 557 at 560. See also Lillich R B 'Forcible self-help by states to protect human rights' (1967-68) 53 *Iowa Law Review* 325 at 332.
[84] Lori Fisler Damrosch 'Politics across borders: Non-intervention and non-forcible influence over domestic affairs' (1989) 83 *The American Journal of International Law* 1 at 1 - 2.
[85] Ibid, at 5.
[86] Ibid.

### *2.3.2.2 Origin and Legal Status of the Principle of Non-interference*

The origin and establishment of the principle of non-interference is indebted to the Treaty of Westphalia of 1648, which founded the system of states.[87] Further the principle is based on equality of states in the international law system that discourages cross-border influences. Vattle is given credence as the first to formulate the principle and explore the application of natural law to the conduct of states and sovereigns.[88] He further discussed the rights and obligations of states and limits of the rights, sovereign power and relations among sovereign states, including international legal agreements and treaties.

Of the early treaty formulations of the principle of non-interference was Article 15(8) of the Covenant of the League of Nations and, the 1933 Montevideo Convention on Rights and Duties of States, as well as the 1936 Additional Protocol on Non-Intervention, which inter alia, prohibited interference in the domestic affairs or freedoms of another state. It is reported that during the Cold War Era, the socialist states in the Soviet Bloc were insistent on the recognition of the principle of non-interference.[89]

Also, insistent on the principle of non-interference were colonial Powers in the early years of the establishment of the UN, and thereafter many newly-independent states.[90] Arguably, the colonial powers used the principle to justify illegal occupation of their territories vis-à-vis the moral voice of the community of states, while the newly-independent states used the same principle to ensure former colonial masters did not interfere with their affairs. Two distinctions can be made: On the one hand, the colonizers used the principle to block any legitimate attempts to stop their continued illegal occupation of the colonies. On the other hand, the former colonies used the principle for the good cause to establish and defend their self-determination. When used to defend a case that arises from a legitimate claim, one would argue that the principle underpins international peace and friendly relations amongst states. Accordingly, the principle of non-interference involves the rights of every state to conduct its

[87] See generally Richard A Falk 'The interplay of Westphalia and Charter concepts of international legal order' in Richard A Falk & Cyril E Black (eds) *The Future of International Legal Order Vol 1: Trends and Patterns* (1969) 43.
[88] See generally Emer de Vattel *Droit Des Gens ou Principes de la loi Naturelle Volume 1* (1758) para 37.
[89] Michael Wood, op cit note 68.
[90] Ibid.

affairs without interference;[91] however, colonial masters were not justified in their use of the principle because the colonies were not independent states. Similarly, the implication of the principle in domestic affairs of states '[…] is a corollary of every state's right to sovereignty, territorial integrity and political independence'.[92]

Regardless of views to the contrary, no state should interfere, militarily or otherwise, in the domestic affairs of another state.[93] However, '[t]he counterpart of [non-interference], domestic jurisdiction, is those issues that a state may freely choose for itself […]'[94] - fundamentally the choice of economic and political system, as well as the manner in which states assert sovereignty over their mineral resources.[95] Although the UN Charter does not overtly lay down non-interference as a rule governing international relations among states (except Article 2 that sets out the guiding principles for the UN and member states),[96] the principle remains a well-established part of international law that supports state sovereignty.

The International Court of Justice (ICJ) held that this principle is part of customary international law; however, examples of direct infringement of this principle are seldom encountered.[97] For example, it could be argued a state may use the principle to prevent effective implementation and enforcement of rights provisions it does not consider favourable.[98] Oppenheim says the prohibition of interference is a corollary of the state's right to sovereignty, self-determination, economic and political independence.[99] In the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, the ICJ referred to some matters to which each state is permitted,

[91] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America),* Judgment of 27 June 1986, at 106 para 202; hereafter the *Nicaragua Case.* See also Michael Wood, op cit note 68.
[92] Lassa Oppenheim, op cit note 70 at 428.
[93] The theoretical underpinning of the principle of non-interference is best discussed through analyzing the principles of sovereignty and the right of states to self-determination.
[94] Steven Wheatley, op cit note 71 at 190.
[95] Ian Brownlie, op cit note 78 at 553.
[96] Oliver Ramsbotham & Tom Woodhouse, op cit note 73 at 234.
[97] The *Nicaragua Case*, supra note 91 para 202.
[98] See Principle VI - Non-intervention in internal affairs: the participating states will refrain from any intervention in the internal affairs falling within the domestic jurisdiction of another participating state, regardless of their mutual relations. Principle VII - Respect of human rights and fundamental freedoms: the participating parties recognize the universal importance of human rights and freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and cooperation among states.
[99] Lassa Oppenheim, op cit note 70 at 428. See also the Helsinki Final Accord (1975); Steven Wheatley, op cit note 71; Henkin L 'Human rights and domestic jurisdiction' in T Buergnthal (ed) *Human Rights, International Law and the Helsinki Accord* (1977) 22.

by the principle of state sovereignty, to decide freely, including to exercise sovereignty without conditionality or pressure.[100] It further endorsed and broadened the scope of, and legal status of the principle of non-interference to involve the right of a sovereign state to conduct its domestic affairs without external interference.[101] The ICJ further submitted that one of these is the choice of economic policies and political system.[102]

The ICJ stated that:

> [the non-interference] principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, […] system, and the formulation of foreign policy. [The Court held that] **[i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones**. The **element of coercion,** which defines, and indeed forms the very essence of, prohibited [interference], is particularly obvious in the case of an intervention which uses force, either in the direct form of […] action, or in the indirect form of support for […] activities within another State .[103] (the words in bold is my emphasis).

The highlighted part reiterates that the intention to coerce constitutes illegality in the practice of states in international law. As such, all coercive interferences are illegal regardless of their legal effect.[104] Also, non-interference applies to non-binding policies, recommendations or decisions. Thus, it is unlawful to interfere in the competences of states including legislating laws or policies for, and control over domestic mineral resources.[105] Any policy recommendation or investment conditions which cause the host state to change its domestic vision, and without the state excising its free discretion, amounts to interference and is therefore illegal.

Similarly, the ICJ dealt with the principle of non-interference in the case of the *DRC v Uganda.*[106] The involvement of Ugandan armed forces in the DRC and looting of some mineral resources were, *inter alia*, issues that the DRC brought before the ICJ for determination. Although the ICJ rejected some of the counter-claims relating to activities after August 1998, it is important to recall that the Court held that Uganda was liable for

[100] Ibid.

[101] *Nicaragua Case,* supra note 91, paras 202 – 209 & 212 – 214**.**

[102] Ibid.

[103] Ibid, para 205.

[104] Philip Kunig 'Prohibition of intervention' in Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2008) 1 at 4.

[105] Ibid. However, in practice, the UN has developed the consistent tendency in order to limit the scope of domestic jurisdiction with reference to human rights, and international peace and security.

[106] See also the *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) Judgment, ICJ Reports (2005) 168 para 11 & 56; hereafter the *Armed Activities Case.*

interfering in the domestic affairs of the DRC during that period. The DRC was therefore legitimately entitled, under Article 51 of the UN Charter, to use force in order to repel the attack by Uganda.[107] In its findings, the ICJ held that Uganda violated the sovereignty and territorial integrity of the DRC.[108] In the context of the study, the ICJ's decision is consistent with the objectives of the principle of non-interference.

Non-forcible interferences which reach certain kind of influence may not be considered as interference for the purposes of the study. Further, since states may have accepted and, indeed, encouraged certain influences, '[…] international law cannot be said to prohibit all the kinds of external involvement in [domestic control and regulation of mineral resources]'.[109] Taking into account the legal status of the principle of non-interference, I shall discuss in chapters 3, 4 and 5 examples of forms of interference, which have the potential to restrict the assertion of sovereignty over mineral resources.

#### *2.3.2.3 Relevance of the Principle to the Study*

Non-interference is a cardinal principle supporting state control over mineral resources. It reinforces sovereignty and self-determination by restraining others states from interfering in domestic affairs of host states in the control and regulation of mineral resources. The principle forbids interference, for example, in domestic legislative processes, judicial decisions and enforcement, and policing of mining laws. In terms of the principle, the host state is free to exercise its competences, for example, in the formulation of mineral resource laws, indigenization policies and implementation of mining policies, as well as their enforcement and policing. Accordingly, non-interference supports states to freely decide how to uphold the mandate and control domestic mineral resources, and their exploitation for self-determination. Accordingly, the host state has prerogative powers and discretion to determine its property rights and security of tenure, and their implementation.

### 2.3.3 The PSNR Principle

As referred to in chapter 1, the PSNR found its space in international law and emerged as a new principle in the post-World War II era. The principle was advocated by developing states in the early 1950s in order to ensure host states have inherent rights of control over natural

[107] Ibid, para 304.
[108] Ibid, para 165.
[109] Lori Fisler Damrosch, op cit note 84 at 5.

resources within their territories. The principle is primarily based on two key concerns of the UN, namely, economic development of developing states and their self-determination.[110] The objective was to ensure developing states derive benefits from exploitation of their natural resources without interferences.[111] Accordingly, the PSNR is a dimension of sovereignty and is rooted in two traditional principles of international law, namely, sovereignty and territorial jurisdiction.

#### *2.3.3.1 Substantive Development of the PSNR Principle*

As states attained political independence and began to function as sovereign territories, one of the attributes of a nation's assertion of sovereignty was control and exploitation of domestic natural resources for economic benefit. As referred to in chapter 1, the PSNR principle is intended to be an important pillar for economic development, as mere political independence without economic power and development does not constitute sovereignty.[112] The PSNR principle is also referred to as 'absolute territorial sovereignty', suggesting that, in principle, a state has unrestrained rights to regulate and control, as well as to exploit its mineral resources.[113]

The PSNR principle is considered one of the cardinal constitutional doctrines of the law of nations.[114] The principle is linked to the idea of equality of states and regulates a community of states that bear uniform legal personality.[115] The principle and the literature on sovereignty moved in the direction that supports the notion that there are higher norms or power than the state in international law,[116] and could imply a right against interfering in domestic affairs of each state.[117] There is clearly an overlap with the principle of non-interference in this regard.

[110] Ibid, at 3 - 17. See also Nico J Schrijver 'Natural resources, permanent sovereignty over' in Rudiger Wolfrum (ed) *Max Planck Encyclopedia of International Law* (2008) 1 at 2.
[111] Nico Schrijver, op cit note 10 at 3.
[112] Surya P Subedi *International Economic Law* (2007) at 22.
[113] Nico J Schrijver, op cit note 110 at 7.
[114] Nico Schrijver, op cit note 10 at 2.
[115] Ian Brownlie, op cit note 78 at 289.
[116] Nico Schrijver, op cit note 10 at 1 – 2. See also John H Jackson *Sovereignty, the WTO and the Changing Fundamentals of International Law* (2006) at 58.
[117] Ibid.

The PSNR principle embodies the rights of host states, which are the representatives of the citizens to control, regulate and dispose freely of their mineral resources.[118] The principle is grounded in three main concerns; namely, economic development of developing states through exploitation of domestic natural resources, self-determination of the peoples in those states, and to provide a legal shield against interference in the domestic affairs of host states, for example, issues to do with property rights, investment agreements or contractual claims by other states or foreign investors.[119] In so doing, the PSNR principle is a mirror that reflects potential tensions between the traditional '[…] principles such as *pacta sunt servanda* and respect of for acquired rights and modern international law principles such as self-determination and the duty to co-operate for development'.[120] In the development of the principle, debates on resource sovereignty broadened the scope and deepened claims on resource-related rights, to the regulation of foreign investment and protection of investors' business interests in the host state.[121] In this way, the importance of the PSNR principle '[…] gradually shifted from a primarily rights-based to a qualified concept encompassing duties as well as rights'.[122]

A survey of the literature on sovereignty suggests that a state has unrestrained rights cum mandate and, powers to regulate and control, as well as exploit its mineral resources. However, such powers are not inherently absolute. The assertion of sovereignty is limited, usually by treaties and international agreements freely entered into and also by the principle of *pacta sunt servanda*.[123] Further sovereignty is limited when a state freely consents to a norm; for example, consent to ratify an instrument or excerpts of a declaration or convention.[124] For example, while the Declaration on Environment and Development (Rio Declaration)[125] indirectly supports the PSNR; it also restricts the assertion of sovereignty:

> States have, in accordance with the [UN Charter] and the principles of international law, the sovereign right to exploit their own [natural] resources pursuant to their own policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to […] other States or of areas beyond the limits of national jurisdiction.[126]

[118] Hans Morten Haugen 'The right to self-determination and natural resources: The case of Western Sahara' (2007) 3 *Law, Environment and Development Journal* 72 at 73.
[119] Nico J Schrijver, op cit note 110 at 2.
[120] Ibid.
[121] Ibid.
[122] Ibid. See also Samantha Besson, op cit note 4 at 18 – 20.
[123] Ibid. See also Article 27 of the Vienna Convention on the Law of Treaties, 1969.
[124] Nico Schrijver, op cit note 10 at 1 – 2.
[125] Declaration on Environment and Development, 1992; hereafter the Rio Declaration.
[126] Ibid, Principle 2.

It is important to note the nature of the limitation here – the duty not to cause damage to other state or areas beyond national jurisdiction. This is a very restrictive limitation.

Subedi also submits that,

> [a]sserting economic [independence] meant having control over the economic activities of both juridical and natural persons conducting business within the country, whether nationals of that country or foreigners.[127]

Although there is recognition of a symbiotic relationship between economic independence and assertion of sovereignty, in many African states the minerals sector is controlled by foreign investors in terms of investment contracts concluded between governments of states and investors.[128]

In recognition of the importance of natural resources as a catalyst for economic development,[129] one of the important initiatives of developing states during the decolonization period was to prioritize, as a matter of urgency, the control and ownership of all domestic natural resources.[130] It is widely known that the resolve of new politically independent states led to the enactment of the UNGA Resolution 1803(VII).[131] Importantly, the Resolution recognized the rights of developing states to regulate all domestic natural resources within their territories, and derive economic benefits. Arguably, the PSNR principle was intended to give developing states the assertion of sovereignty and control over their domestic natural resources, thus, requiring domestic legislative interventions to effectively support the principle.[132]

In the context of the thesis, however, the PSNR principle provides host states with the rights of control and to benefit from exploitation of their mineral resources. The principle vests the

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[127] Subedi, op cit note 112 at 22. See generally David Greenaway 'Trade related investment measures: Political economy aspects and issues for GATT' (1990) 13 *World Economics* 367 at 373 - 374 (positing that investment measures help lock-in desired benefits for the host economy, including increased employment and increased foreign exchange earnings).

[128] Thomas Walde 'Third world mineral development: Recent issues and literature' (1984) 2 *Journal of Energy and Resources Law* 282 at 290.

[129] Ibid, at 282.

[130] See generally principles 1, 3 - 6 & 14 of the Recommendations of the UN Conference on Trade and Development, 1964. See also Article 1 of the UNGA Resolution 1803 (XVII), supra note 10; UNGA, Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-determination, 1958.

[131] Ibid. The Resolution was adopted by the UNGA and it is widely considered a milestone for the newly independent states to achieve their political control over natural resources within their territories.

[132] Walde, op cit note 128 at 282. See also Luke A Whittemore 'Intervention and Post-Conflict Natural resources Governance: Lessons from Liberia' (2008) 17 *Minnesota Journal of International Law* 387 at 388. See further Michael Ross 'Natural resource curse: How wealth can make you poor' in Ian Bannon & Paul Collier (eds) *Natural Resources and Violent Conflict: Options and Actions* (2003) 3.

state with permanent custodianship over mineral resources. Accordingly, the principle provides the executive and legislature with the authority to enact mining laws and policies, determine conditions of access and regulation of mineral resources, acquisition and cancellation of mining licences, as well as the system for security of tenure. Host states have inalienable rights to decide which investors to grant licences to the exclusion of others, as well as to decide on mining taxes, and the allocation and use of revenues for development purposes. By virtue of the PSNR principle, host states have legal authority to control and regulate all domestic mineral resources and their exploitation through municipal legislation discussed in chapters 4 and 5.

#### *2.3.3.2 Origin and Legal Status of the PSNR Principle*

The literature shows that the decolonization period after World War II was an era during which the newly independent states hoped to redress economic and developmental challenges caused by colonialism.[133] One of the ways was the assertion of sovereignty over domestic natural resources. Through the influence of international law, the newly independent states adopted several basic strategies through which they sought to satisfy their economic interests. Sinha says;

> [t]he new states attempted to revise […] doctrines to which they were ostensibly bound but which, they believed, were created to further the interest of the Western states and which [developing states] had played no role in formulating.[134]

The newly-independent states focused on established doctrines of international law they saw as operating to their economic disadvantage, principally the principle of *pacta sunt servanda*.[135] The desire to revise this principle, among others, was intended to address

[133] Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens 'Introduction' in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens (eds) *International Law and the Third World: Reshaping Justice* (2008) 1 at 1 – 19. See also Bulajic M *Principles of International Law: Progressive Development of International law Relating to the New International Economic Order* (1986) at 79; Fred Nelson 'Introduction: The politics of natural resource governance in Africa' in Fred Nelson (ed) *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (2010) 1; Duruigbo Emeka 'Permanent sovereignty and peoples' ownership of natural resources in international law' (2006) 38 *George Washington International Law Review* 33 at 38 – 43; Raia Prokhovnik *Sovereignties: Contemporary Theory and Practice* (2007) at 1 – 32.

[134] Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2004) at 198. See also Prakash S Sinha 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *International and Comparative Law Quarterly* 127; George M Abi-Saab 'The Newly Independent States and the Scope of Domestic Jurisdiction' (1960) 54 *American Society of International Law Proceedings* 84.

[135] '*Pacta sunt servanda*' originated from Roman Civil law and which means that contracts that have been freely entered and concluded have a binding force of law between the parties and accordingly, require the parties to honour their acquired contractual obligations. They may be revoked only by mutual consent, or for causes authorized by law. They must be performed in good faith'. In international law, this maxim suffers from the application of *rebus sic stantibus*, which allows states to excuse themselves from treaties which they had

investment agreements that afforded foreign investors extensive control over mineral resources in host states.[136] The principle of *pacta sunt servanda* is in essence related to the concept of sovereignty in that it creates rights and duties. The new states wanted the development of international law principles and rules to assert and strengthen their political positions in international relations and to promote their economic and political interests.[137]

Since the Treaty of Westphalia in 1648,[138] the concept of sovereignty served as the backbone of international law. The relations among states were based on the principles emanating from the interpretations of the Treaty of Westphalia, which established the basic rights and duties of states.[139] This Treaty created fundamental rules applicable to the contemporary system of sovereign states; for example, the cardinal principle of state sovereignty, which includes non-interference in the domestic affairs of states and self-determination.[140] Therefore this Treaty is a landmark international instrument and the basic constitutional doctrine of the law of nations.[141]

Importantly, the influence and importance of the Westphalian principles steadily expanded beyond Europe and over time became accepted as norms governing the relations among states on a global scale.[142] However, it is not clear whether the political influence of the Treaty would be adequate to advance the economic development interests of independent but fragile states in Africa such as the DRC and Zimbabwe.

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previously endorsed. However, Article 26 of the Vienna Convention on the Law of Treaties (1969) provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. See generally Broom H*A Selection of Legal Maxims10th ed* (1939).

[136] Ibid. See generally Richard Falk 'The New States and International Legal Order' (1966) 118 *Academie du Droit International, Recueil de Cours* 1 at 34.

[137] Nico Schrivjer, op cit note 10 at 1.

[138] Ibid. See also Richard A Falk, op cit note 87 at 48.

[139] Richard A Falk, op cit note 87 at 43 – 48. See also Gareth Evans *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008) at 15 – 16.

[140] For discussion of state sovereignty and Westphalian evolution, see Stephen D Krasner 'Compromising Westphalia' (1995/6) 20 *International Security* 115; Nico Schrijver 'The changing nature of state sovereignty' in James Crawford & Vaughan Lowe (eds) *British Year Book of International Law Vol 70* (2000) 65 at 69 – 70; The International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (2001) at 5 – 13.

[141] Ian Brownlie, op cit note 78 at 287. See also Steinberger H 'Sovereignty' in Bernhardt R (ed) *Encyclopedia of Public International Law, 10 Instalment* (1987) 397; Jackson Nyamuya Maogoto 'Westphalian sovereignty in the shadow of international justice: A fresh coat of paint for a tainted concept' in Trudy Jacobsen, Charles Stamford & Ramesh Thakur (eds) *Re-envisioning Sovereignty: The end of Westphalia?* (2008) 211 at 213 – 215.

[142] Gareth Evans, op cit note 139 at 16.

Further the newly-independent states used the UN as the main forum '[…] to express their uneasiness about their relationship with the [former colonial states] which they perceived as very unequal'. [143] Countries from Latin America, in particular Chile, 'took the initiative of introducing [the discussion of] the principle of state sovereignty in the UN'.[144] The initiative culminated in two UNGA resolutions; namely, Resolution 626(VII) of 1952 and subsequently Resolution 1803(XVII) of 1962.[145] The view from the literature suggests the UNGA Resolution 626 (VII) is the origin of the PSNR principle.[146] For this reason, the PSNR has frequently been branded as the Seventh General Assembly 'nationalization' Resolution.[147]

The UNGA Resolution 1803(XVII) of 1962,[148] however, entrenched the PSNR principle by declaring, that both indigenous peoples and nations have the right of control over their domestic natural resources. Arguably, the same Resolution recognized the possibility that national interests could override the hallowed principle of *pacta sunt servanda*. The recognition is a very important dimension of the PSNR principle. In this regard Article 4 stated:

> […] nationalization, expropriation or requisitioning shall be based […] on national interests which are recognized as overriding purely individual or private interest, both domestic and foreign.[149]

Accordingly, the rights derived from the assertion of the PSNR principle are *erga omnes*, belonging to the peoples of a particular state, and therefore generate a corresponding duty

[143] Nico Schrivjer, op cit note 10 at 36.
[144] Ibid. Developing states emphasized the need for recognition of principles such as state sovereignty, sovereign equality of states, non-intervention in the domestic affairs of states and respect of territorial integrity.
[145] UNGA Resolution 626 (VII) - the Right to Exploit Freely Natural Resources Natural Wealth and Resources of 21 December 1952. See also UNGA Resolution 523(VI) of 12 January 1952; UNGA Resolution 1314(XIII) of 12 December 1958, which established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a comprehensive survey of the status of the PSNR as a basic constituent of the right to self-determination. UNGA Resolution 1515(XV) of 15 December 1960 reiterates that the sovereign rights of every state to dispose of its wealth and natural resources must be respected; UNGA Resolution UNGA Resolution 1803(VIII) - Permanent Sovereignty Over Natural Resources states, among other issues, that the right to '[…] natural wealth and resources must be exercised in the interest of their natural development and of the well-being of the people of the State concerned'. Further, see para 17 (a), (e) & (f) of the Preamble to the Declaration of Principles on International Law Concerning Friendly Relations & Cooperation Among States in Accordance with the Charter of the United Nations, 1970; Article 1 on the Right of Peoples to Self-determination contemplated in the ICCPR and the ICESCR.
[146] Ian Brownlie, op cit note 78 at 539. See generally Edmund Halsey Kellogg *The 7th General Assembly 'Nationalization' Resolution: A Case Study in United Nations Economic Affairs* (1955).
[147] Ibid.
[148] For discussion of the Resolution, see Duruigbo, op cit note 133 at 38 & Bulajic, op cit note 133 at 79.
[149] Article 4 of the UNGA Resolution 1803 (XVII), supra note 10. See also James N Hyde 'Permanent sovereignty over natural wealth and resources' (1956) 50 *American Journal of International Law* 854.

upon all states to recognize and respect those rights.[150] The objectives of the Resolution could be, inter alia, to balance competing economic interests between developing states, that wanted nationalization of natural resources and, the colonial masters who were opposed to the idea. From the literature, domestic nationalization of natural resources is also consistent with the assertion of sovereignty over mineral resources.[151]

Various injunctions have been framed according to which states have to assert their sovereignty, but there can never be a situation of complete non-interference.[152] Thus, the interplay between internal and external factors, on one hand, and self-determination and non-interference on the other hand, necessitates cooperation among states and citizens.[153] However, international law commentators disagree on whether foreign investors who obtained entitlements to exploit mineral resources under colonial regimes had to renegotiate the investment agreements.[154] The debate on renegotiating new contractual terms versus the principle of *pacta sunt servanda* generated uncertainties between developing states (former colonies) and their colonial masters. The existence of legal complexities that were yet settled was used as an excuse to enforce potentially prejudicial mineral resource investment agreements between the new host states and investors from former colonial states.[155]

Due to the principle of equality of states, the newly independent states (former colonies) are sovereign states; accordingly, they are treated equally with their former colonial masters in

[150] See Dissenting opinion of Judge Weeramantry in *Case Concerning East Timor: Portugal v Australia:* ICJ Report 90, Judgment of 30 June 1995; hereafter the *East Timor Case.* See also the *Armed Activities Case,* supra note 106 para 11 & 56.
[151] The success of nationalization depends on domestic policies and political will. In most cases, nationalization is a governance solution; it is adopted with a view to increase the capacity of ruling institutions in order to control the distribution of national resources. However, nationalization can widen the existing fractures between states. From the mineral resource perspective, nationalization can be perceived as a wrong decision as states were slow to change due to market pressures, could as well be the answer. Although it is harder to monitor, the private sector will most likely introduce alternatives long before states are able to do the same. In the event that this happens, the nationalization effort becomes mute. See Aureliu Cristescu, op cit note 65 at 118 para 687.
[152] Nico Schrivjer, op cit note 10 at 144.
[153] Richard N Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 at 95.
[154] See Duruigbo, op cit note 133 at 39 & Nico Schrivjer, op cit note 10 at 1. See also Nico J Schrijver 'Permanent sovereignty over natural resources versus the common heritage of mankind: Complementary or contradictory principle of international economic law?' in Paul de Waart et al (eds) *International Law and Development* (1988) 87 at 87 – 88; Samuel K B Asante 'The Concept of Stability of Contractual Relations in the Transnational Investment Process' in Kamal Hossain (ed) *Legal Aspect of the New International Economic Order (*1980) 234 at 234 – 235.
[155] Ibid.

international law.[156] The changed circumstance could be an exception to the principle of *pacta sunt servanda* and opens room for renegotiation of prejudicial mineral resource investment agreements that were concluded before attaining political independence. The "changed circumstances" and the principle of *pacta sunt servanda* could be the cause of the difficulties in order to renegotiate mineral resource investment or contractual agreements that were considered prejudicial to host states.[157] This brings in the general law on changed circumstances, which can be traced to the Vienna Convention on the Law of Treaties of 1969. In terms of this Convention, Article 62 gives guidelines on the general law on changed circumstances.[158] A hardship clause is also relevant - an exception to the *pacta sunt servanda* principle. By definition, a "hardship clause" is a provision in an agreement that is intended to cover cases where unforeseen events so fundamentally alter the equilibrium of a contractual agreement in which disproportionate obligations are placed on one of the parties to the contract.[159] In this regard Hans van Houtte submits that;

> […] the mere presence of a hardship clause should not in itself exclude the application of the general law on changed circumstances. It would be too cumbersome if parties were obliged to negotiate and draft hardship clauses covering all possible events which may affect performance. Consequently, the general law on changed circumstances remains applicable to all changes not covered by a hardship clause.[160]

However, the review of the literature showed that the proposal to renegotiate investment agreements, which are prejudicial to host states was a heated debate; former colonizers opposed the proposal with reference to the principle of *pacta sunt servanda* and respect for acquired rights.[161] Further the literature showed that newly-independent states protested to the objection on the basis that the agreements were largely economically prejudicial to host states.[162] Irrespective of the challenges noted above, the examination of issues relating to the PSNR principle also brings to the fore one preliminary issue, namely, the legal status of the

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[156] Article 5 of the Declaration on Rights and Duties of States, 1949, and the Draft Declaration was adopted by UNGA Resolution 375 (IV) of 6 December 1949. See also Ian Brownlie, op cit note 78 at 289 – 290.
[157] See generally György Haraszti *Treaties and the Fundamental Change of Circumstances Volume146* (1975) at 46 – 64.
[158] Compare Article 62 (fundamental change of circumstances) & 26 (*pacta sunt servanda*) of the same Convention.
[159] Melis Werner 'Force majeure and hardship clauses in international commercial contracts in view of the practices of the ICC Court of Arbitration' (1984) 1 *Journal of International Arbitration* 213 at 215.
[160] Hans van Houtte 'Changed circumstances and *pacta sunt servanda'* in Gaillard (ed) *Transnational Rules in International Commercial Arbitration* (1993) 107 at 110.
[161] Jackson Webb Yackee 'Pacta *sunt servanda* and promises to foreign investors before bilateral treaties: Myth and reality' (2009) 32 *Fordharm International Law Journal* 1550. See also Sornarajah M 'The international law' in Swan Sik Ko (ed) *Nationality and International Law in Asian Perspective* (1990) 423 at 426.
[162] Ibid. See also Nico Schrijver, op cit note 10 at 1 & 380; James Edmund, Sandford Fawcett & Audrey Parry *Law and International Resource Conflicts* (1981) at 8. See generally Karol N Gess 'Permanent sovereignty over natural resources: An analytical review of the United Nations declaration and its genesis' (1964) 13 *The International & Comparative Law Quarterly* 398.

principle. The status has been mired in some controversy dating back to the negotiation of the principle.[163]

The legal merits of the development of international law principles regarding sovereignty over natural resources through the political organs of the UNGA has always been a source of doctrinal debate. A further reason exacerbating the difficulty is that sovereignty deals with broad and controversial issues such as minimum standards for handling and treatment of foreign investors, as well as their investment.[164] Developing states' claims over domestic mineral resources reveal an inclination to broaden the natural resource debate and its international legal framework. Although much commentary has focused on this controversy over the years,[165] it is no longer tenable to deny the principle its legal status.[166] For example, the dissenting opinion of the two judges, namely; Weeramantry and Skubiszwski, in *the East Timor Case,* embraced the PSNR principle, as well as self-determination and non-interference, as part of modern international law.[167] The legal endorsement of the PSNR principle enhanced the establishment of corresponding duties upon all states to recognize and respect the rights derived from the principle. This strengthens the legal position of the PSNR to become universally accepted and a binding principle of international law.[168] Further the PSNR principle has been endorsed by some international institutions and acknowledged by the ICJ. For example, in *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic*,[169] the sole arbitrator, René-Jean Dupuy, held that sovereignty over natural resources was adopted by many developing states with varying levels of development, which

[163] Ibid, (Karol N Gess) at 406 – 408.
[164] After the formative years the PSNR principle became recognized in many international instruments; this is evidenced by its incorporation in different fields and treaties such as the Human Rights, State Succession, Law of the Sea, International Environmental Law and Investment Law.
[165] Duruigbo, op cit note 133 at 39. See also Delbrueck J 'International protection of human rights and state sovereignty' in Frederick E Snyder & Surakiart Sathirathai (eds) *Third World Attitudes Towards International Law: An Introduction* (1987) 263; Abi-Saab George 'Permanent sovereignty over natural resources and economic activities' in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (1991) 593; Subrata Roy Chowdhury 'Permanent sovereignty over natural resources' in Kamal Hossain & Subrata Roy Chowdhury (eds) *Permanent Sovereignty Over Natural Resources in International Law* (1984) 1; see generally George Elian *The Principle of Permanent Sovereignty over Natural Resources* (1979).
[166] Robert Dufresne 'The capacity of oil: Oil corporations, internal violence, and international law' (2004) 36 *New York University Journal of International Law & Policy* 331 at 354.
[167] Ibid. See further Judge Weeramantry and Judge Skubiszwski's dissenting judgments, paras 204 and 264 respectively in the *Case Concerning East Timor (Portugal v Australia) Judgments, 1995 ICJ Reports.*
[168] Duruigbo, op cit note 133 at 39 – 40. See also Nico Schrivjer, op cit note 10 at 33. Subrata Roy Chowdhury 'Permanent sovereignty over natural resources' in Kamal Hossain & Subrata Roy Chowdhury (eds) *Permanent Sovereignty Over Natural Resources in International Law* (1984) 1, where the authors emphasizes the validity of the principle of state sovereignty over natural resources in international law is undoubtedly not worth to challenge.
[169] *Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic* (1978) 17 *International Legal Materials* 1, (Award of 19 January 1977); hereafter *Texaco v Libya Case.*

represents not only all geographical areas but also various political and economic classifications.[170] The arbitrator examined, however, whether in the assertion of sovereignty, a state can disregard its international obligations assumed within the framework of its sovereignty.[171] The arbitrator made it clear that international law governs contractual relations between states and foreign investors and '[…] for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities'.[172] Consequently, an important qualification is that a state cannot use its sovereignty to circumvent international obligations into which it freely contracted.

In the *Case Concerning Armed Activities on the Territory of the Congo,*[173] which primarily involved allegations of violation of sovereignty of the DRC, the ICJ stated that the PSNR principle forms part of customary international law.[174] In this case, as noted above, the DRC alleged, *inter alia*, that the Ugandan army systematically looted and exploited mineral resources and formally requested the ICJ to order Uganda to cease violating its sovereignty and territorial integrity. However, Uganda denied responsibility in the absence of reliable evidence to corroborate the allegations.[175] The ICJ held that the request by the DRC to order Uganda to cease continuing internationally wrongful acts in the absence of evidentiary proof of the allegations could not be sustained. Accordingly, the DRC's request was dismissed. In this case, it may be argued that although the DRC failed to establish that Uganda violated its sovereignty, there could be some elements of interference in the affairs of the DRC. The fact that the DRC failed to prove its allegations does not automatically rule out that Uganda was not to blame. Regardless of the ICJ's findings against the DRC, interpretation can also be inferred from the declaration by the same Court's acknowledgement of the customary and global legal character of the PSNR principle, and implies that the rights and benefits formulated within always remain effective.[176]

In a nutshell, the PSNR principle is not cast in iron and can evolve in light of more recent rules and practices accepted as binding by the international community. This could allow the

[170] Ibid, para 183.
[171] Ibid.
[172] Ibid, para 182.
[173] *Armed Activities Case*, supra note 106.
[174] Ibid, para 226.
[175] Ibid, at 171.
[176] Ibid, para 11 of Judge Koroma's judgment.

principle to encompass Africa's concerns in natural resource politics including self-determination and non-interference in the internal affairs of states. The need for foreign investment through bilateral investments (BITs) may weaken the effectiveness of the PSNR principle at a domestic level. However, the principle still serves as the fountainhead for a state's freedom to regulate its mineral resources, and as the basis for corresponding national and international responsibilities.[177] Since the world is characterized by inequalities of power and mineral resource distribution the extent to which African states endowed with the resources can use the principle as their best line of defence is a topic worthy of consideration. The principle is more than just a functional norm of international law but a legal tool to protect the assertion of sovereignty and regulation of domestic mineral resources from external interference. This is the point of departure for this chapter and the same aspect is amplified by the principles discussed below.

#### *2.3.3.3 The Relevance of the Principle*

The PSNR principle primarily vests host states with the mandate, legal authority and autonomy as well as permanent custodianship over domestic mineral resources on behalf of the citizens. The broader framework of the principle shows that it empowers the executive and the legislature, inter alia, to make mining laws and determine conditions necessary to control access to, and regulate domestic mineral resources for self-determination. The principle empowers host states to decide on security of tenure and to choose which investors to grant mining licences and exclude others. This is the broader context in which the DRC and Zimbabwe's sovereignty is considered with a view to control and exploit the resources for self-determination. Also, the PSNR principle gives host states the opportunity to work out technical features of mineral resource control and regulation, which can manifest through property regimes applicable to mining, conditions of access to mineral resources, royalties and mining taxes, policy implementation, enforcement and policing; indigenization, beneficiation and trade (as discussed in chapters 4 and 5 below).

### 2.3.4 The Right to Development

The right to development is recognized in the preamble to the UN Declaration on the Right to Development (UNDRD), which states that;

[177] ICISS, supra note 140 at 7.

> […] development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of well-being of the entire population and individuals on the basis of their active, free and meaningful participation in the development and the fair distribution of benefits resulting therefrom.[178]

This definition is consistent with a further section in the preamble that considers the principle of self-determination as reinforcement of the right to development. States have the right to their autonomy and to economic development; by virtue of having the right freely to determine their political status and to pursue their economic development, they should be the masters of their economic destiny.[179]

#### *2.3.4.1 Substantive Development of the Right to Development*

As a concept of international law, the right to development was first attributed to Keba M'Baye, a Senegalese jurist, after he delivered a lecture at the International Institute of Human Rights in 1972.[180] However, the notion of development had been in existence for decades and its substance is embedded in various international instruments, which include the Declaration Concerning the Aims and Purposes of the International Labour Organization.[181] The concept was later tabled and debated for inclusion in the Universal Declaration of Human Rights (UDHR) in 1948,[182] but it was not incorporated into the final document. One of the reasons for not incorporating the concept in the UDHR was attributed to the failure to reach consensus over the content and scope of the right to development.[183] Although legal commentators from developing states enumerated the possible content, the subjects and objects of the right to development, however, jurists from developed and industrialized countries did not support the proposal. Among their arguments, they disputed whether the notion was worth giving recognition.[184]

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[178] Para 2 of Preamble to the UN Declaration on the Right to Development (1986); hereafter UNDRD, was adopted by the UNGA Resolution 41/128 of 4 December 1986. See the discussion of the definition by Isabella D Bunn *The Right to Development and International Economic Law: Legal and Moral Dimensions* (2012) at 92 – 94.

[179] Para 6 of the Preamble to the UNDRD. See also Isabella D Bunn, op cit note 178 at 93.

[180] Alhagi Marong 'The right to development in international protection' in Rudiger Wolfrum (ed) *Max Planck Encyclopaedia of International Law* (2010) 1 at 2. See also Russel Lawrence Barsh 'The right to development as a human right: Results of the global consultations' (1991) 13 *Human Rights Quarterly* 322 at 322.

[181] Declaration Concerning the Aims and Purposes of the International Labour Organization, 10 May 1944 (15UNTS 35).

[182] UNGA Resolution 217A (III) -Universal Declaration of Human Rights, 10 December 1948. The UDHR is a landmark document in the history of human rights. See also Ian Brownlie 'The human right to development' Commonwealth Secretariat Human Rights Unit Occasional Paper, 1989.

[183] See generally Rene-Jean Dupuy *The Right to Development at the International Level* (1980).

[184] Ibid. See also Russel Lawrence Barsh, op cit note 180 at 322.

Regardless of the debate, however, the literature survey shows that the concept of development was used to support calls for a New International Economic Order (NIEO). This followed after the newly independent states hoped to take the opportunities to develop and improve the general standards of living of their peoples.[185] It is further submitted that the NIEO strategy was used to support claims that the newly independent states had rights to receive development assistance from the developed and industrialized countries owing to the historical damage caused by colonialism and economic inequalities.[186] In short, this shows how the concept of development gradually developed and found space in international law.

#### *2.3.4.2 Origin and Legal Status of the Right to Development*

The evolution of the right to development can be regarded in terms of both economic and political spheres. From the political sphere, major political factors that overshadowed the period spanning the formation of the UN in 1945[187] and the adoption of the UNDRD in 1986 play a significant role.[188] Events that took place between the two periods point to the factors that shaped this right. Also,

> [t]he evolution of the right to development in international law has been both inspired and shaped by ethical insights. Against the backdrop of changing political factors, [new directions in religious perception] grow into vital comprehensive understanding of the right to development.[189]

The idea of the right to development was originally proposed in Catholic teachings and various religious groups that participated in UN efforts to formulate this right.[190] Further the literature show that debates preceding the right to development influenced the ethical views and calls for international justice, as well as an end to poverty. The evolution of the right to development, however, was subject to debates regarding its conceptual validity and practical implications.

This right to development is 'the cornerstone of the human rights system'[191] and implies realization of the peoples' rights through self-determination and non-interference enshrined in

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[185] Alhagi Marong, op cit note 180 at 2. See also Russel Lawrence Barsh, op cit note 180 at 322; Philip Alston 'The right to development at the international level' in Frederick E Snyder & Surakiart Sathirathai (eds) *Third World Attitudes Towards International Law: An Introduction* (1987) 811.
[186] Ibid.
[187] See generally Stanley Meisler *United Nations, the First Fifty Years* (1997). See also Isabella D Bunn, op cit note 178 at 13 – 20.
[188] Ibid, at 13.
[189] Ibid, at 20 – 21.
[190] See generally Franciscans International *The Right to Development - Reflections on the First Four Reports of the Independent Expert on the Right to Development* (2003).
[191] Isabella D Bunn, op cit note 178 at 1.

the UN Charter and other international instruments considered above.[192] In this vein, Article 1 of the UNDRD states that:

> [t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.[193]

Moreover, the right invokes states to benefit from the international duty to cooperate and to regenerate economic development. The provisions of the Universal Declaration of Human Rights[194] reaffirmed the right to development. The restatement shows that the right is not determined by a single factor but a collection of rights and principles such as PSNR, self-determination, meaningful participation in development, equal opportunities, and creation of a favourable environment for the enjoyment of political and economic rights.[195] Accordingly, the right to development makes the human person the participant and beneficiary.

With regard to the legal status of the right to development, it springs mostly from UN documents.[196] The 1979 Report of the UN Secretary-General established the international dimension of the right to development and

> […] indicates that there is a very substantial body of principles based on the [UN Charter] and the International Bill of Human Rights and reinforced by a range of conventions, declarations and resolutions which demonstrate the existence of a human right to development in international law.[197]

Alston supports this view and proposes that:

> '[…] the existence of the right to development is a *fait accompli* [and] [w]hatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure […] the formal process of elaborating the content of the right [as a constructive exercise].[198]

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[192] See generally Articles 1(2), (3) & 55 – 60 of the UN Charter. See also the Preamble to the UNDRD.
[193] Article 1 (1) of the UNDRD.
[194] Gareth Evans, op cit note 139 at 169 – 171.
[195] UN Human Rights Office of the High Commissioner 'The right to development at a glance' available at http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf (accessed 10 November 2012). See also Rajendra Kumar Nayak 'Evolving right to development as a principle of human rights law' in Subrata Roy Chowdhury, Erik M G Denters & Paul J I M de Waart (eds) *The Right to Development in International Law* (1992)145 at 153.
[196] Wil D Verway 'The establishment of a New International Economic Order and the realization of the right to development: A legal survey' (1981) 21 *Indian Journal of International Law* 1. See also Isabella D Bunn 'The right to development: Implications for international economic law' (2000) 15 *American University International Law Review* 1434 – 1436.
[197] Isabella D Bunn, op cit note 178 at 127.
[198] Philip Alston 'Development and the rule of law: Prevention versus cure as a human rights strategy' in International Commission of Jurists (eds) *Development, Human Rights and the Rule of Law* (1981) 31 at 106.

The right to development is therefore a principle of international law in general and is based on the principle of self-determination.[199] The adoption of the UNDRD in 1986 was a milestone in the furtherance of this right,[200] which is also contemplated in the African Charter on Human and Peoples' Rights[201] and the Arab Charter on Human Rights,[202] the ICCPR and the ICESCR,[203] the first and third session of the UN Conference on Trade and Development of 1964 and 1972, respectively.[204] Another important step in the recognition of the right to development is the UN Resolution 1161(XII) in which the UNGA concluded;

> […] that a balanced and integrated economic and social development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of and respect for human rights and fundamental freedoms […].[205]

In order to evaluate the feasibility of the right to development, the UNGA Resolution 4 (XXXIII)[206] and the UN Commission on Human Rights considered the insight to the problems hindering full realization of economic rights and measures to be considered at domestic and international levels to secure the enjoyment of this right.[207] This is confirmed in some of the UNDRD provisions on domestic and international state's development responsibilities, which include establishment of an enabling legal environment to spur development.[208]

Although the right to development satisfies the procedural requirements to become a recognized international human right, however, a review of the literature shows that it is not legally binding in international law and therefore states cannot be liable for domestic failure

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[199] S Chowdhury & P de Waart 'Significance of the right to development: An introductory view' in Subrata Roy Chowdhury, Eric M G Denters & Paul J I M de Waart (eds) *The Right to Development in International Law* (1992) 7 at 19 – 22.

[200] Isabella D Bunn, op cit note 178 at 40 – 41 & 127 – 128. See also Fiona Macmillan 'Development, cultural self-determination and the World Trade Organization' in Amanda Perry-Kessaris (ed) *Law in the Pursuit of Development: Principles into Practice?* (2010) 68. See also Roland R Rich 'The right to development: A right of peoples?' in James Crawford (ed) *The Rights of Peoples* (1988) 39.

[201] See for example Articles 20(1) & (3); 21, 22, 24 & 29(5).

[202] For example, Articles 1 & 4(A).

[203] Article 1 of the ICCPR & Article 1 of the ICESCR.

[204] Aureliu Cristescu, op cit note 65 at 13 – 15. See also principles II, V & VI of the UNGA Resolution 46(III) - Steps to Achieve a Greater Measure of Agreement on Principles Governing International Trade Relations and Trade Policies Conducive to Development, 1972.

[205] Para 4 of the Preamble to the UNGA Resolution 1161 (XII) - Balanced and Integrated Economic and Social Progress, 1957.

[206] UNGA Resolution 4 (XXXIII) – The Right to Development, 1977.

[207] See generally Qerim Oerimi *Development in International Law: A Policy-Oriented Inquiry* (2012) at 114 – 146.

[208] Para 13 of the Preamble to the UNDRD. See also Articles 2(3), 3(1) & (3), 4(2), 5, 6(1) & (3), 7 & 8 of the UNDRD. Further, see Principles 1 & 2 of the Rio Declaration; Article 3 of the CBD unambiguously reiterated that human beings are at the center of all natural resource exploitation and development processes.

to implement and enforce it.[209] Nevertheless, this does not mean states have to disregard this right because it does not give binding obligations to the parties to the various international instruments that support this right. The World Conference on Human Rights[210] considered comprehensively the right to development by adopting the Vienna Declaration and Programme of Action,[211] which *inter alia*, acknowledged respect for economic development as interdependent and mutually reinforcing this right.[212]

Accordingly, the right to development ties in with the international law principles discussed above. The principles support common interests in the assertion of sovereignty over domestic mineral resources in order to derive economic benefits and development in the long run. Accordingly, states are the primary duty bearers of right to development while the citizens in each state are the right-holders, on whose behalf states act to realize development.[213]

#### *2.3.4.3 Relevance of the Right to Development to the Study*

Firstly, the right to development places a duty (at least moral) to formulate a domestic development vision. Secondly, it reinforces the rights of the host state to benefit from exploitation of domestic mineral resources. In order to do so, a state can be influenced to apply the revenues derived from mineral resources in line with the domestic development vision. In order to achieve development, the way that could be worked out at the domestic level could include formulating a national development vision, undertaking development planning, and enacting development laws. However, the right to development does not stand alone; it is a corollary of the right of the good intentions and use of sovereignty, self-determination and non-interference, as well as how sovereignty is worked out over control and exploitation of mineral resources and the use of economic benefits that are derived from the resources. The right to development underpins the objectives of the Africa Mining Vision (AMV), which inter alia encourages African states to be proactive and take advantage of their

[209] Laure-Helene Piron *The Right to Development: A Review of the Current State of the Debate for the Department for International Development* (2002) at 14.
[210] The World Conference on Human Rights was held in Vienna, Austria in 1993.
[211] The Vienna Declaration and Programme of Action, supra note 58.
[212] Ibid. See generally Ted Trainer 'What does development mean? A rejection of the uni-dimensional concept' (2000) 20 *The International Journal of Sociology & Social Policy* 95. See also E Goldsmith 'Development as enclosure' (1992) 22 *The Ecologist* 132. See also Tatjana Ansbach 'Peoples and individuals as subjects of the right to development' in Subrata Roy Chowdhury, Erik M G Denters & Paul J I M de Waart (eds) *The Right to Development in International Law* (1992) 155. See also Navi Pillay 'No real development without human rights' paper delivered at the Fourth UN Conference on 'the Least Developed Countries (LDC-IV)', 9 – 13 May 2011, Istanbul, Turkey.
[213] Alhagi Marong, op cit note 180 1 at 3.

mineral endowment in order to derive economic benefits from exploitation of the resources for economic growth and development. In a nutshell, the right to development underpins what constitutes economic development in legal and political settings,[214] including the DRC and Zimbabwe as the selected case studies for this thesis.

## 2.4 Principles Facilitating Investment and Trade in Mineral Resources

The three international law principles mandating benefits over domestic mineral resources and the right to development (discussed above) provide African states with basic rights over their resources. However, in order to exploit and derive benefits from the resources, investment and trade are inherently required. As noted in chapter 1, principles and rules associated with investment in and trade of mineral resources may create tensions with the principles that establish host states' mandate over the mineral resources. For purposes of this thesis, two basic non-discrimination principles are considered; namely, national treatment and the most-favoured nation (MFN) principles. These two principles overlap between investment and trade; however, this section discusses them from the perspective of international investment law because my focus is largely on investment. This section also considers two further aspects of international investment law, namely, foreign exchange and repatriation of profits, and compensation for expropriation. Rules relating to these aspects of international investment law potentially restrict revenues available for development in host states.

### 2.4.1 National Treatment Principle

The national treatment principle advocates non-discrimination amongst investors in international investment law and trade. One of the legitimate expectations of foreign investors arising from the conclusion of investment agreements with host states is to be guaranteed fair and non-discriminatory treatment, for example, through legislative, judicial, administrative or other domestic processes.[215] The national treatment norm entails that the host state shall accord foreign investors and their business interests located in its territory no less equal and favourable treatment than what it accords, in "like or similar circumstances" to

[214] Isabella D Bunn, op cit note 178 at 2. See also Khurshid Iqbal 'The declaration on the right to development and implementation' (2007) 1 *Political Perspectives* 1.
[215] Subedi, op cit note 112 at 177 – 178. See also UNCTAD 'Investor – state dispute arising from investment treaties: A review' UNCTAD Series on International Investment Policies for Development, 2005, hereafter UNCTAD 'Investor – state dispute' at 32.

its local mining investors in the regulation and disposal of their investments.[216] On the one hand, the objectives of national treatment include discouraging and addressing any forms of discrimination based on, *inter alia*, the origin or foreign status of the investor,[217] and on the other hand, to spur fair and equitable treatment towards foreign investors doing investment or trade business in host states.[218] The scope of the national treatment principle is broad and covers pre- and post-establishment rights, which includes operational and winding up phases.[219]

Like pre-establishment rights in terms of the General Agreements on Trade in Services (GATS),[220] BITs do not always define the standard for fair and equitable treatment of foreign investors.[221] However, the national treatment principle indicates that the standard which is expected is to provide at least equal treatment to foreign and local investors in host states.[222] Against this background, it can be argued that

> [a]sserting notions of sovereignty and sovereign equality, [has led developing states to argue] that foreign investors were not entitled to protection greater than that accorded to nationals under the laws of the country. Thus, if the host state treated foreign investors without discrimination, and on par with nationals of the country, then that host State [would be] in compliance with the norms of international law.[223]

In light of this quote, there could be varying views on the nature of host states' responsibility to reinforce the standard of national treatment and protect the interests of foreign investors. However, there is a need to assess whether host states' regulatory measures are not contrary to the accepted international standards for national treatment. In *S D Myers Inc v Government of Canada*,[224] the tribunal considered two factors; namely, whether the efficacy of practical effects of the measure creates a disproportionate benefit for locals over foreign investors, and whether, *prima facie*, the measure appears to favour the host state's local over foreign

[216] Subedi, op cit note 112 at 32 – 34. See Article 4.1 of the SADC Model Bilateral Investment Treaty Template with Comments, 2012, hereafter SADC Model BIT; UNCTAD 'Investor – state dispute', supra note 215 at 32 – 34; UNCTAD 'National Treatment' UNCTAD Series on Issues of International Investment Agreements, 1999, hereafter UNCTAD 'National treatment' at 28 – 34.
[217] See generally *Marvin Roy Feldman v The United Mexican States*, ICSID Case No: ARB(AF)/99/1, Award on Merits, of 16 December 2002.
[218] Subedi, op cit note 112 at 70.
[219] Ibid. See also UNCTAD 'Investor – state dispute', supra note 215 at 32 – 34; UNCTAD 'National treatment', supra 216 at 10 – 11.
[220] See generally the General Agreements on Trade in Services, 1995; hereafter the GATS.
[221] Subedi, op cit note 112 at 131 – 132.
[222] For exceptions to the national treatment principle, see UNCTAD 'National treatment', supra 216 at 12 – 13.
[223] Emmanuel Laryea 'Contractual arrangements for resource investment' in Francis N Botchway (ed) *Natural Resource Investment and Africa's Development* (2011) 107 at 294.
[224] *S D Myers Inc v Government of Canada, UNICITRAL Arbitration Rules*, First Partial Award of 13 November 2000. (NAFTA)

investors who may be protected by a BIT.[225] The two factors may be considered as the substantive content in which the national treatment has to be applied. Also, in the process of interpreting provisions of national treatment, attention should be on determining the nature of entities and their operations; this serves as a point of reference in order to ascertain whether there is discrimination against foreign investors. The concept of 'like or similar circumstances' becomes vital and the basis for application of the standard national treatment principle.[226]

The national treatment requirement might be one of the most important standards of treatment enshrined in international investment law, as well as in international trade law. However, it is also a complex standard to fulfill since it covers a wide spectrum of delicate and sensitive issues.[227] Apparently, the obligation to render national treatment to foreign investors does not support or give the host state discretion to give preferential treatment to locals over foreign investors. It can be maintained that international investment law and the national treatment principle give foreign investors rights while host states have obligations to protect those rights; this distinction appears to favour the former, thus promoting an unequal relationship between the contracting parties.[228] In international investment law, host states are required to provide protection to foreign investors operating within their territories, however, granting national treatment could restrict the sovereignty of the host, for example, to stimulate the development of manufacturing capacity and industrialization based on its mineral resources.[229] Compelling the host state not to do so may amount to economic suicide for domestic entities, and adversely give an edge to foreign investors, that further restricts or weaken the host's sovereignty. By compelling host states not to discriminate against foreign investors, the host has no discretion but to give national treatment to all foreign investors. This restricts sovereignty by limiting the host's discretion to choose which foreign investors to afford national treatment to the exclusion of others.

In a nutshell, the national treatment principle negatively affects sovereignty in that host states are compelled to guarantee and grant foreign mining investors non-discriminatory treatment through executive, legislative, judicial and administrative decisions. Compelling host states to

[225] Ibid, at 252. See also UNCTAD 'Investor – state dispute', supra note 215 at 33.
[226] Ibid.
[227] UNCTAD 'National treatment', supra note 216.
[228] UNCTAD 'Investor – state dispute', supra note 215 at 34.
[229] UNCTAD 'National treatment', supra note 216 at 15 – 16.

provide national treatment to foreign investors implies the host state cannot pass laws favouring nationals, this could negatively impact on indigenization laws.

### 2.4.2 Most Favoured Nation (MFN) Principle

A second component of non-discrimination against foreign investors in international investment law and trade is the MFN treatment. By definition, the MFN treatment is

> […] accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.[230]

In the context of international investment, the MFN treatment clause is a treaty-based investment obligation and may be provided for in BITs between contracting states.[231] The purpose of MFN treatment clauses is to ensure equal competing conditions among foreign investors who invested in similar fields, for example, in the host state's minerals sector. This acts as a safeguard to curb discrimination and distort competition among foreign investors in the same field.[232] In other words, the presence of MFN clauses in BITs entail that the host state extends the MFN treatment to all foreign investors covered in its BITs, as well as investors from non-contracting states. The obligation ensures the host state protects all foreign investors and their business interests in its territory. The treatment must not be less favourable than that which the host state accords to foreign investors from any third state.[233]

Although BITs allow foreign investors and host states to establish legally binding rights and obligations in terms of specific investment agreements, the provision of MFN treatment clauses in the treaty are designed to increase investor confidence. A key factor is security and protection of the investment since investors invest to make profits and not for charity. However, the MFN treatment is subject to controversy in that it might be used to broaden the scope of investors' procedural and substantive rights outside those provided for in the

[230] Article 5 of the Draft Articles on the Most-Favoured-Nation Clauses with Commentaries, 1978. See also Report of the Commission to the General Assembly *Yearbook of the International Law Commission, Volume II Part Two* (1978).
[231] UNCTAD 'Most favoured nation treatment' UNCTAD Series on Issues in International Investment Agreements II, 2010 at 22. See also Erik Denters 'Preferential trade and investment treaties' in Tarcisio Gazzini & Eric De Brabandere (eds) *International Investment Law: The Sources of Rights and Obligations* (2012) 49 at 57; Subedi, op cit note 112 at 146.
[232] Ibid, (UNCTAD 'Most favoured nation treatment) at 14.
[233] Ibid, at 13.

agreement in terms of which a foreign investor may claim protection.[234] The broadening of foreign investors' rights against the contracting state could be a slap on the sovereignty of the host state to choose investment partners of its choice and grant them favourable investment conditions.[235] Thus, sovereignty of the host state is restricted when the host is unable to extend favourable mining investment conditions to foreign investors from a certain state and ignore the same conditions to investors of another state doing mining business in the same state. Therefore MFN treatment may allow foreign investors to demand more favourable treatment conditions that are extended to third-country BITs; however, ordinary mining investment treaties may contain an explicit exception for MFN treatment.[236]

The MFN treatment aims at establishing a non-discriminatory environment and conditions for investors from various countries operating in the host state. It is a fundamental legal norm underpinning equal treatment and competition amongst foreign investors. In the absence of indicators to the contrary, the MFN advantages foreign investors and adversely affects host states by weakening their sovereignty, amongst other things, their right to choose investors to give special treatment based on what such investors might in turn promise for development. Restrictions on the assertion of sovereignty can be high where the host state has limited capacity to regulate mining activities of foreign investors operating in its territory. It is most likely foreign investors are benefiting from investing in Africa and host states have not obtained any tangible benefits; thus, weakening the right of host states to develop through exploitation of their mineral resources. This assertion is supported by research showing that although investment has increased substantially in Africa, it has not produced notable economic development.[237] This could be the case where most investment in the minerals sector, as discussed in chapters 4 and 5, may not have significantly benefited host states.

In a nutshell, the MFN principle weakens sovereignty and the mandate of host states. This is done through restricting host states' discretion or choices regarding which foreign investor to give investment and trade advantages over others in the mineral value chain. Further

[234] UNCTAD, 'Investor – state dispute', supra note 215 at 35. See also Erik Denters, op cit note 231 at 57. Further, see Stephan W Schill 'Mulitilateralizing investment treaties through most-favoured-nation clauses' (2009) 27 *Berkeley Journal of International Law* 496 at 506 – 509 & 528 – 529.
[235] See generally *Emilio Agustin Maffezini v The Kingdom of Spain*, ICSID Case No: ARB/97/7: Award of 13 November 2000 & Rectification of Award on 31 January 2001 (Argentina/Spain BIT).
[236] Stephan W Schill, op cit note 234 at 525 – 528.
[237] See generally Anupam Basu, Evangelos A Calamitsis & Dhaneshwar Ghura 'Promoting growth in Sub-Saharan Africa: Learning what works' International Monetary Fund, 2000, available at http://www.imf.org/external/pubs/ft/issues/issues23 (accessed 3 August 2014).

sovereignty is affected in that host states may not be able to pass laws giving investment and trade advantages to certain partners over others. Furthermore, the MFN principle negatively impacts on enforcing beneficiation laws. This is against the backdrop that the host state may require beneficiation and value addition for all its minerals before export.

### 2.4.3 Foreign Exchange and Repatriation of Profits Restrict State Sovereignty

One of the objectives of investors when investing in foreign states is to make profits and repatriate the proceeds to their home states. In the event that repatriation of profits is prevented or restricted, whether owing to exchange controls shortfall, the objectives of the investor are frustrated.[238] In determining the potential to invest in the host state where there is a BIT,[239] one of the issues to be considered is whether the contracting states spelt out the issue of repatriation of profits. In the absence of a BIT, negotiations on the potential investment between the host state and a foreign investor have to deal with repatriation of profits as a legitimate expectation prior to commencing investment.[240] Identifying issues such as barriers to repatriation of profits and how to mitigate through appropriate regulatory measures comes to the fore.[241]

The regulation of capital controls is marked by significant diversity and is shaped by states' perceived economic interests.[242] However, the common denominator is the international legal framework which regulates monetary relations among states. In particular, the Articles of Agreement of the IMF (IMF Rules)[243] recognizes foreign exchange and capital controls.[244] The IMF Rules provides two types of capital transactions that are capable of restricting member states' exchange controls. The two categories are "control of capital movements"

[238] M Sornarajah *The International Law on Foreign Investment 3rd ed* (2010) at 206. See also Eric M Burt 'Developing countries and the framework for negotiations on foreign direct investment in the World Trade Organization' (1997) 12 *American University International Law Review* 1015 at 1023 – 1024.
[239] Jeswald W Salacuse *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) at 77.
[240] Sornarajah, op cit note 238 at 206. See generally UNCTAD 'Transfer of funds' UNCTAD Series on Issues in International Investment Agreements, 2000.
[241] Vera Rechsteiner 'International Deal-Making: Top Ten on the Checklist' 2013, available at www.andrewskurth.com/pressroom-publications-1008.html (accessed 10 December 2013).
[242] Jeswald W Salacuse, op cit note 239 at 76. See also Elizabeth Asiedu & Donald Lien 'Capital controls and foreign direct investment' (2004) 32 *World Development* 479.
[243] Articles of Agreement of the IMF of 1945, as amended; hereafter IMF Rules.
[244] Some of the regulations are, for example, Appendix I of the Introduction to the OECD Codes of Liberalization of Capital Movements and Current Invisible Operations, 1995, Paris; hereafter Introduction to the OECD Codes. See also Annex A of the OECD Code of Liberalization of Capital Movements (OECD/C/61) of 1991 at 31, adopted by the OECD Council on 12 December 1961 as amended, hereafter OECD Capital Movement Codes; OECD Codes of Liberalization User's Guide, 2008.

and "payment for current transactions" which are contemplated in section 3 of Article VI and Article XXX(d) of the IMF Rules, respectively. Section 3 of Article VI, section 2(a) of Article VIII and Article XIV of the IMF Rules are the principal provisions recognizing exchange control. As such, the IMF Rules are the most applicable and universally accepted in the regulation of exchange controls and repatriation of profits, ostensibly the reason being that the IMF has majority of state membership in the world.[245] In terms of the Rules, member states may exercise controls of capital transfers when

> […] necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in [section 3(b) of Article VII and section 2 of Article XIV].[246]

Accordingly, foreign investors' basis to repatriate profits is international law backed and to a greater extent does not support the mandate of host states (developing states) to compel investors to reinvest greater percentages of their profits more than the investor can offer. As such, the requirement to repatriate a certain percentage of the profits restricts the amount of revenue available for local development.

Yianni and Vera,[247] as well as Salacuse[248] correctly noted that section 3 of Article VI of the IMF Rules can be used by a state to hold back capital flight by reducing the ability of residents and investors to transfer or export capital, (the case of South Africa during apartheid as discussed below). Unless there are BITs regulating repatriation of profits, the host state may use Article VI of the IMF Rules to reduce or limit capital flight including the amount that a foreign investor may be allowed to repatriate.

IMF member states are free to adopt measures on capital controls; however, states are obliged not to impose restrictive regulatory controls prior to obtaining permission from the IMF. Section 3(b) of Article VII and section 2 of Article XIV of the IMF Rules, as well as section 2(a) of Article VIII deal with "avoidance of restrictions on current transactions" without express approval from the IMF. Regardless of the provisions, the IMF '[…] policy has

[245] As of 2014, the IMF has 188 member states that make almost all countries of the world subject to its provisions. This could be the reason the IMF rules are widely used. See generally at http://www.imf.org/external/country/index.htm (accessed 20 April 2014).
[246] Section 3 of Article VI of the IMF Rules.
[247] Andrew Yianni & Carlose de Vera 'The return of capital controls?' (2010) 73 *Law & Contemporary Problems* 357 at 360 – 361.
[248] Jeswald W Salacuse, op cit note 239 at 78 – 79.

traditionally been to approve reasonable restrictions on current transactions'.[249] It is presumed that by becoming a member, a state accepts the negative obligations which are provided by sections 2(a), 3 and 4 of Article VIII of the IMF Rules, which prohibit imposing restrictions on capital transactions and transfers for current international transactions. Also host states cannot apply discriminatory exchange controls and currency arrangements without IMF approval. As a result, there is the need for approval before a state engages in any capital restrictions and regulation on transfers and payments for current international transactions.[250] This restricts sovereignty, and failure to seek approval from the IMF is breach of sections 2(a), 3 and 4 of Article VIII of the IMF Rules.[251] Therefore member states cannot legitimately exercise their sovereignty over capital controls, unless approved by the IMF.

The IMF may allow requests by member states to impose transitional arrangements in order to restrict foreign exchange for a certain period.[252] When approved, the restrictions '[…] that would otherwise be in breach of […]'[253] section 2(a) of Article VIII of the IMF Rules are legitimately justified in order to develop financial and commercial arrangements with other IMF member states and to facilitate international payments.[254] When the period for transitional arrangement expires, the measures cannot be reintroduced by a member state without IMF approval in terms of section 2(a) of Article VIII of the IMF Rules.[255] In terms of section 3(b) of Article IV of the IMF Rules, the IMF has a duty to monitor the exchange rate policies of member states.[256] This restricts sovereignty of member states to adopt their own policies in addition to that which the IMF may prescribe for the state.

'[T]he right of repatriation of profits may be restricted in exceptional economic or financial circumstances'.[257] Although not widely used, and regardless of the circumstances, domestic measures on repatriation of profits that implicate the General Agreement on Tariffs and Trade

[249] Ibid, at 79. See also Joseph Gold 'Exchange contracts: Exchange control, and the IMF Articles of Agreement: Some animadversions on *Wilson, Smithett & Cope Ltd. v Terruzzi'* (1984) 33 *International and Comparative Law Quarterly* 777 at 779.
[250] Andrew Yianni & Carlose de Vera, op cit note 247 at 361.
[251] Ibid. See also Joseph Gold, op cit note 249 at 779.
[252] Sections 1 – 3 of Article XIV of the IMF Rules.
[253] Andrew Yianni & Carlose de Vera, op cit note 247 at 361.
[254] Section 3 of Article VI of the IMF Rules. See also section 2 of Article XIV of the IMF Rules.
[255] See also section 1 of Article XIV of the IMF Rules.
[256] See also Joseph Gold, op cit note 249 at 780.
[257] Sections 1 – 3 of Article XIV of the IMF Rules. See also Sornarajah, op cit note 238 at 207. See also Article XV(7b) of the General Agreement on Tariffs and Trade, 1947 as amended; hereafter the GATT. Further, see The Secretariat (WTO) 'Exceptions and balance of payments safeguards' 2002 World Trade Organization at 2, available at http://www.jmcti.org/2000round/com/doha/wg/WT_WGTI_W_137.pdf (accessed 3 January 2015).

of 1947 (the GATT)[258] may require a foreign investor to re-invest a certain fraction of profits in the host state.[259] Trade requirements and investment conditions that would otherwise contravene Article XI of the GATT may, however, be justified by Article XII of the GATT which permits '[…] mainly non-discriminatory, quantitative restrictions where necessary to address a balance of payment crisis.'[260] On the contrary, limitations on repatriation of profits could be a challenge to the sovereignty of the host states *vis–a–viz* the desire to attract foreign investment.[261] The requirement to re-invest a certain percentage of profits could support the state in its mandate to realize benefits from its mineral resources.[262] Arguably, both re-investing of a certain portion of the profits and limitations on repatriation of profits may contravene Article XV of the GATT, which requires the contracting parties to adhere to the IMF Rules regarding balance of payment and currency exchange arrangements.[263] To a certain extent, the IMF Rules allow considerable scope for developing countries to restrict repatriation of profits and foreign exchange, as well as exchange controls.[264]

The Organization for Economic Co-operation and Development (OECD) Codes which prohibit the introduction or maintenance of regulations or practices which restrict repatriation of profits are relevant; however, the Codes are not used widely and therefore not considered for the purposes of this thesis.[265]

IMF Rules are considered, and therefore the need for domestic laws which regulate repatriation of profits and exchange controls must be aligned with IMF Rules to avoid adverse effects.[266] For example, the restructuring by South Africa relating to exchange control regulations during the apartheid era is a case in point. Severe capital-account

[258] See generally Chris Brown 'China's GATT bid: Why all the fuss about currency controls?' (1994) 3 *Pacific Rim Law & Policy Journal* 57 at 72 – 77.
[259] See generally Sornarajah, op cit note 238 at 186, 188 & 206 – 207. See also Eric M Burt, op cit note 238 at 1019 – 1026; Michael J Trebilcock & Robert Howse *The Regulation of International Trade* 2nd ed (1999) at 348.
[260] Ibid, at 349. See also Article XV of the GATT. Further, see The Secretariat (WTO), supra note 257 at 3.
[261] Ibid. See generally Rosanne Altshuler & Harry Grubert 'Repatriation taxes, repatriation strategies and multinational financial policy' paper presented at the Trans-Atlantic Public Economics Seminar, Gerzensee, Switzerland, May 2000.
[262] Michael J Trebilcock et al, op cit note 259 at 349.
[263] Cynthia Day Wallace *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (2002) at 413 – 320. See also Michael J Trebilcock et al, op cit note 259.
[264] Section 3 of Article VI of the IMF Rules. See also Cynthia Day Wallace, op cit note 263 at 420 – 423.
[265] See generally Appendix I of the Introduction to the OECD Codes of Liberationzation of Capital Movements and Current Invisible Operations, 1995 at 37, hereafter Introduction to the OECD Codes. See also Annex A of the OECD Code of Liberalization of Capital Movements (OECD/C/61) of 1991 at 31, adopted by the OECD Council on 12 December 1961 as amended; hereafter the OECD Capital Movement Codes.
[266] Ibid. See also The Secretariat (WTO), supra note 257 at 2 – 3.

deficiencies in the 1980s forced the apartheid government to unilaterally adopt domestic measures to restrict currency outflows. The various measures that were adopted include restriction of exchange control and payment of current international transactions, as well as non-payments of claims in the form of foreign-currency-dominated loans that were governed by foreign law.[267] In 1986 the apartheid government unilaterally declared provisional suspension of all short-term debt repayments.[268] The moratorium was unilaterally extended twice in the same year violating section 2 of Article XIV of the IMF Rules. Regardless of the irregularity, the apartheid government had to control the amount of capital leaving the country through domestic-exchange control legislation, which interfered in many private-sector contracts.[269] However, the moratorium ostensibly failed to curb capital flight and apartheid South Africa experienced uncontrolled capital woes in the form of external debt repayments, interests, and various illicit flows.[270] It could be argued that in an attempt to redress domestic exchange controls woes, the apartheid government willfully violated the IMF Rules and also investor contracts. Even the sovereign debt restructuring made around exchange controls failed to ease exchange control challenges.

In a nutshell, foreign exchange and repatriation of profits restricts the quantity of revenue that would be available for local development. The requirement to repatriate profits does not, however, allow the host state (developing states) to claim a reasonable percent of the profits other than what the IMF Rules require. Accordingly, the mandate of the host state to derive benefits from its mineral resources is weakened to a certain extent since the host cannot compel foreign investors not to repatriate the maximum percentage of their profits.

### 2.4.4 Compensation for Expropriation

When investors invest in host states, it is recognized that they have a legitimate expectation that host states will protect their investments and business interests. The dominant elements of the legitimate expectation at least includes non-discrimination, fair and equitable treatment, and control over their investment and business interests.[271] A distinctive concern of

[267] Andrew Yianni & Carlose de Vera, op cit note 247 at 367.
[268] The unilateral imposition of unsanctioned exchange controls and capital transfers was a violation of section 2(a) of Article VIII of the IMF Rules.
[269] Andrew Yianni & Carlose de Vera, op cit note 247 at 367.
[270] Ibid, at 366. See also Alan Hirsch 'The origins and implications of South Africa's continuing financial crisis (1989) 9 *Transformations* 31.
[271] See generally Elizabeth Snodgrass 'Protecting investors' legitimate expectations: Recognizing and delimiting a general principle' (2006) 21 *ICSID Review – Foreign Investment Law Journal* 1 at 1-2 & 25. See also Michele

foreign investors is whether their business interests or assets are firmly secured from expropriation by appropriation, nationalization or confiscation.[272] However, in the event of expropriation, four conditions must be met; namely, an expropriation must be for the public interest, should be non-discriminatory, must be done with regard to applicable municipal laws and due process, and full compensation must be paid.[273] These requirements are the least legal expectations in international law. However, the standard of compensation and minimum standards of treatment create disagreements and conflicts between capital importing and capital exporting states.[274] Traditionally, when expropriation or nationalization took place, the "Hull Rule"[275] would apply and required the host state to "promptly, adequately and effectively" pay compensation to the affected foreign investor.[276] However, the literature shows that after World War II developing states raised concerns regarding the "Hull Rule", and claimed the right to determine the manner in which they have to treat foreign investors and the required standard of compensation where the treatment was not sufficiently harmful. The coming in of BITs on the international arena changed the traditional position reiterated in the Hull Rule; the contracting states may deviate from the standard treatment contemplated in customary international law with regard to the standard of compensation.[277] Generally, BITs transposed the "prompt, adequate and effective" approach to "fair and equitable compensation" with regard to expropriations in foreign investment law.[278] Although approved

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Potesta 'Legitimate expectations in investment treaty law: Understanding the roots and limitations of a controversial concept' (2013) 28 *ICSID Review* 88 at 93 – 121; Ali Ehsassi 'Cain and Abel: Congruence and conflict in the application of the denial of justice principle' in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 213 at 214 – 215; Jeffrey F Beatty, Susan S Samuelso & Dean A Bredeson *Business Law and the Legal Environment 6th edition* (2013) at 226.

[272] Subedi, op cit note 112 at 73 – 74 & 91 – 92.

[273] Ibid. See also Article 6 of SADC Model BIT, supra note 215; R Dolzer 'Indirect expropriations: New developments?' (2003) 11 *New York University Environmental Law Journal* 64; A F M Maniruzzaman 'Expropriation of alien property and the non-discrimination in international law of foreign investment: An overview' (1998) 8 *Journal of Transnational Law & Policy* 57; R Geiger 'Regulatory expropriations in international law: Lessons from the multilateral agreement on investment' (2002) 11 *New York University Environmental Law Journal* 94 at 104; Rosalyn Higgins 'The taking of property by the state' (1982) 176 *Receil des Cours* 259 at 371.

[274] Sornarajah, op cit note 238 at 445 – 447.

[275] The 'Hull Rule' was named after the US Secretary of State, Cordell Hull, who, in response to the appropriation of the US's controlled oil interests by Mexico in 1938. For more detail, see J L Kunz 'The Mexican expropriations' (1940) 17 *NYULQR* 327.

[276] See generally Subedi, op cit note 112 at 73 – 80. See also Andrew Newcombe & Lluis Paradell *Law and Practice of Investment Treaties: Standard of Treatment* (2009) at 18; Andrew T Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1998) 38 *Virginia Journal of International Law* 639 at 651 – 652.

[277] For more detail, see Subedi, op cit note 112 at 92 – 93.

[278] Ibid, at 92. See generally Markus Perkams 'The concept of indirect expropriation in comparative public law – searching for light in the dark' in Stephan W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 107.

without support of capital exporting states, the UNGA Resolution 3171(XXVII),[279] the Resolution on New International Economic Order[280] and the Charter of Economic Rights and Duties of States,[281] among others, sought to give host states the right to determine the amount for compensation.[282] However, the absence of capital-exporting states during the passing of the resolutions could reflect high levels of dissatisfaction. Thus demonstrating the controversy of the issue and the extent to which it has not yet been sufficiently resolved in international law.

When the host state expropriates a foreigner investor's property or mining business interests, it could be argued that the state acts in the interest of the nation in order to promote the mandate and benefit from domestic mineral resources. However, the expropriation must be in accordance with the international minimum standards and therefore requires domestic policy formulation. Host states may not expropriate due to fear that arbitrary expropriation may cause disinvestment and maladministration. Accordingly, such fear may limit the mandate and restrict sovereignty. In the event of expropriation, the host state must pay fair and equitable compensation.[283] Nevertheless, the international legal requirement to pay compensation subsequently limits the mandate and sovereignty to expropriate, especially where the host state cannot afford to pay compensation. Where the host state expropriates without compensation, litigation may arise (as discussed below). Even where capital is available, however, paying compensation lessens the revenue available for development.

A leading African example of the nationalization of foreign investment is Libya's nationalization of foreign interests in petroleum concessions.[284] In this case, the Arab Republic of Libya issued two decrees, the first was on 1 September 1973 and the second on 11 February 1974, with the effect of nationalizing all the properties, rights and interests of Texaco Overseas Petroleum Company and California Asiatic Oil Company, which had been granted to the two corporations jointly by the Libyan government in terms of 14 deeds of

[279] UNGA Resolution 3171 (XXVIII): Permanent Sovereignty over Natural Resources, 1973.
[280] The UNGA Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order, 1974.
[281] UNGA Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, 12 December 1974.
[282] See generally Sornarajah, op cit note 238 at 443 – 452.
[283] A J Van der Walt *Constitutional Property Clauses* (1999) at 15 – 17. See also Loukas Kozonis 'GATS negotiations on domestic regulations: Pre-established regulations and development permits' 2010, Working paper at 6, available at www.boell.org/downloads/Kozonis_pre-established_devel_permits.pdf (accessed 2 March 2014).
[284] *Texaco Overseas Petroleum Co/California Asiatic Oil Co v Libya* (1978) 17 *International Legal Materials*1; hereafter *Texaco v Libya Case*.

concessions.[285] This was the cause of contention between the Libyan government and the two corporations. The 14 deeds of concession conferred upon the two corporations by the Libyan government, permitted the President of the ICJ to appoint an arbitrator to make a determination in the event of a dispute. Libya objected to the provision and submitted that the dispute was not subject to arbitration because the cause arouse as a result of sovereign acts. The President of the ICJ rejected the argument and appointed a sole arbitrator, Professor Rene-Jean Dupuy, to hear both sides of the dispute and make a decision. In the findings, the arbitrator questioned, however, whether the act of sovereignty which constitutes nationalization authorizes a state to disregard its contractual obligations it assumed within the framework of its sovereignty.[286] This was found in the negative and the arbitrator ruled against Libya. It was held that the corporations were legally entitled to compensation or the state was obliged to uphold the terms of the treaty agreement.[287] This was the first international arbitration award relating to breach of investment agreements. Regardless of Libyan asserting its sovereignty through nationalization of foreign interests in petroleum concessions agreements, the case shows that the assertion of sovereignty is limited and restricted by contractual agreements undertaken by the Libyan government in the process of exercising its sovereignty.

Another case demonstrating the relationship between sovereignty and treaty agreements involves Zimbabwe and the Southern African Development Community (SADC) Treaty. Zimbabwe is a member and signatory to the SADC Treaty. During the period spanning 2000 and 2010, the Zimbabwean government expropriated white commercial farms (including those protected under BITs), without compensation. The victims of the land seizures were denied access to domestic courts after the constitutional amendment 17,[288] which vested ownership of certain categories of land in the Zimbabwean government. The effect of the constitutional amendment was also to eliminate the jurisdiction of municipal courts to hear

[285] A concession agreement varies from a standard contract in that in the former, one of the parties is a sovereign state. See Margarita T B Coale 'Stabilization clauses in international petroleum transactions' (2001/2) 30 *Denver Journal of International Law & Policy* 217 at 222.
[286] *Texaco v Libya Case*, op cit note 284 at 183.
[287] Robert von Mehren 'Introductory Note' (to the report of) *Texaco Overseas Petroleum Co/California Asiatic Oil Co v Libya* (1978) 17 *International Legal Materials* 1.
[288] The Constitution of Zimbabwe of 1979, (old constitution) often referred to as 'the Lancaster House Constitution' since it was a negotiated at the Constitutional Conference held at Lancaster House, London in 1979 between the British government, on the one hand and Mugabe and Nkomo delegation, on the other hand, and Muzorewa delegation. For more detail, see Report on Southern Rhodesia Constitutional Conference Held at Lancaster House, London, September - December 1979, available at http://www.rhodesia.nl/lanc1.html (accessed 3 March 2014).

and determine any court applications relating to the land expropriation. In *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe,*[289] Mike Campbell and 77 other affected commercial farmers (applicants) filed an application in terms of Article 28 of the Protocol of the SADC Tribunal read with Rule 61(2) – (5) of the Rules of Procedure of the SADC Tribunal for interim relief restraining the government of Zimbabwe from interfering with the Applicants' farm activities, whatsoever, pending the determination of the matter.[290] After hearing of the matter in 2007, the Tribunal granted an interim relief in favour of the applicants and restrained the respondent from taking steps, whether directly or indirectly, to evict or interfere with activities of the applicants on their farms. On 28 November 2008, the SADC Tribunal passed its final decision on the matter and held, *inter alia*, that the respondent breached its obligations in terms of Articles 4(c) and 6(2) of the SADC Treaty and was therefore required to pay compensation to the applicants for their seized properties. Further the respondent was ordered to take all the necessary measures through its agents, to protect possession, occupation and ownership of the properties of the applicants[291] and pay the legal costs but the respondent declined to enforce the order of the tribunal. In order to enforce the Tribunal's order, the applicants applied to the Gauteng High Court of South Africa to have the order of the SADC Tribunal recognized in South Africa.[292] The North Gauteng High Court sitting as a court of first instance granted the application.[293] On appeal by Zimbabwe, the Supreme Court of Appeal of South Africa upheld a decision of the North Gauteng High Court and dismissed the appeal.[294] In order to enforce the decision in *Campbell case*, the court ordered auction of the property of the Zimbabwe Government in South Africa, it was only then when Zimbabwe agreed to honour the SADC Tribunal's order to pay compensation and legal costs. These cases show how state sovereignty can be challenged and

[289] *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* SADC (T) Case No: (2/2007) 1 at 4; hereafter the *Campbell Case.* For summary of events, see Mike Campbell Foundation '*Campbell Case*: decisions by SADC tribunal' 2012, available at http://www.mikecampbellfoundation.com/page/campbell-case-decisions-by-sadc-tribunal (accessed 1 March 2014).

[290] See also *Mike Campbell (Private) Limited & William Michael Campbell v The Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* 2007 *(*Judgment No. SC 49/2007) 1; hereafter *Campbell v Minister of National Security & Land Reform.*

[291] Ibid, at 55 – 59.

[292] See generally *Government of the Republic of Zimbabwe v Fick & Others* (657/11) ZASCA.

[293] *Fick & Others v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8 (16 July 2010); *Government of the Republic of Zimbabwe v Louis Karel Fick, Richard Thomas Etheredge, William Michael Campbell & The President of the Republic of South Africa* (The North Gauteng High Court, Pretoria, SA); Case No: 47954/2010; 72184/2010; 77881/2009.

[294] *Government of the Republic of Zimbabwe v Fick & Others* (657/11) ZASCA 122 (20 September 2012). The Government of Zimbabwe appealed to the Constitutional Court of South Africa against the decision of the Supreme Court of Appeal of South Africa, but lost the appeal. See also *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

restricted. Further the relief that was provided by the SADC Tribunal and South African courts shows the manner in which the judiciary does not effectively support expropriation without compensation.

The cases discussed above show the manner in which the sovereignty of Libya and Zimbabwe over their respective natural resources was challenged, restricted or weakened in regard to issues relating to expropriation. The competence of the two states to enter into the treaty agreements in each case was their sovereignty. However, they also manifested voluntarily and consented to limit the assertion of their sovereignty when each became a party to the agreements.

### 2.4.5 Dispute Settlement

In the context of the study, dispute settlement can be defined as a method of resolving disagreements or misunderstandings relating to mining investment agreements between the host state and foreign investor(s) or between contracting states.[295] In settlement of the disputes, an international tribunal chosen by the parties plays a fundamental role.[296] There are various international investment arbitration tribunals; here attention is given to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC)'s International Court of Arbitration[297] and the International Commercial Arbitration.[298] The tribunals are established by their own conventions, for example, the ICSID was established under the ICSID Convention. Just like municipal courts, the tribunals are expected to be impartial in resolving disputes, by invoking internationally accepted norms, standards and balancing competing interests of the parties to the dispute.[299]

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[295] See generally Richard B Bilder 'An overview of international dispute settlement' (1986) 1 *Journal of International Dispute Settlement* 1 at 3 – 4.
[296] Susan D Franck 'Development and outcomes of investment treaty arbitration' (2009) 50 *Harvard International Law Journal* 427 at 1539 – 1540.
[297] The International Chamber of Commerce (ICC) International Court of Arbitration, available at http://www.internationalarbitrationlaw.com/arbitral-institutions/icc (accessed 3 December 2014).
[298] See UN Commission on International Trade Law (UNICITRAL) Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006. The UNICITRAL Model Law was designed to assist countries in restructuring or reforming and modernizing their domestic laws on arbitral procedure in order to take into account specific features and needs of international arbitration. For more detail; see the UNICITRAL, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed 21 March 2014).
[299] Subedi, op cit note 112 at 196.

This section highlights the development of investment dispute settlement, the manner in which the choice of international arbitration potentially restricts the assertion of sovereignty of the host state and the way in which municipal legislation spells out provisions for dispute settlement between the host state and a foreign investor.

The history and development of investment dispute arbitration dates back beyond the eighteenth century;[300] however, consideration is taken from common state actions by some states in Latin America, which were reportedly involved in arbitrary expropriations of foreign investors' properties or cancellation of claimed contractual obligations against the host state by foreign investors. In this regard, disputes would arise where a legitimate foreign investor perceived itself to be injured and formulate a valid claim from the agreement, only to be rejected by the host state.[301] As a result of the ill-treatment of foreign investors and arbitrary breach of their foreign investment agreements, the home states of foreign investors gradually developed tendencies to intervene in the controversies in order to defend the legitimate interests of corporations of their nationals that were investors abroad, and at times could use force in support of their claims.[302]

For example, in *Case Concerning Elettronica Sicula SPA (ELSI) (United States of America v Italy),*[303] the US advocated a claim on behalf of its investor, the Raytheon Corporation, against the Republic of Italy. Raytheon had an investment project located in Sicily, a region in Italy which was undeveloped in comparison to the rest of Italy. Raytheon's plans were to manufacture and produce electronic parts in Palermo but resulted in severe financial constraints, and the management resolved to liquidate the Italian subsidiary. The ensuing bankruptcy proceedings faced interference and resistance from the Italian government, which frustrated efforts to resolve the matter amicably. After exhausting all domestic legal recourse in Italy, Raytheon sought help from its home government to resolve the matter. On half of its corporation, the US instituted legal proceedings against Italy in the ICJ, by assuming *locus standi in judicio* on the basis of a bilateral agreement, the Treaty of Friendship, Commerce

[300] For detailed discussion of investment arbitration, see Susan D Franck, op cit note 296 at 1536 – 1545.
[301] Bilder, op cit note 295 at 17.
[302] Susan D Franck, op cit note 296 at 1536 – 137.
[303] *Case Concerning Elettronica Sicula SPA (ELSI) (United States of America v Italy)* (1989) ICJ Report 15; hereafter *US v Italy Case.* See also *Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe* (2005) ICSID Case No. ARB/05/6; *Bernhard von Pezold & Others v Republic of Zimbabwe* (2010) ICSID Case No. ARB/10/15; *Border Timbers Limited, Border Timbers International (Private) Limited & Hangani Development Co (Private) Limited v Republic of Zimbabwe* (2010) ICSID Case No. ARB/10/25. See also Gerhard Loibl 'International economic law' in Malcolm D Evans (ed) *International Law 2nd ed* (2006) 689 at 708 – 715.

and Navigation, between the two countries.[304] In its ruling, the ICJ held that local remedies had to be exhausted, regardless of the fact that the court did not conclude that the exhaustion of local remedies played no role in the proceedings.[305] The procedural rules governing diplomatic protections, which include exhaustion of local remedies, had to be considered and applied.[306] Although Italy is not a developing state, the case illustrates the manner in which home governments of foreign investors may intervene on behalf of their investors abroad. It can be argued that Italy exercised its sovereignty by adopting measures that interfered with the Raytheon liquidation matter; however, the sovereignty was challenged in the ICJ. This further shows that although a state may take advantage and exercise its sovereignty, however, the sovereignty is not absolute – it can be challenged and restricted.

From the history and development of the concept of dispute resolution, home states of foreign investors, mainly from Europe, took advantage of the crystallization of customary international law rule that host states could not arbitrarily expropriate property or business interests of foreign investors without prompt, adequate and effective compensation.[307] In support of the interests of their investors abroad, the home states reiterated that host states had responsibilities and to observe the commitments, as well as contractual obligations arising from investment agreements, which are underpinned by the *pacta sunt servanda* norm. The developing states became assertive of their equal sovereignty with their colonial masters,[308] and as such, states in the Latin American region were at the fore and consistently resisted any form of colonial influence.[309] It is further reported that the resistance became stronger and popular when the communist movement gained political control in Russia and other countries across the globe; they ideologically aligned themselves with developing states in Latin America. The countries established qualitative momentum and intensified ties among communist values as more developing states joined the world community during the period

[304] The Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, was adopted on 2 February 1948 at Rome, and entered into force on 26 July 1949.
[305] *US v Italy Case*, supra note 303. See also Krista Nadakavukaren Schefer *International Investment Law: Text, Cases and Materials* (2013) at 317; Stephen W Schill & Yun-i Kim 'Sovereign bonds in economic crisis – is the necessity defence under international law applicable to investor –state relations? A critical analysis of the decision by Germany Constitutional Court in the *Argentine Bondholder Case'* in Karl P Sauvant (ed) *Yearbook on International Investment Law & Policy* 2010 – 2011 (2012) 489 at 503.
[306] Ibid.
[307] Susan D Franck, op cit note 296 at 1536.
[308] Ibid. See also Emir Sader 'Latin America in the XXI Century' in Atilio A Boron & Gladys Lechini (eds) *Politics and Social Movements in an Hegemonic World Lessons from Africa, Asia and Latin America* (2005) 23 at 23 – 37. See also Detlev Vagts 'Dispute resolution and development' in International Sustainable Development Law Volume 2, available at http://www.eolss.net/Sample-Chapters/C13/E6-67-04-02.pdf (accessed 27 February 2014).
[309] Ibid.

of de-colonization in the mid-1940s and after.[310] It is further reported the movement reached its peak in 1973, during the oil crisis which conferred a sense of empowerment upon developing states rich in natural resources.[311]

The developments gave rise to a series of resolutions passed by the UNGA, including the resolution on the Charter of Economic Rights and Duties of States, which largely renounced pro-investor principles and emphasized collective states' responsibilities towards the international community.[312] The Resolution set the stage to formulate the fundamentals for international economic relations, which included sovereign equality of states, non-interference, mutual and equitable benefit sharing, peaceful settlement of disputes and co-existence.[313] The period spanning the 1980s and 1990s witnessed a paradigm shift as a result of international efforts to accommodate the doctrines and interests of capital importing and exporting states.[314] Further the proliferation of BITs and attempt to agree on a multilateral investment agreement could be an indication of softening confrontations.[315] It is reported that gradually the trend developed of referring issues of controversy between developing and developed states to arbitration before an appointed panel to resolve the dispute, rather than engaging municipal courts.[316]

With the increase in the demand for mineral resources and foreign investment in the minerals sector among African states, it is becoming important for host states and foreign investors to have established methods of resolving investment and related disputes within a reasonable time. The types of disputes vary in nature and content,[317] and when disputes arise, it is important for the parties to resolve them amicably and thereafter maintain their

[310] See generally Luis Maira Aguirre 'Relations between Latin America and the United States: Balance and prospects' in Atilio A Boron & Gladys Lechini (eds) *Politics and Social Movements in an Hegemonic World Lessons from Africa, Asia and Latin America* (2005) 16 at 16 – 21.
[311] See generally Leah Fusco 'Energy policy development in the globalized world: A comparison of the USA, Canada, Britain and Norway' occasional paper 1 of the project on Oil, Power and Dependency: Global and Local Realities of the Offshore Oil Industry in Newfoundland and Labrador, 2006, available at http://www.ucs.mun.ca/~oilpower/documents/energypolicy3.pdf (accessed 2 April 2014).
[312] See generally the UNGA Resolution 3281 (XXIX): the Charter of Economic Rights and Duties of States, 12 December 1974.
[313] Martins Paparinskis *Basic Documents on International Investment Protection* (2012) at 78.
[314] Detlev Vagts, op cit note 308.
[315] Ibid.
[316] Ibid. See also Susan D Franck, op cit note 296 at 1537 & 1542 – 1545.
[317] Gary Born 'A new generation of international adjudication' (2012) 61 *Duke Law Journal* 775 at 823. See also Julia Hueckel 'Rebalancing legitimacy and sovereignty in international investment agreements' (2012) 61 *Emory Law Journal* 601 at 609 – 610.

relationship.[318] The rules for arbitration promulgated by each forum are generally used to regulate the proceedings.

Of the various forms of dispute resolution which include conciliation, mediation and negotiation,[319] arbitration proves to be the most common form of resolving investment disputes.[320] It is conceived as a dispute settlement mechanism which is outside municipal law and established judicial system of a sovereign state.[321] With regard to arbitration agreements, they can be formed at two stages: during the negotiation of an investment agreement or after a legal dispute arises. The first phase has the advantage in that the investment agreement negotiation process offers an opportunity without the animosity that could arise at the second stage.[322] Here arbitration clauses may be incorporated in the agreement in order to manage future dispute resolution process. What may be included in the arbitration clause is, *inter alia*, choice of law and the forum. The location may determine the potential aid or level of interference, by domestic courts during arbitral proceedings.[323]

Generally, national Constitutions provide for the establishment of the domestic judiciary system of state.[324] The provision for, and establishment of the judiciary in the constitution empowers courts to derive legitimacy and authority, as well as to hear and determine disputes arising from the territory of the state. However, the choice of law and forum may give a negative impression that host states' judiciary is incompetent and biased.[325] Further by

[318] Susan D Franck, op cit note 296 at 1540 – 1542. Also, there are various international tribunals, such as the World Bank's ICSID, the Stockholm Chamber of Commerce, the UN Commission on International Trade Law, the WTO Panels and Appellate Body, and the ICJ. Each forum has its own composition and jurisdiction.
[319] Bilder, op cit note 295 at 22 – 26.
[320] See generally Susan D Franck, op cit note 296 at 1539 – 1545.
[321] Ibid, at 1539 – 1540. See generally Eric De Brabandere 'Arbitral decisions as a source of international investment law' in Tarcisio Gazzini & Eric De Brabandere (eds) *International Investment Law: The Sources of Rights and Obligations* ((2012) 245. See also UNCTAD 'Investor – state disputes arising from investment treaties: A review' 2005 UNCTAD Series on International Investment Policies for Development at 18 – 21.
[322] Gary Born, op cit note 317 at 819.
[323] Susan D Franck, op cit note 296 at 1542 – 1543. See also Charles H Brower II 'Mitsubishi, investor – state arbitration, and the law of state immunity' (2005) 20 *American University International Law Review* 907 at 919; US Government Attorneys 'International arbitration' 1998, available at http://www.osec.doc.gov/ogc/occic/arb-98.html (accessed 23 December 2012).
[324] For example, section 2 of the Constitution of Zimbabwe of 2013; section 139 read with section 69 of the Constitution of the Republic of the DRC of 2005; section 2 of the Constitution of South Africa of 1996; section 1(i) & (3) of the Constitution of the Federal Republic of Nigeria of 1999.
[325] Thomas M Franck *The Power of Legitimacy Among Nations* (1990) at 64. See also Paul Michael Blyschak 'State consent, investor interests and the future of investment arbitration: Re-analyzing the jurisdiction of investor – state tribunals in hard cases' (2009) 9 *Asper Review of International Business & Trade Law* 99 at 116 – 117; James H Carter & John Fellas *International Commercial Arbitration in New York* (2010); Murat Sumer 'Jurisdiction of sovereignty states and international arbitration: A bound relationship' (2008) 2 *Ankara Bar Review* 55.

recognizing foreign arbitral awards, domestic courts may find themselves becoming rubberstamps for the decisions, which they did not reach and which are therefore not subject to appeal.[326] In this case, it is mainly the judiciary of the host state (a pillar which supports sovereignty) is affected. Reference shall be made in chapter 4 and 5 whether Zimbabwe and the DRC provides for dispute settlement in domestic legislation, respectively.

In a nutshell, dispute settlement in international investment law is difficult to understand, more particularly, why host states would voluntarily limit their sovereignty, by submitting to such processes of arbitration-enforced discipline. By consenting to such external, malleable tribunal, generally a state gains in reputation, in lowering its economic and political risk position and improving its ability to participate and benefit from the global economy.[327] However, the host state is at risk and consequently punished, usually with good reason, in many ways by investors and the global markets. Submitting to an external dispute resolution mechanism may also provide host states with defence against domestic business lobbies and ideological interests groups, which more often push domestic regulatory tools and manoeuvre it for protectionist policies which in the end damage the country's economic potential.[328] The tightly contested situation portrayed here gives host states limited options among or between competing and conflicting alternatives which, on the one hand, might support state sovereignty and, on the other hand, restricts it.

## 2.5 How Sovereignty is Worked out at Domestic Level

The manner in which sovereignty is worked out at the domestic level in order to uphold the mandate and control over mineral resources for self-determination is very important. The outworking aspect and implementation is accordingly a technical feature of resource sovereignty and forms a foundation upon which host states can successfully control their mineral resources. The technical manner in which Zimbabwe and the DRC have controlled and exercised sovereignty is discussed in chapters 4 and 5, respectively.

[326] See generally Vincent O Orlu Nmehielle 'Enforcing arbitration awards under the international convention for the settlement of investment disputes (ICSID Convention)' (2001) 7 *Annual Survey of International & Comparative Law* 21

[327] Todd Weiler & Thomas W Walde 'Investment arbitration under the Energy Charter Treaty in light of new NAFTA precedents: Towards a global code of conduct for economic regulation' (2003) 2 *International Oil, Gas & Energy Dispute Management* 1 at 2.

[328] Ibid.

The principles discussed in this chapter can be operationalized in various themes discussed in the thesis. The table below provides a summary of the principles and effect of sovereignty.

| Principle | Effect on Sovereignty (nature of the impact) | The way in which sovereignty may be worked at domestic level |
|---|---|---|
| **Self-determination** | -the right to decide how benefits from exploitation of mineral resources will be used in accordance with the wishes of the people. | -indigenization policies and laws.<br>-transparency and accountability in control, regulation as well as revenue use and management<br>-planning for use of mineral resources<br>-control of corruption |
| **Non-interference** | -reinforces the PSNR and self-determination principles by ensuring other subjects of international law are restrained from interfering in the domestic affairs of the host state in so far as the control and regulation of mineral resources are concerned.<br>-non-interference in domestic executive, legislative or judiciary decisions, as well as enforcement and policing of mining laws. | -policy formulation, implementation and enforcement, as well as policing.<br>-dispute resolution<br>-mineral resource policing |
| **PSNR** | The right to benefit from exploitation of mineral resources, as well as the following:<br>(i)vesting the state with permanent custodianship over domestic mineral resources.<br>(ii)providing the executive and legislature with authority to make laws to determine conditions of access & regulation, acquisition and cancellation of mining licences, security tenure system.<br>(iii)inherent powers to choose who should invest and who to exclude.<br>(vi)inalienable right to control and regulate the resources, as well as their exploitation, allocation and use of the revenue for development purposes. | The way in which sovereignty is worked out at the domestic level is the technical features of mineral resource control and regulation which manifests through:<br>-property regime applicable to mining.<br>-conditions of access to the mineral resources.<br>-policy implementation, enforcement and policing.<br>-beneficiation and trade.<br>-indigenization.<br>-dispute resolution.<br>-environmental requirements.<br>-royalties and tax rates.<br>-legal obligations towards indigenous communities |

| | | |
|---|---|---|
| | | -investment laws. |
| **The right to development** | -the mandate and resource sovereignty, self-determination and non-interference in the control of domestic minerals and their exploitation and trade.<br>-reinforces the right to benefit from mineral exploitation.<br>-to apply revenues in line with development vision of the state. | -development planning.<br>-development laws.<br>-sustainable development in line with African Mining Vision (AMV) |
| **National Treatment** | -executive and legislative under must guarantee foreign mining investors fair and non-discriminatory treatment through legislative, judicial and administrative.<br>-host state compelled to provide same treatment to domestic and foreign investors. | -may not pass laws favouring nationals - impact on the indigenization laws. |
| **Most Favoured Nation** | -restricts choices - which investor to give trade advantages over another.<br>-state cannot pass laws giving trade advantages to certain parties in the mineral value chain.<br>-restricts the mandate and sovereignty to grant trade advantages to one investor to the exclusion of others in the mineral value chain. | -impact on enforcing beneficiation laws.<br>-mineral laws that may convey advantages to one investor over another. |
| **Foreign exchange and repatriation of profits** | -restricts state's ability to control movement of investors' capital into the country and out of the country<br>-restricts quantity of revenue (a reasonable percent) available for development.<br>-municipal law relating to capital movements is inferior to international law which regulates capital controls and current transactions (the IMF Rules). | -foreign exchange laws and current transactions. |
| **Compensation for expropriation** | -restricts the executive from expropriating unless compensation is available.<br>-requires policy formulation to justify expropriate.<br>-restricts arbitrary expropriation.<br>-fear of causing disinvestment and maladministration could force executive not to expropriate.<br>-paying compensation lessens revenue available for development. | -expropriation law.<br>-obligation on host states to equitable treatment of investors' mining investments and interests. |

## 2.6 Conclusion

The chapter has discussed the international legal framework that supports sovereignty over mineral resources, and how this can be worked out at the domestic level. The cardinal principles of international law discussed in this chapter collectively tell us that sovereignty over mineral resources is fundamental and provides a legal shield against interference, and African states have the autonomy to control the resources. This legal framework gives host states inherent rights to control domestic mineral resources for self-determination. Accordingly, other subjects of international law are legally required to respect the sovereignty of another state by not interfering in its domestic affairs, including in the assertion of sovereignty over mineral resources.

The chapter has discussed the uncertainties surrounding the scope and content of the principles and how they are relevant to thesis. Chiefly what constitutes "interference" remains of cardinal importance in upholding the mandate and exercising sovereignty over mineral resources in Africa. The manner in which the principles collectively conceptualize the mandate and sovereignty gives African states the international legal basis in order to control their mineral resources for self-determination. The success in so doing lies in observing the duties imposed on each state individually and collectively in international law, and in turn this could be an aid to ameliorate the interferences and to navigate them.

In a nutshell, sovereignty is a key principle that supports the mandate and control over domestic mineral resources and their regulation without interference. With reference to the DRC and Zimbabwe, the principle is considered in terms of the manner and extent to which it empowers African states to be the agents of their own development. Sovereignty confers states with a legal shield and authority to define the manner in which, for example the DRC and Zimbabwe, spell out the rights to ownership, custody of, and control over domestic mineral resources, as well as access to those resources. The authority includes setting out the terms and conditions fundamental for a state to exercise control over the resources. For example, the application of property rights and security of tenure, the right of access to a mineral resource, as well as criminalizing conduct that violates provisions of domestic mineral laws and policies. While empowered with the principle of sovereignty, states formulate policies and enforce them in order to assert control over the resources. This includes general policing, beneficiation and trade, taxation and investors' obligations towards

indigenous communities. These themes among others are discussed in chapters 4 and 5 with a view to show the operationalization of the principles discussed in this chapter.

# CHAPTER 3

# THREATS TO THE "OUTWORKING" OF SOVEREIGNTY OVER MINERAL RESOURCES IN DEVELOPING STATES

## 3.1 Introduction

There are various threats that can interfere with and weaken state sovereignty over domestic mineral resources and the mandate to develop through exploiting such resources. This chapter discusses four threats to the "outworking"[1] of sovereignty over mineral resources, namely, the conditionality policies of the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF), illegal mining, corruption and mineral resource conflicts. The conditionalities in loan agreements (these are the actual loan agreements rather than the conditionality policy) are directly relevant since they potentially undermine sovereignty; however, the proponent deems it another area of study. Reference shall only be made thereto when necessary.

While transparency initiatives such as the Extractive Industry Transparency Initiative (EITI) and the Kimberley Process Certification Scheme, along with stabilization clauses in mining contracts also restrict sovereignty over mineral resources in various ways, these areas of focus are not considered in this thesis. However, reference shall be made when necessary.

## 3.2 The Role of International Financial Institutions in Relation to State Sovereignty

Two international financial institutions, namely, the IMF and the World Bank play a fundamental role in shaping the relationship and interaction between developing states and global capital. In particular, the IMF and the World Bank conditionality incorporated in policy agreements are capable of interfering with and affecting state sovereignty.[2] Conditionality can be defined as a technique which is used to attract the consent of the other party in return for support and in the process influences domestic policies of the recipient

[1] For purposes of the thesis, "outworking" refers to (i) the action or process by which states exercise authority to control and regulate domestic mineral resources; or (ii) the act or results of developing mineral resource activities with a view to derive economic benefits throughout the mineral value chain.

[2] Ross P Buckley 'Re-envisioning economic sovereignty: Developing countries and the international monetary fund' in Trudy Jacobsen, Charles Sampford & Ramesh Thakur (eds) *Re-Envisioning Sovereignty: The End of Westphalia?* (2008) 267.

state or proposes undertaking of certain domestic reforms in exchange for financial support.[3] The conditionality can be a way by which the recipient state is made to adopt or pursue specific policies or political reforms in exchange for financial support, which might not have been pursued in the absence of the conditionality.[4] In the context of the IMF and the World Bank, conditionalities refer to policies or strategies a recipient or member state is conditionally expected to accept and follow in order to have access to financial resources of the two organizations.[5] Generally, the conditionalities are programme related and are arguably, intended to ensure the capital provided to a member state is used for the purpose for which it was sought.[6]

> The World Bank and [the IMF] are two of the most powerful international financial institutions in the world. They are the major sources of lending to African countries, and use the loans they provide as leverage to prescribe policies and dictate major changes in the economies of these countries.[7]

The two international financial institutions are controlled by the world's richest states, including the US, which is the major shareholder in both institutions. The shareholders with the greatest financial contributions have the greatest influence in institutional decisions and policies.[8] Also, major shareholders have the capacity to make funds contingent on such policies as they wish.[9] The two institutions have the potential to use conditionality

[3] Ariel Buira 'An analysis of IMF conditionality' paper prepared for the XVI technical Group Meeting of the Intergovernmental Group of 24 Port of Spain, Trinidad & Tobago, on 13 – 14 February 2003 at 3.
[4] Ibid. See also European Network on Debt & Development 'Conditionally yours: An analysis of the policy conditions attached to IMF loans' 2014, available at http://www.eurodad.org/conditionallyyours (accessed 10 January 2015).
[5] Ibid.
[6] See generally Timothy F Geithner & Francois Gianviti 'International Monetary Fund: Guidelines on conditionality' prepared by the Legal and Policy Development and Review Departments, 2002.
[7] The Levin Institute of the University of New York 'International Monetary Fund and World Bank' 2011, available at http://www.globalization101.org/uploads/File/IMF/imfall2011.pdf (accessed 21 October 2012). See also The World Bank and IMF in Africa 2008, available at http://rainbowwarrior2005.wordpress.com/2008/11/07/the-world-bank-and-imf-in-africa (accessed 22 October 2012). See further Anne O Krueger 'Whither the World Bank and the IMF?' (1998) XXXVI *Journal of Economic Literature* 1983.
[8] Ibid. From the voting structures of these two financial institutions, it is clear that they are controlled by the developed world. The US has about 17 per cent of the votes in the World Bank and the about 48 Sub-Saharan African states have a total of less than 9 per cent of the votes. The Group of 7 richest countries (G 7) controls about 54 per cent of the World Bank votes. This disproportionate control of the World Bank and the IMF ensures that these institutions largely act in the best interests of the rich states. Thus, promoting a model of economic growth referred to as 'neo-liberal' that only benefit the rich countries and the international private sector of those countries. See IMF, available at http://www.imf.org/external/np/sec/memdir/members.aspx (accessed 22 October 2012). See also Namiita Wahi 'Human rights accountability of the IMF and World Bank: A critique of existing mechanisms and articulation of a theory of horizontal accountability' (2006) 12 *University of California, Davies* 331 at 333 – 351.
[9] Michael Hodd 'Africa, the IMF and the World Bank' (1987) 86 *African Affairs* 331 at 338.

mechanisms designed to influence policy changes in recipient states, and this occurs most notably in African states.[10]

The conditionality policy includes structural programmes (formerly structural adjustment programmes).

> Widespread and increasing use of controversial conditions in politically sensitive economic policy areas, particularly tax and spending, including increases in [value added tax (VAT)] and other taxes, freezes or reductions in public sector wages, and cutbacks in welfare programmes […]. Use of these types of conditions tends to be lower in low-income countries, but is very high in some of the largest programmes. Other sensitive topics include requirements to […], restructure and privatize public enterprises, and reduce minimum wage levels.[11]

The research confirms that the IMF and the World Bank use substantial influence to promote controversial austerity and liberalization measures, with potentially severe impacts on the recipient states, most notably developing states.[12] The two international financial institutions have various programmes, which include Stand-by Arrangements, the Extended Fund Facility, the Poverty Reduction and Growth facility (formerly the Enhanced Structural Adjustment Facility) and the Structural Adjustment Facility.[13] The conditionalities associated with each programme constitute an integral feature of the two international financial institutions' policies. However, the conditionalities are considered controversial policy tool and have the potential of undermining sovereignty,[14] by restricting policy formulation and interfering with the state process to function as it would without such conditions. Also, the executive and the legislature can be compelled to adopt certain policies, such as structural programmes as well as political reforms, which may affect sovereignty by weakening enforcement capacity. For example, some African states including Zimbabwe and the DRC, conditionally accepted the structural programmes that were alien to their domestic policies

[10] Ross P Buckley, op cit note 2 at 268. See also John Robertson 'Structural challenges of transformation in Zimbabwe' in Richard Cobbold & Greg Mills (ed) *Global Challenges and Africa: Report of the 2004 Tswalu Dialogue* (2004) 45 at 46.
[11] Ibid.
[12] Ibid.
[13] See generally Doris A Oberdabernig 'The effects of structural adjustment programmes on poverty & income distribution' 2010, available at http://wiiw.ac.at/the-effects-of-structural-adjustment-programs-on-poverty-and-income-distribution-p-2016.html (3 October 2013).
[14] Joseph E Stiglitz *Globalization and its Discontents* (2002) at 195 – 197. See also Ariel Buira, op cit note 3 at 1 – 31. See further Devesh Kapur & Richard Webb 'Governance related conditionalities of the international financial institutions' UNCTAD, G-24 discussion paper series, paper 6 of August 2000, available at http://www.g24.org/Publications/Dpseries/06.pdf (accessed 2 April 2014).

with a view to stimulate economic growth. However, upon implementation of the structural programmes as discussed in chapters 4 and 5, they did not perform as anticipated.[15]

The issue of conditionalities is a long established principle relating to access to World Bank and IMF financial resources.[16] The question arises as to whether the conditionalities constitute interference in the domestic policy space of the recipient African states. The extent to which the conditionalities are interference would relate to the extent to which they compel a state to depart from the track it would have taken to regulate domestic resources. In the absence of any agreeable international standard, the possibility for designing the conditionalities to suit the lender and at the same time prejudice the recipient state is most likely.[17] Accordingly, the conditionality policy of both institutions has the potential to influence the recipient state' sovereignty, by restricting space for policy development.

Proponents of the two international financial institutions are of the view that the conditionalities are potentially a specific influential tool for guaranteeing compliance with institutional lending policies. Samoff and Carrol argue that the significance of World Bank and IMF policies is situationally determined and may assist one to understand that despite the influence they have on the recipient states, the policies are predicated on an inherently uneven relationship between the two institutions on one hand, and the recipient state, on the other.[18] The requirements of conditionality have negatively influenced African states to turn their economies into sources of cheap natural resources and labour.[19] Against this background, issues such as the legality of adopting such policies may arise. For example,

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[15] Ibid. See also F E Ogbimi 'Structural adjustment is the wrong policy' African technology Forum 1995, available at http://www.iisd.org/youth/ysbk077.htm (accessed 2 April 2014); Anup Shah 'Structural adjustment - a major cause of poverty' 2013, available at http://www.globalissues.org/article/3/structural-adjustment-a-major-cause-of-poverty (accessed 2 April 2014).

[16] Fenardo Jose Cardim de Carvalho 'Once Again, On the Question of IMF's Conditionalities' 2009 at 8 – 23, available at http://sistemas.mre.gov.br/kitweb/datafiles/IRBr/pt-br/file/CAD/LXIII%20CAD/Economia/Once%20again,%20on%20the%20question%20of%20IMF's%20conditionalities.pdf (accessed 31 March 2013). See also Martin Khor 'A Critique of the IMF's Role & Policy Conditionality' Global Economy Series No. 4, available at www.twnside.org.sg/title/geseries4.htm (accessed 3 March 2014).

[17] See generally Mac Darrow *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (2003) at 29 – 51. See also Roland Rich 'Development assistance and the hollow sovereignty of the weak' in Trudy Jacobsen, Charles Sampford & Ramesh Thakur (eds) *Re-Envisioning Sovereignty: The End of Westphalia?* (2008) 231at 237 – 243.

[18] Joel Samoff & Bidemi Carrol 'Conditions, coalitions, and influence: The World Bank and higher education in Africa' (2004) at 17, paper presented at the Annual Conference of the Comparative and International Education Society, Salt Lake City, 8 – 12 March 2004.

[19] The World Bank and IMF in Africa, supra note 7.

> […] if the financial leverage of the IMF and World Bank acting alone is not decisive in imposing policy change, why then have so many African countries begun substantial restructuring of their economies […]? This is an intriguing question, particularly when the evidence is by no means conclusive regarding the efficiency benefits and the nature of distributional changes resulting from [appropriate regulation of mineral resources].[20]

IMF programmes such as the structural adjustment, formerly the economic structural adjustment programme[21] were adopted by some African states in the 1990s and caused domestic fiscal policy failure, and massive retrenchment in the public sector.[22] Also, the structural programmes adversely affected such states and their capacity to develop.[23] This is one example where IMF policies, coupled with domestic factors such as corruption and mismanagement, failed some African states including the DRC and Zimbabwe. This prompts commentators to assert that the IMF and the World Bank are the 'death start of capitalism'.[24] While the two institutions' policies and decisions may influence policy changes in poor recipient states, the same institutions may extend loans to developed states without strict contingent measures.[25] This assertion is supported by the view that the IMF and the World Bank policies do not 'march across featureless terrain'.[26] This could translate to the fact that the IMF may use its conditionalities to derive benefits from poor states.

It can be argued that the conditionality policy of the IMF and the World Bank can be linked to colonialism in the sense that it compelled the colonies to accept foreign rule. In this regard, the conditionality policy is forced on the recipient state as a condition for aid. The conditionality comes with the objective to control the recipient state and its internal regulation structures, policies and as well as self-determination. It can also be argued that both international financial institutions can interfere with the investment climate in host states by negatively influencing major potential investors. Further, the conditionality policy can be considered as a colonial tool to exploit recipient states, mainly developing states and African states are no exception.[27] In this regard, it can be argued that,

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[20] Ibid, at 340.
[21] Economic Structural Adjustment Programme; hereafter ESAP. See John Robertson, op cit note 10.
[22] Ibid, (John Robertson).
[23] See generally Herbert Jauch 'How The IMF-World Bank and structural adjustment programme (SAP) destroyed Africa' *News Rescue*, 19 July 2012.
[24] Samoff & Carrol, op cit note 18 at 3.
[25] Joseph E Stiglitz, op cit note 14 at 33.
[26] Samoff & Carrol, op cit note 18 at 4.
[27] Jim Guenza 'The IMF and the World Bank: A neo-colonial interpretation the destabilization of regions, the establishment of resource extraction mechanisms and economic slavery' California State University, Chico, available at https://www.academia.edu/9667907/The_IMF_and_the_World_Bank_A_Neo-Colonial_Interpretation (accessed 7 January 2015). See also Richard Gerster 'The IMF and basic needs conditionality' (1982) 16 *Journal of International Trade* 497; Claudia R Williamson 'Exploring the failure of

> [w]hen developing countries face financial ruin, agreeing to the one sided requirements contained in conditionality accords set forth in multilateral aid negotiations offered by the IMF and the World Bank are often their only option and must accept. This is significant because it serves as one of the foundations upon which the wholesale looting of developing countries' wealth and resources occurs.[28]

From this quotation, one can argue that developing states have been left without options but to accept the conditionality policy which adversely affects them. Like colonialism, local communities were forced to accept because they had no other alternative. Regardless of any contrary view and in order to support this notion, however, one can find substantive opinions from the International Financial Institution Advisory Commission report of 2000,[29] in which the Commission concluded that,

> [t]he use of IMF resources and conditionality to control the economies of developing nations often undermines the sovereignty and democratic processes of member governments receiving assistance. IMF staff often admit (with pride) that the executive branch of borrowing nations likes to use IMF conditions to exact concessions from their legislatures. While this mechanism may sometimes work to achieve desirable reforms, it often does so by shifting the balance of power within countries in ways that distort the constitutionally established system of checks and balances.[30]

It can therefore be argued that the World Bank and the IMF are relatively new institutions or structures in the post-colonial era which superseded the old-fashioned imperial and colonial methods and practices once used by the colonial masters and their governments in order to subjugate African communities and their leadership with a view to loot, as much as they can, domestic mineral resources in the colonies.[31] However, my views towards both institutions are never an excuse to shove aside greed and failure in the leadership of most African states. Regardless of the remarks about the leaders, both institutions can be blamed for wrongful use of conditionality policy and inappropriate policy advice to developing states (see chapters 4 and 5 below), and the prevalence of such an attitude or practice can be ascribed to the weak economic situation in many of the recipient states that scramble for the aid.[32] Like colonial regimes that were used as apparatuses in the colonies to derive economic benefits for their home governments (colonial masters), one can argue that the IMF and the World Bank are

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foreign aid: The role of incentives and information' (2010) 23 *Review of Austrian Economics* 17; Keith B Griffin & J L Enos 'Foreign assistance: Objectives and consequences' (1970) 18 *Economic Development & Cultural Change* 313 at 317. See further Daniel R Kalderimis 'IMF conditionality as investment regulation – A theoretical analysis' 2003 at 1, paper first presented at the Appeal Conference on Foreign Direct Investment, held at Columbia Law School between 27 – 29 March 2003.

[28] Ibid, (Jim Guenza) at 2.

[29] Allan H Meltzer 'The Report of the International Financial Institution Advisory Commission: Comments on the Critics' 2000, Tepper Business School, Carnegie Mellon University, available at http://repository.cmu.edu/tepper/29 (accessed 5 December 2014).

[30] Stephen Knack 'Does foreign aid promote democracy?' (2004) 48 *International Studies Quarterly* 251 at 253. See also Jim Guenza, op cit note 27 at 2.

[31] Ibid.

[32] Herbert Jauch, op cit note 23.

tools that can be used by the world's richest shareholders, particularly the US which is the major shareholder in both institutions, to control and extract wealth from politically weak and economically poor African states. This view is supported by the fact that both institutions,

> […] are merely instruments of control and wealth extraction which operate under the benevolent auspices of charity and altruism. Furthermore, […] the extension of foreign aid and the conditionality agreements that go with it are the specific mechanisms that grant developed countries the ability to wield political influence, dictate policy, and undermine state sovereignty in developing countries.[33]

Accordingly, the conditionality policy of the two financial institutions restricts sovereignty of the recipient state in the form of domestic policy space and its implementation. This could also translate to the way in which colonialism restricted the sovereignty of the colonies, where after the colonial regimes imposed their illegitimate rule, the freedom of local communities was no longer in existence. In a similar process, however, recipients of the conditionalilites in Africa restrict or compromise their sovereignty as discussed in chapters 4 and 5 below.

It can be argued that since the establishment of both the IMF and the World Bank about 60 years ago, both financial institutions, in addition to conditionally providing aid to developing countries, took the lead in making policy prescriptions to recipient states, which were made to be adopted by making the policies and the prescriptions "conditions for lending".[34] Accordingly, one cannot deny that the conditionality policy of both institutions is discriminatively imposed on the economically weak and poor recipient states (developing states, for example African states), and in the process interfere with, as well as restrict and weaken the recipient states' rights to make sovereign decisions for self-determination. Further it can be argued that,

> [w]hen developing countries accept financial aid, the World Bank and the IMF are in the position to unleash the metaphorical soldiers waiting inside of their Trojan horse. Policy dictation is not contingent on a recipient country defaulting; the conditions of just accepting loans expressly spell out the powers gained by donors.[35] These conditions are the

[33] Ibid. See also Jim Guenza, op cit note 27 at 1.
[34] Building a Global Movement for Khilafah 'IMF and World Bank: Colonial tools to exploit the world' 2007, available at http://www.khilafah.com/index.php/analysis/america/462-imf-and-world-bank-colonial-tools-to-exploit-the-world (accessed 2 December 2014). See also Lindsay Whitfield 'Trustees of development from conditionality to governance: Poverty reduction strategy papers in Ghana' (2005) 43 *Journal of Modern African Studies* 641 at 644.
[35] See generally Daniel R Kalderimis, op cit note 27 at 3 – 25. See also Dani Rodrik 'How should structural adjustment programmes be designed?' (1990) 18 *World Development* 933; Tony Killick 'Principals, agents and the failings of conditionality' (1997) 9 *Journal of International Development* 483; Jeffrey Sachs 'The IMF is a power unto itself', speech delivered at Harvard University on 11 December 1997. See further Michael Mussa *Argentina and the Fund: From Triumph to Tragedy* (2002); Jeffrey Sachs 'The IMF is a power unto itself' *Financial Times*, 11 December 1997 at 21.

> manifestations that come in the form of structural adjustment programs and conditionality agreements.[36]

Accordingly, the extent to which the conditionalities are coercive depends on the prevailing financial circumstances of the recipient state.[37] However, Volcker argued that when the two financial institutions consult with economically poor and weak states, the state succumbs to the pressure; however, when the institutions consult with economically strong and developed states, they fall in line with the demands of the state.[38] It can therefore be argued that conditionality is a function of economic and political power. The fact that most African states are relatively weak, both economically and politically, means that the conditionalities are more likely to be coercive, when the cost of not accepting them is greater. Many African states have no choice but to accept the conditions; thus, compelling them to do things they would otherwise not have done.[39] Under such circumstances, the conditionalities have the potential to heighten the possibility that African states will not take up their mandate to benefit from the exploitation of mineral resources.

The policies of the two financial institutions have the potential to affect sovereignty of the recipient state in varying degrees.[40] The effects of the policies on state sovereignty are more pronounced in developing states that rely extensively on the IMF and World Bank loans. The conditionalities may indirectly influence, for example, domestic policies such as structural transformation policies. This in turn can affect the mineral value chain and its regulation in that the conditionality policy has a coercive effect on the recipient developing states. For example, the mining sector and its regulation can be affected by weakening policing and enforcement capacity of the recipient state through reduction of the public service, the case of Zimbabwe.[41] This is against the backdrop that almost all African states have sought IMF and World Bank loans and very few, if any, are in a position to reject the conditionalities of the loans.

### 3.3 Illegal Mining

Illegal mining can be defined as unlawful winning of a mineral resource from the soil or earth without a mining licence, mining rights or exploration rights, as well as in the absence of

[36] Jim Guenza, op cit note 27 at 5.
[37] Allan Drazen 'Conditionality and ownership in IMF lending: A political economy approach' 2002 at 3 – 9, available at http://econweb.umd.ed~drazen/ConditionalityIMF Staff.pdf (accessed 2 April 2014).
[38] See generally Paul A Volcker & Toyoo Gyoten *Changing Fortunes* (1992).
[39] Ariel Buira, op cit note 3 at 5. See also Samoff & Carrol, op cit note 18 at 25 – 36.
[40] Samoff & Carrol, op cit note 18 at 3.
[41] Ibid. See also Joseph E Stiglitz, op cit note 14 at 195 – 197 & 206 – 213; section 4.5.4 of chapter 4 below.

mineral processing or transportation licence and any other legal documentation that may be required in the domestic mining processes and operations. Since the host state is the custodian of all mineral resources found or located within its territory, the resources are considered to be the property of the state in terms of the international law principle of permanent sovereignty over natural resources (PSNR).[42] Illegal mining activities are done without state authorization; importantly, the activities do not comply with minimum requirements and environmental regulations, and those involved do not pay royalties and mining taxes. It is therefore illegal to exploit the resources without a mining licence or permit, which implies state authorization. Accordingly, the resources can only be lawfully exploited and processed by a licenced entity or individuals on a specific location in terms of the relevant laws and policies of the host state.[43] Illegal mining or the practice of illegal mining is against the host state's mining requirements in that the domestic state institutions responsible for regulating mineral resources cannot monitor and control the activities of unlicenced mining holders and ensure they comply with the requirements underpinning the issuance of the mining permit. It has to be noted too that illegal mining is not necessarily carried out by individual peasants or small groups of villagers but many of such activities or operations can actually be undertaken by criminal syndicates and entities too, which use different ways to corruptly and illegally amass revenues and in the process prejudice host states.

Since illegal mining is against the laws of host states, however, the activities often take place under the cover of darkness, along river beds and river banks, in forests, on farms and remote locations.[44] Illegal mining '[…] is a job that needs no education, qualification or experience. It is patronized by all categories of persons who are physically strong; men, women, children, teenagers and even the aged engage in the winning of diamonds'.[45] Most of the illegal mining activities '[…] take place in low grade areas or abandoned mining sites. Low productivity

[42] See also Articles 1 & 2 of the Charter of Economic Rights and Duties of States (1974); George Elian *The Principle of Sovereignty over Natural Resources* (1979) at 83 – 191; Richard B Bilder 'International law and natural resource policies' (1980) 20 *Natural Resources Journal* 451 at 453 – 457; Lillian Aponte Miranda 'The role of international law in intrastate natural resource allocation: Sovereignty, human rights, and peoples-based development' (2012) 45 *Vanderbilt Journal of Transnational Law* 785; Chris Armstrong 'Against permanent sovereignty over natural resources' Forthcoming in Politics, Philosophy and Economics, University of Southampton, 2014, available at https://www.academia.edu/1105120/Against_Permanent_Sovereignty_over_Natural_Resources (accessed 3 December 2013).
[43] Ibid.
[44] Edwin Eric Owusu & Dr Gabriel Dwomoh 'The impact of illegal mining on the Ghanaian youth: Evidence from Kwaebibirem District in Ghana' (2012) 2 *Research on Humanities and Social Sciences* 86 at 88.
[45] Ibid.

and limited production are therefore illegal mining's main characteristics'.[46] Regardless of this, however, it is most likely that the minerals that are illegally acquired are smuggled through the loopholes in the regulatory system, and the revenues are not always put in the formal channels. Accordingly, the host states loses substantial amount of revenues.

Illegal mining can be linked to colonialism in the sense that both phenomena involve criminality and resource plunder, which disadvantage host states of their lawful control of the resources and the right to derive revenues that can be channeled towards national development for the benefits of the citizens.[47] In other words, both phenomena involve illegal access to domestic mineral resources and their exploitation, as well as trading. Further, both phenomena deprive host states, which are the legitimate custodians and the citizens who are owners of the resources, of the economic benefits that are associated with the resources. During colonialism, however, the local communities were denied control of, and access to their resources for community self-determination.[48] On the same note, illegal mining deprives the host state control of, and the power to determine the conditions of access to the resources in that the illegal activities overshadow state control in the areas where the activities are undertaken. Also, the loss of revenue is exacerbated by the fact that those involved in illegal mining do not pay any mining tax and they use illegal channels to trade the minerals, which more often are undervalued because illegal miners do not have legitimate claims. Accordingly, the host state's mandate to develop is adversely affected due to the fact that the illegally mined resources do not contribute to national income. Therefore it can be argued that both colonialism and illegal mining are threats to PSNR and the mandate to control the resources for self-determination and development.

Furthermore, illegal mining is a threat to state sovereignty in that the operations are not sanctioned by the state and are incapable of being regulated. In terms of the mandate of the state which is derived from the international law principle of PSNR, the host state has an inherent duty to control access to domestic minerals for self-determination. However, failure to do so as evidenced by illegal mining could also mean that the competence of host states to

[46] About Money 'What is illegal mining?' available at http://mining.about.com/od/OperationsManagement/a/What-Is-Illegal-Mining.htm (accessed 3 December 2014). See generally Adjei Samuel, N K Oladejo & I A Adetunde 'The impact and effect of illegal mining (galamsey) towards the socio-economic development of mining communities: A case study of Kenyasi in the Brong Ahafo region' (2012) 1 *International Journal of Modern Social Sciences* 38.
[47] Michael A Lundberg 'The plunder of natural resources during war: A war crime?' (2008) 39 *Georgetown Journal of International Law* 495.
[48] See generally Walter Rodney *How Europe Underdeveloped Africa, revised edition* (1981) at 320 – 448.

regulate and enforce domestic mining laws and policies, as well as policing is threatened. Although the introduction of the PSNR principle in modern international law gives host states indisputable custody and control over domestic natural resources, mere legal entitlement without practical implementation could be one of the challenges undermining state sovereignty and the mandate to benefit from exploitation of mineral resources in Africa. Since the state is the supreme authority which enacts mining laws (through parliament) and derogates authority to the Ministry responsible for Mines, as well as entrusting with the responsibility to regulate the resources for national benefit; however, failure to curb illegal mining can be a threat to the state in that the mandate to derive benefits for self-determination is weakened. Also, the proliferation of illegal mining can be an indication that the Ministries responsible for Mines in host states are failing their responsibility to control and promote the mandate to develop through exploitation of the resources.

Illegal mining does not support state sovereignty over mineral resources; instead the operations criminal and predatory practice, and undermine state sovereignty. This is a particular view on illegal mining; however, one should acknowledge that there might be other views. The state's mandate in accordance with the PSNR principle, to develop through exploitation of the resources, is undermined because national interests are not protected. Accordingly, the presence or prevalence of illegal mining in host states could be an indication of weak regulation and flawed regulatory processes, which can discourage foreign investment, as well as a threat to state sovereignty and the mandate to develop through exploiting the resources. The prevalence of illegal mining activities in many African states can be an indication that regulation and enforcement of domestic laws relevant to the mining sector, as well as policing is largely lacking.[49] Also, illegal mining could be a manifestation or an indication that state institutions or agencies responsible for regulation do not have adequate technically qualified personnel and tools for their effective operations. Accordingly, '[…] lack of monitoring personnel from the regulatory agencies will also make it difficult to determine and verify the extent and volume of mineral extraction and processing making it difficult for government to assess its fair share of benefits to be obtained from mining

[49] See generally Adjei Samuel, N K Oladejo & I A Adetunde, op cit note 46 at 39. See also Rights & Accountability in Development (RAID) 'Unanswered questions: Companies, conflict and the Democratic Republic of Congo' 2004, Work of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Natural Wealth in the Democratic Republic of the Congo & the OECD Guidelines for Multilateral Enterprises; News Desk 'Malawi battles increased illegal mining' *World Bulletin*, 26 January 2015.

operations'.[50] In the circumstances, it remains imperative for host states to effectively regulate and ensure those accessing the resources comply with domestic laws. Accordingly, it can be argued that host states' mandate to develop from the exploitation of mineral resources is threatened due to lack of appropriate regulation, law enforcement and policing.

In short, illegal mining is a threat to state sovereignty over mineral resources and the mandate to develop through exploitation of the resources. The operations are prejudicial to host states over control of the resources and the right to determine conditions of access. As a result, there is loss of revenues that could have been used for development and other areas of national priority.

### 3.4 Corruption

There is no clear consensus on a uniform definition of corruption. Former UN Secretary–General, Kofi Annan, defined corruption as 'an insidious plague that has a wide range of corrosive effects on societies'.[51] Transparency International has defined corruption as any abuse of position of trust to gain an unfair economic advantage.[52] Corruption in itself is hard to define since different phenomena are included in the umbrella definition. In light of the two definitions and in the context of the study, however, corruption can be defined as conduct which deviates from official and normal duties of a public officer due to pecuniary or status gain, and in the process violates rules against the exercise of certain types of private-regarding influence.[53]

The UN Convention Against Corruption of 2003 was a step towards addressing corruption at international level. However, the convention is silent on defining corruption, thus, leaving it to each member state.

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[50] Dr Roberto B Raymundo 'The Philippine Mining Act of 1995: Is the law sufficient in achieving the goals of output growth, attracting foreign investment, environmental protection and preserving sovereignty?' 2014 at 9, Presented at the DLSU Research Congress, 6 – 8 March 2014, De La Salle University, Manila, Philippines.
[51] Kofi A Annan 'Foreword' to the UN Convention Against Corruption (2003) iii.
[52] Transparency International, available at www.transparency.org (accessed 2 May 2013). See also Alejandro Posadas 'Combating Corruption Under International Law' (2000)10 *Duke Journal of Comparative & International Law* 345; Antonio Argandona 'The United Nations Convention Against Corruption and its Impact on International Companies' 2006 *IESE Business School – University of Navarra* 1; John Makumbe 'Anti-corruption Efforts in the SADC Southern Economist' (1999) 13 *African Political Economy Monthly* 1; J S Nye 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 *American Political Science Review 417*.
[53] Ibid. See also Kofi A Annan, op cit note 51.

Regardless of the above, however, corruption can be linked to colonialism in the sense that it is exploitative in nature. Colonialism largely caused underdevelopment of Africa,[54] and so does corruption.[55] Both phenomena have unsustainable effects on economic growth and development. For example, the underdevelopment of Africa is largely traced back to colonialism,[56] and corruption is exacerbating the levels of poverty by slowing down economic potential that can be derived from mineral resources. Regardless of the fact that Africa is endowed with an array of mineral resources, the continent is very poor, prompting

> '[…] many people asking how there can be two such conflicting realities. And in particular they are asking about the exploitation and export of our region's mineral resources. They want to know what governments are doing with the revenues that they collect from the commercialization of these minerals – and why our natural riches do not seem to translate into a reduction in poverty. And another question that comes up time and again is – how have other nations managed to use their minerals to successfully build their societies and diversify their economies?[57]

Retrospectively, the exploitation of mineral resources in Africa commenced prior to colonialism and even before slave trade.[58] Kabemba points out that '[…] the oldest mines in the world are to be found in Africa – such as the Ingwenya mine in Swaziland, which was being exploited 2000 years ago for iron […]'.[59] Moreover, traces of ancient and current mining activities across the continent evidences years of active mineral exploitation, sadly, the continent is largely poor and underdeveloped.[60] In this regard, the nexus between colonialism and corruption hinges on the fact that both undermine African states' mandate to derive economic benefits from exploitation of domestic mineral resources for self-determination. While colonialism plundered and siphoned various mineral resources and the proceeds derived from the exploitation of the resources for the benefit of colonial masters, however, presently the elites are involved in corruption, which is prejudicing host states to derive maximum benefits from exploitation of the resources. Accordingly, both colonialism and corruption have predatory tendencies which ultimately affect, negatively, the mandate of host states to derive benefits from mineral resources for self-determination. In these circumstances, however, sovereignty of host states over mineral resources and the mandate

[54] See generally Walter Rodney, op cit note 48.
[55] Bonnie Campbell 'Introduction' in Bonnie Campbell (ed) *Mining in Africa: Regulation and Development* (2009) 1 at 3.
[56] See generally Walter Rodney, op cit note 48.
[57] Dr Claude Kabemba 'Myths and mining: The reality of resource governance in Africa' 2014, available at http://www.osisa.org/open-debate/economic-justice/regional/myths-and-mining-reality-resource-governance-africa (accessed 12 December 2014).
[58] Ibid.
[59] Ibid.
[60] Claude Kabemba 'Undermining Africa's wealth' 2014, available at http://www.osisa.org/economic-justice/blog/undermining-africas-wealth (accessed 2 December 2014). See also Walter Rodney, op cit note 48.

can be weakened by the prevalence of corruption. It can be argued that corruption has a coercive influence that can restrict or weaken state sovereignty and the mandate of host states to derive maximum benefits from mineral resources. The perpetuation of corruption has unlawfully helped the elite as well as the outside world enjoy a monopoly over African mineral resources. At national level, arguably, host states have no much development that can be attributed to mineral resources. In other words, the prevalence of corruption in the mineral resources sector influences "kind of private conditions" in order to access the resources.[61] Thus, corruption disrupts the fair and equitable application, and enforcement of domestic mining laws. This in itself is contrary to the dictates of two core non-discrimination principles, namely, the most favoured and national treatment principles discussed in chapter 2.

It is widely acknowledged that corruption has far-reaching social, economic and political costs.[62] Further, there is general consensus that corruption has a corrosive effect on sovereignty in that it affects economic growth and development opportunities.[63] Furthermore, the negative effects of corruption can be sector specific, and other studies suggest it can be regime specific too. Thus, the political regime can be a vital determinant to the relationship between corruption and economic growth and development.[64] However, it is extremely difficult to evaluate the quantities of these costs in monetary terms because of,

> […] the methodological challenges inherent in the measurement of such a phenomenon. By its nature, corruption occurs clandestinely, making it difficult to identify and collect hard data as evidence. In addition, corruption has indirect and monetary costs that are difficult to define, identify and quantify.[65]

Regardless of the challenges, it is argued that estimations of the costs of corruption vary, and range from bribery to illicit financial flows.[66] Therefore the correlation between the extent of corruption at domestic levels has significant adverse impacts on state sovereignty and the mandate to derive benefits from mineral resources. Corruption thus affects the revenue

[61] Dr Claude Kabemba, op cit note 57 at 2.
[62] Sofia Wickberg 'Literature review on costs of corruption for the poor' 2013 Transparency International, Article Number 382 at 1. See also Marie Chene 'The impact of corruption on growth and inequality' 2014 Transparency International, Paper No. 1414, available at http://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf (accessed 3 December 2014).
[63] Ibid, (Marie Chene) at 1. See also Meon Pierre-Guillaume & Khalid Sekkat 'Does corruption grease or sand the wheels of growth?' (2005) 122 *Public Choice* 69.
[64] See generally Fabio Méndeza & Facundo Sepúlveda 'Corruption, growth and political regimes: Cross country evidence' (2006) 22 *European Journal of Political Economy* 82.
[65] Sofia Wickberg, op cit note 62 at 1. See also Corruption Watch 'Economic impact of corruption' available at http://www.corruptionwatch.org.za/content/economic-implications (accessed 3 December 2014).
[66] Ibid.

collection system as well as increases economic risks.[67] The World Economic Forum estimates that corruption increases the cost of doing business by up to 10 percent[68] and it also reduces the levels of foreign investment by increasing costs and creating uncertainty, as well as making doing business in the host state more complex.[69]

For the above reasons, corruption is a threat to sovereignty over mineral resources. It weakens the state's regulatory capacity and the mandate to derive economic benefits from the resources, by incapacitating regulatory institutions to enforce mining laws and policies, as well as policing. The economic contribution of mineral resources to the economy is negatively affected because the revenues that would have been used for national development are siphoned by pernicious private hands.[70] In turn, host states lose the prospects to obtain maximum revenues because '[a] review of literature indicates that corruption has a significant negative impact on the levels of tax revenue collected in a country'.[71] Also, corruption hinders economic growth and development, thereby adversely affecting the future mining tax revenue base and tax structures.[72]

The prevalence of corruption in Africa's mineral sectors and value chain is in part driven by lack of strong regulatory institutions, weak enforcement of mining laws and enforcement capacity.[73] As such, corruption makes the mandate of the state to develop through the

[67] Farzana Nawaz 'Exploring the relationships between corruption and tax revenue' 2010 Transparency International, Article No. 228 at 1 & 4 – 6. See also Jorge E Viñuales 'The resource curse: A legal perspective' (2011) 17 *Global Governance* 197 at 197 –212; U4 report entitled 'Corruption and illicit financial flows: The limits and possibilities of current approaches' 2011 Transparency International.

[68] The World Economic Forum 'Clean business is good business: The business case against corruption' A joint publication by the International Chamber of Commerce, Transparency International, the United Nations Global Compact and the World Economic Forum Partnering Against Corruption Initiative (PACI), available at http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf (accessed 10 January 2015). See also Organization for Economic Co-operation and Development (OECD) 'Background brief: The rationale for fighting corruption' 2014 at 2, available at http://www.oecd.org/cleangovbiz/49693613.pdf (accessed 2 January 2015).

[69] Victoria Janette 'Summaries of literature on the cost of corruption' 2007 Transparency International, available at http://www.u4.no/publications/summaries-of-literature-on-costs-of-corruption (accessed 2 January 2015).

[70] See generally Sofia Wickberg, op cit note 62 at 2 – 6. See also Paolo Mauro 'The persistence of corruption and slow economic growth' (2004) 51 *International Monetary Fund Staff Papers* 1.

[71] See generally Farzana Nawaz 'Exploring the relationships between corruption and tax revenue' 2010 Number 228 at 1.

[72] Ibid, at 2 – 3. See generally Dan Brockington 'Corruption, taxation and natural resource management in Tanzania' (2008) 44 *Journal of Development Studies* 103.

[73] Liesl Louw-Vaudran 'Clamping down on corruption in Africa's extractive industries' 2014, available at http://www.issafrica.org/iss-today/clamping-down-on-corruption-in-africas-extractive-industries (accessed 3 June 2013). See also Lynley Donnelly 'Report: Corruption, weak governance costing Africa billions' 2013, available at http://mg.co.za/article/2013-05-10-report-corruption-weak-governance-costing-africa-billions (accessed 3 December 2014); Simon Taylor 'Ending corruption is the key to ending poverty in Africa. Will President Obama push it at this week's summit?' 2014, available at http://www.globalwitness.org/blog/ending-

exploitation of mineral resources more difficult. The two case studies (chapters 4 and 5 below) include a discussion of how corruption is a threat to Zimbabwe and the DRC's sovereignty over mineral resources and the mandate to develop from the exploitation of the resources, as well as how it adversely affects economic growth and development in both countries. This is against the backdrop that both states have established anti-corruption institutions and enacted anti-corruption law. Regardless of this, however, it is reported that corruption is very high in both countries.[74]

### 3.5 Conflicts

Natural resource conflicts can be defined as disputes or disagreements over access to, and control or regulation and use of natural resources.[75] The disputes or disagreements can be violent or non-violent, and frequently arise because peoples or communities have diverse needs and uses for natural resources, including minerals. Further, conflicts can be acts of sabotage and violence, or can remain hidden or latent.[76] However, the disagreements or disputes over mineral resources can arise when community interests and needs conflict with, or become incompatible, especially when the priorities of different mineral resource user groups are ignored or not considered to the extent that was expected. Also, disputes can arise when policies are imposed without the participation of local communities, or poor

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corruption-is-the-key-to-ending-poverty-in-africa-will-president-obama-push-it-at-this-weeks-summit (accessed 3 October 2014); Ondotimi Songi 'EU accounting and transparency directives' claws on Africa's extractive industry' 2014, available at http://www.csrinternational.org/claws-on-africas-extractive-industry (accessed 14 June 2014); Mary Kimani 'Mining to profit Africa's people' 2009, available at http://www.un.org/africarenewal/magazine/april-2009/mining-profit-africa%E2%80%99s-people accessed 31 December 2014); PricewaterhouseCoopers LLP (PwC) 'AFRICA: Corruption no deterrent for oil and gas companies' 2014, available at www.finweek.com/2014/07/23/africa-corruption-deterrent-oil-gas-companies (accessed 29 August 2014).

[74] See also the Zimbabwe Anti-Corruption Commission Act 13 of 2004; sections 154 – 257 of the Constitution of Zimbabwe of 2013; Prevention of Corruption Act 34 of 1985. See further Marie Chene 'Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC)' 2013, available at www.transparency.org/files/content/corruptionqas/Country_Profile_DRC_2014.pdf (accessed 11 June 2014).

[75] Violet Matiru 'Conflict and natural resource management' 2000 at 1, available at http://www.fao.org/forestry/21572-0d9d4b43a56ac49880557f4ebaa3534e3.pdf (accessed 3 December 2014). See also Michael Warner 'Conflict management in community-based natural resource projects: Experiences from Fiji and Papua New Guinea' 2000, Overseas Development Institute, Working paper 135 at 9, available at http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2738.pdf (accessed 3 December 2014). See further Marcel Chimwala 'Malawi fights graft in minerals sector' 2014 *Mining Review* at http://mininginmalawi.com/2014/10/29/malawi-fights-graft-in-minerals-sector-mining-review-october-2014 (accessed 1 December 2014).

[76] Ibid, (Violet Matiru) at 2. See also Paul S Orogun 'Plunder, predation and profiteering: The political of armed conflict and economic violence in modern Africa' (2003) 2 *Perspectives on Global Development & Technology* 283 at 285 – 287; Michael A Lundberg, op cit note 47 at 497 – 501.

identification of, and inadequate consultation of local communities.[77] Further conflicts over control of, and access to mineral resources and their regulation can arise due to disputes between indigenous and 'introduced management systems, misunderstandings and lack of information about policy and programme objectives, contradictions or lack of clarity in laws and policies, inequality in resource distribution or poor policy and programme implementation'.[78] However, the picture becomes more complex when access to the resources, their control and management is the reason for conflicts, or more often, the resources are used to fuel conflicts, for example, diamonds.[79] Apparently, amongst the causes of conflict, control and access to minerals figure prominently in natural resource conflict.

Apart from being dissatisfied with the manner in which mineral resources accessed and regulated, as well as the transparency and accountability in revenue use and management, conflicts can rise from other factors, which include exclusion and marginalization. The alienation from participating and equitable sharing of benefits derived from mineral resources, as well as development is considered to be on the increase in many parts of Africa.[80] The literature survey shows that since 1990 at least twenty deadly conflicts in Africa have been associated with "alienation" as well as control of, and access to mineral resources.[81]

What exacerbates conflicts in many developing states and Africa includes corruption and mismanagement, policies imposed without local consultation and participation, as well as

[77] Ibid, at 1 & 7 – 12; See also Frances Stewart & Graham Brown 'Motivations for conflict: Groups and individuals' in Chester A Crocker, Fen Osler Hampson & Pamela Aall (eds) *Leashing the Dogs of War: Conflict Management in a Divided World* (2007) 219; Rabindra K Singh & Vinay K Sinha 'Analyzing conflicts in natural resource management' Proceedings of the Workshop, 3 – 5 June 2002 Bhopal, India (2003), Indian Institute of Forest Management, available at https://www.academia.edu/4309196/ANALYSING_CONFLICTS_IN_NATURAL_RESOURCE_MANAGEMENT (accessed 1 December 2014).

[78] Violet Matiru, op cit note 75 at 2. See generally Gerbian King & Vanessa Lawrence 'Africa, a continent in crisis: The economic and social implications of civil war and unrest among African nations' 2005 *EDGE Final Spring* 1.

[79] United States Institute of Peace, Washington DC 'Natural resources, conflict, and conflict resolution' 2007 at 3, available at http://www.usip.org/sites/default/files/file/08sg.pdf (accessed 3 December 2014). See also Abiodun Alao *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (2007) at 242 – 252.

[80] Office of Conflict Management and Mitigation (U.S Agency for International Development (USAID)) 'Land and violent conflict: A toolkit for programming' 2005.

[81] United Nations Development Group (UNDG) 'Natural resource management in transition settings: UNDG – ECHA guidance note' 2013 at 3, available at http://www.un.org/en/land-natural-resources-conflict/pdfs/UNDG-ECHA_NRM_guidance_Jan2013.pdf (accessed 3 January 2015). See also United States Institute for Peace, Washington DC, supra note 79 at 3; Paul Collier 'Economic causes of civil conflict and their implications for policy' in Chester A Crocker, Fen Osler Hampson & Pamela Aall (eds) *Leashing the Dogs of War: Conflict Management in a Divided World* (2007) 197.

lack of noticeable development.[82] This brings to the fore the nexus between mineral resources and conflict, which is inherently not a new phenomenon in the history of natural endowment in Africa.

> Research further suggests that over the last 60 years at least 40 percent of all intrastate conflicts have a link to natural resources. These statistics provide a clear basis for United Nations Country Teams (UNCTs) and UN Missions to incorporate principles and practices that promote the equitable, transparent and sustainable management of natural resources into transition planning processes and activities.[83]

The nature of conflict in the control of, and access to, mineral resources can be linked to colonialism in the sense that the colonizers used force to access and control the resources, and to overcome resistance by the indigenous communities. Accordingly, the nexus between conflict and natural resources, in particular strategic mineral resources, which I can refer to as "conflict resources", is not a new phenomenon in human history. The nexus can be traced to the genesis of the human settlement and as the basis for establishment of kingdoms and empires in which powerful communities controlled almost all the resources.[84] Alao submits that;

> [h]istory is also replete with examples of friendships and alliances forged by empires and kingdoms to defend access to, and control of, essential natural resources, while efforts have always been made to appease those who might block access to sources of vital natural resources. This portrays the importance of natural resources to politics […] and intergroup relations. The formation of modern nation-states, however, introduced more complex dimensions into the nature of resource politics, with issues such as disagreements […] [and] protests over the forceful incorporation of hitherto autonomous units into nation-state structures, [and] creation of new national identities […], all becoming crucial factors that consequently changed the nature of the conflict surrounding natural resources. [85]

The quote illustrates how modern conflicts over the control of, and access to, certain valuable mineral resources have been tailored along political and ethnic lines, as well as cultural beliefs in order to ensure that certain user groups have control over, and access to, certain portions of the resources as a symbol of authority and dominance. In this regard and by virtue of the principle of PSNR, host states have the prerogative to control all domestic mineral

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[82] See generally Abiodun Alao, op cit note 79 at xii – xiii. See also Violet Matiru, op cit note 75 at 7 – 12; S Mansoob Murshed 'When does natural resource abundance lead to a resource curse?' 2004 at 9, Discussion Paper 04-01; Stilwell Lancelot Charles 'Mineral endowments and developing economies' 2009 *The Southern African Institute of Mining & Metallurgy* – Base Metals Conference at 153.

[83] United Nations Development Group (UNDG) 'UNDG-ECHA Guidance note natural resource management in transition Settings' 2013, available at http://www.un.org/en/land-natural-resources-conflict/offer/undp-echa.shtml (accessed 2 December 2014). See generally Jack S Levy 'International sources of interstate and intrastate war' in Chester A Crocker, Fen Osler Hampson & Pamela Aall (eds) *Leashing the Dogs of War: Conflict Management in a Divided World* (2007) 17.

[84] See generally Abiodun Alao, op cit note 79 at 1 & 14 – 29.

[85] Ibid. see generally Yacob Arsano 'Sharing water resources for economic cooperation in the horn of Africa' in Belay Gessesse & Lucia Ann McSpadden (eds) *Trading Places: Alternative Models of Economic Cooperation in the Horn of Africa* (1996) 29.

resources and determine the conditions of access, as well as investors who can access them to the exclusion of others.

The present conflicts over mineral resources can be linked to colonialism.[86] Initially, the communities vehemently resisted the colonial rule but the resistance often led to violent conflicts.[87] In contemporary natural resource conflicts, however, user groups or communities clash with the government in control in the host state.[88] The host state being the custodian of all domestic mineral resources, by virtue of the operation of the international law principle of PSNR has the right to defend its sovereignty and the mandate to exploit the resources for self-determination. Accordingly, host states may use every legitimate means available in international law to defend their sovereignty over mineral resources.

It is argued that the costs of mineral resource plunder during conflict are shockingly high and history is full of examples of the close nexus between conflict and control over host states' lucrative mineral resources.[89] Arguably, mineral resource conflicts are obstacles to economic growth and development. For example, with regard to;

> [t]he loss of economic capital – countries affected by resource-driven conflicts suffer lost revenue from depleted resources, a displaced labour pool as people flee the fighting, and the destruction of governance institutions. Such a triple loss severely hinders a country's ability to support itself during active conflict and undermines its capacity to rebuild to quality, but the immediate dollar value of resources lost to plunder or destruction during the [conflict] is significant.[90]

From the quotation, it becomes obvious that mineral resource conflicts disrupt the mineral value chain and self-determination. There is fundamental challenge to the host states' control over the resources vis-a-vis balancing competing or conflicting interests between the host and other parties to the conflict.[91] The conflicts interfere with sovereignty over mineral resources

[86] See generally Abiodun Alao, op cit note 79 at 15 – 29. See also Walter Rodney, op cit note 48 at 142 – 151.
[87] See generally William Worger, Nancy Clark & Edward Alpers (eds) *Africa and the West: A Documentary History from the Slave Trade to Independence* (2001). See also Africana Age 'African resistance to colonial rule' available at http://exhibitions.nypl.org/africanaage/essay-resistance.html (accessed 12 December 2014).
[88] See generally Emmy Godwin Irobi 'Ethnic conflict management in Africa: A comparative case study of Nigeria and South Africa' 2005, available at http://www.beyondintractability.org/casestudy/irobi-ethnic (accessed 1 June *Volume VIII: Africa Since 1935* (1993) 1.
[88] Michael A Lundberg, op cit note 47 at 497. See also Gerbian King & Vanessa Lawrence, op cit note 78 at 1 – 5.2014). See also David Chanaiwa 'Southern Africa since 1945' in Ali A Mazrui (eds) *General History of Africa, Volume VIII: Africa Since 1935* (1993) 1.
[89] Michael A Lundberg, op cit note 47 at 497. See also Gerbian King & Vanessa Lawrence, op cit note 78 at 1 – 5.
[90] Ibid, at 498. For detailed look at the economic effects of domestic resource conflict, see Paul Collier 'On the economic consequences of civil war' (1999) 51 *Oxford Economic Papers* 168.
[91] See generally Knight M, Loayza N & Villanueva D 'The peace dividend: Military spending cuts and economic growth' (1996) 43 *IMF Staff Papers* 1 at 1 – 37.

in that the host state's ability to determine how to regulate the resources, by setting conditions to access and control the resources becomes a security issue, which if not carefully monitored can threaten sovereignty and the mandate to the exploitation of the resources for national benefit. In this regard, mineral resource conflict is a threat to state sovereignty and the mandate to foster a stable regulatory environment in order to derive economic benefits from the resources.

> Natural resources, both renewable and non-renewable, that are controlled by the state (which is the case in most developing countries) are used as exports by the government to attain profit and power. Developed countries have established an industrial infrastructure that relies heavily on imports of natural resources, and mineral-rich countries are positioned to supply that demand. Many of these resources have great value in the global market, which allows the developing countries in possession of the resources to be active participants in the international economic system.[92]

This quote shows the importance of mineral resources, including the fact that minerals dovetail many industrial activities, both domestic and internationally. Mineral resource conflicts create a precarious situation that can cause challenges and almost insuperable problems for resource exploitation and related activities in the mineral value chain.[93] In such a situation, the host state's mandate to derive economic benefits from the resources is adversely affected. Further the conflicts affect the security of the state, obstruct space and process for policy formulation, its implementation and enforcement due to multiple and competing demands. In such an unstable or fragile political situation, transparency and accountability in the regulation of mineral resources becomes a lesser priority compared to protecting the state security. It becomes difficult to ensure transparency and accountability in revenue use and its management. Furthermore, the conflicts undermine prospects of development due to threats to the security of the host state. Accordingly, the investment environment becomes unfavourable due to insecurity and viability concerns.[94] The conflicts become a threat to sovereignty because they weaken the regulatory capacity of the state, making the exercise of self-determination difficult. Also, the conflicts use up revenues that would have been available for development,[95] thus weakening the mandate to develop through the exploitation of mineral resources.[96] In this regard, however, it can be argued that

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[92] United States Institute of Peace, Washington DC, supra note 79 at 6 – 7.
[93] Solomon W Polachek & Daria Sevastianova 'Does conflict disrupt growth? Evidence of the relationship between political instability and national economic performance' 2010 IZA Discussion Paper No. 4762, available at http://ftp.iza.org/dp4762.pdf (accessed 1 December 2014). See also News24 'SA troops ready to attack Hutu rebels' *NewZimbabwe*, 18 January 2015.
[94] Ibid, (Solomon W Polachek & Daria Sevastianova) at 4 – 7 & 11 – 12. See also Pieter Serneels & Marijke Verpoorten 'The impact of armed conflict on economic performance: Evidence from Rwanda' 2012 CSAE Working paper WPS/2012-10, at 4 – 6.
[95] See generally Knight M, Loayza N & Villanueva D, op cit note 91 at 2 – 37.
[96] Sofia Wickberg, op cit note 62 at 2.

mineral resource conflict is a threat that interferes with the right to development. The conflicts may also end up having cross border effects, as currently experienced in many parts of Africa, for example, the Great Lakes Region (as highlighted in chapter 5 below). Although the control and management of mineral resources is the primary responsibility of the host state through the department responsible for minerals and mining development, however, some politicians and individuals take the precarious opportunity created by conflicts to illegally amass benefits through plunder of the resources.[97] Since conflict can weaken state control over the resources, it also perpetuates illegal mining, closure of some mining activities, and losing investment and capital flight. Intrinsically, the mandate of the host state to derive economic benefits for self-determination can be threatened because the capacity to regulate is weakened.

Apart from being a threat to state sovereignty and the mandate to derive economic benefits from the exploitation of mineral resources, natural resource conflicts in Africa have other ramifications, which cannot be canvassed in this study. Nevertheless, one can argue that natural resource conflicts are a threat to state sovereignty over mineral resources, and some aspects of the mandate that are discussed in the thesis are affected.

### 3.7 Summary: Threats to the Outworking of Sovereignty over Mineral Resources

Threats to the outworking of sovereignty over mineral resources restrict operationalization of PSNR in various ways as discussed in chapters 4 and 5 below. The effects of the threats have been summarized in the table below.

| Threat | Relationship to Principles in chapter 2 | Potential for state to take reasonable measures |
|---|---|---|
| **Conditionality policies of the IMF and the World Bank** | -restricts policy formulation, interfere with state process to function independently as it would have been without the conditions.<br>-executive and legislature are compelled to adopt certain policies and political reforms.<br>-structural adjustments weaken enforcement capacity. | -domestic laws implementing the conditionalities.<br>-better negotiation of international agreements in trade and investment, as well as loan agreements. |
| | -undermines state effort to assert control | -strong regulatory institutions, |

[97] Abiodun Alao, op cit note 79 at 156. See generally Paul S Orogun, op cit note 76 at 285 – 287 & 291 – 293; Judith Rees *Natural Resources: Allocation, Economics & Policy* (1990).

| | | |
|---|---|---|
| **Illegal mining** | and access to, mineral resources.<br>-restricts the state mandate to develop by reducing mining revenues that could be available for development. | increase monitoring agents to enhance policing and enforcement capacity.<br>-regularize activities of illegal miners in order to enable free participation in the mineral resource value chain and to pay mining taxes. |
| **Corruption** | -conflicts with state sovereignty over mineral resources and the mandate to establish and maintain legitimate, transparent and accountable regulatory institutions.<br>-could trigger and sustain conflicts.<br>-contributes to slow economic growth and development contrary to the objectives of the principles of PSNR and self-determination, alongside the right to development.<br>-undermines effective regulation and revenue transparency and accountability.<br>-conflicts with the objectives of the principle of self-determination in that corruption reduces revenues available for development.<br>-corruption is counter-productive and undermines sovereignty by reducing prospects of investment and making "the ease of doing business" more complex.<br>-undermines the right to development. | -implementing domestic mechanisms to curb corruption.<br>-strong institutions require withstanding the test of time and political intimidation.<br>-the need for good regulation, effective policing and implementation, as well as enforcement of anti-corruption laws without fear or favour.<br>-the need for good governance in the minerals sector, to enhance transparency and accountability in the regulation of minerals, as well as revenue transparency.<br>-host states to manage the distribution of mineral wealth. |
| **Conflicts** | -threaten the principle of self-determination and non-interference in domestic affairs of states by challenging control, regulation and access to mineral resources.<br>-challenges the mandate to foster a stable regulatory environment to sustain economic growth and development, as well as to derive benefits for self-determination.<br>-potential to restrict policy formulation or contrary to what user groups may anticipate.<br>-undermines prospects of development in that conflict threatens security of the state as well as investment, and unfavourable environment for development.<br>-undermines the principle of non- | -there is the need to treat mineral resource regulation as a crucial dimension of conflict prevention in order to unlock the economic potential and build peace, as well as create room for political stability, state control and regulation by redefining access conditions.<br>-host states, non-governmental organizations (NGOs), civil society organizations are actors to participate and facilitate smooth resolution of conflicts, while paying attention to the role of investors and the community in mineral resource regulation. |

| | | |
|---|---|---|
| | interference, self-determination and the right to development. | |

## 3.8 Conclusion

This chapter discussed threats to the outworking of sovereignty over mineral resources and the mandate to develop through the exploitation of the resources. The IMF and the World Bank conditionality policy is paradoxical and potentially restricts the sovereignty of politically and economically weak developing states. The question is why do states voluntarily join the two financial institutions and in the process cede their sovereignty as well as restricting that sovereignty?[98] African member states are caught between competing or conflicting interests, on the one hand, the need to improve their reputation and to attract foreign investment and, on the other hand, the inherent need to protect sovereignty and not to restrict it unnecessarily. Illegal mining, corruption and resources conflicts restrict or weaken state sovereignty, by contributing to breakdown of the operationalization of the mandate to exploit mineral resources for self-determination and development (as discussed in chapters 4 and 5 below).

Having considered other threats to the outworking of sovereignty over mineral resources, chapters 4 and 5 contextualize the manner in which the sovereignty and mandate to develop is asserted in Zimbabwe and the DRC mining laws, as well as how that sovereignty and mandate is restricted or interfered with. Themes such as property and ownership rights, access or allocation of rights to mineral resources, mineral resource policing and enforcement, beneficiation and trade, mining royalties and taxation, as well as obligations towards indigenous communities are considered in how Zimbabwe and the DRC assert sovereignty and mandate. Further the World Bank and the IMF conditionality policy, illegal mining, corruption, and conflicts are considered as these constitute threats and interfere with the mandate.

[98] See generally Liz David-Barret & Ken Okamura 'The transparency paradox: Why do corrupt countries join EITI?' working paper No. 38 – European Research Centre for Anti-Corruption & State – Building, 2013; available at http://eiti.org/files/The-Transparency-Paradox.-Why-do-Corrupt-Countries-Join-EITI.pdf (accessed 15 December 2013). Further, see Gerbian King & Vanessa Lawrence, op cit note 78; Dr Michael C van Walt van Praag & Onno Seroo (eds) 'The implementation of the right to self-determination as a contribution to conflict prevention' Report of the International Conference of Experts held in Barcelona from 21 – 27 November 1998, organized by UNESCO Division of Human Rights Democracy and Peace and the UNESCO Centre of Catalonia.

While taking into account the international law principles and the right to development discussed in chapter 2, and the threats to the outworking of sovereignty over domestic mineral resources in developing states discussed in this chapter, three issues arise, namely; (i) how do international law principles work to protect African countries in governing and exploiting their mineral resources? (ii) What is the key role of national mining laws and their enforcement in order to ensure host African states derive economic benefits from their mineral endowment? (iii) What is the manner in which the international law principles manifest? The choice of Zimbabwe and the DRC case studies demonstrates this aspect.

# CHAPTER 4

# SOVEREIGNTY, MINERAL RESOURCE REGULATION AND ECONOMIC DEVELOPMENT: THE CASE OF ZIMBABWE

## 4.1 Introduction

This chapter, on Zimbabwe, is the first of two case studies considering how states use domestic law to operationalize international principles discussed in chapter 2, and navigate the threats outlined in chapter 3. Zimbabwe is an appropriate case study because its colonial history is wound up with its mineral resource endowment, it has experienced conflicts in relation to that endowment, and (perhaps as a result), it has adopted radical policies with a view to asserting its sovereignty over domestic natural resources. Also, Zimbabwe is richly endowed with natural resources but is poor.

Taking into account the framework discussed in chapters 2 and 3, and the themes which both support and restrict the assertion of sovereignty over mineral resources; this chapter first provides a brief profile of Zimbabwe, including its political economy, mineral resource endowment and the importance of domestic minerals for national development. It then considers the manner in which Zimbabwe has exercised its sovereignty over domestic mineral resources and whether the state is benefiting from the exploitation of the resources. This is done through analysis of the municipal legislation relevant to the regulation of mineral resources. The challenges faced by Zimbabwe in its attempt to regulate and benefit from domestic mineral resources are considered, as well as identifying ways in which sovereignty over mineral resources is exercised or restricted.

## 4.2 Country Profile

Zimbabwe is a relatively large, land-locked country in Southern Africa and has a land surface area of approximately 390 757 square km.[1] The population based on the 2012 census is

[1] Munyaradzi Murwira 'Zimbabwe population stabilization report' 2011, available at http://gillespiefoundation.org/uploads/Zimbabwe_Population_Stabilization_Report.pdf (accessed 14 April 2013).
See also BTI 2014 'Zimbabwe country report' 2014, available at http://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Zimbabwe.pdf (accessed 3 December 2014); CIA World Factbook and Other Sources 'Countries of the World: Zimbabwe people 2015' 2015, available at http://www.theodora.com/wfbcurrent/zimbabwe/zimbabwe_people.html (accessed 25 February 2015); Freedom

approximately 13 million,[2] excluding more than 3 million absentees living or working as migrants in neighbouring countries and overseas.[3] Zimbabwe is surrounded by five countries[4] and lies between two major rivers, the Zambezi River along the northern border with Zambia and the Limpopo River along the southern border with South Africa.[5]

As regards topography, Zimbabwe has a wide central Highveld area, which is often referred to as the 'Zimbabwean Plateau'.[6] Stretching north-east and south-west across this central Highveld is a ridge notable for various mineral resources, which are mined along its length.[7] The Matobo Hills, at the southern end of the city of Bulawayo, are one of the notable physical features made up of huge granite whalebacks or *dwalas* set alongside the formations of gigantic 'balancing' rocks. The Eastern Highlands is another defining landform, a narrow north-south mountain range stretching approximately 250km in the east of the country.[8] This mountain range occupies the central section of the border between Zimbabwe and Mozambique, which ends with a rise of about 2600m at Mt Nyangani in the north of the range.[9] One of the world-famous sites, Victoria Falls, are at the north-western tip of the Zimbabwe border with Zambia and further down the Zambezi River is one of the world's largest human-made lakes, Lake Kariba, which stretches for about 200km.[10]

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House 'Countries at crossroads 2012: Zimbabwe' 2012, available at https://freedomhouse.org/sites/default/files/Zimbabwe%20FINAL.pdf (accessed 20 May 2014);

[2] Zimbabwe National Statistics Agency 'Zimbabwe census 2012 – preliminary report' 2012, available at http://unstats.un.org/unsd/demographic/sources/census/2010_PHC/Zimbabwe/ZWE_CensusPreliminary2012.pdf (accessed 13 April 2013).

[3] United Nations Development Programme (UNDP) 'The potential contribution of the Zimbabwe diaspora to economic recovery' (2010) Comprehensive Economic Recovery in Zimbabwe Working Paper Series No.11 at 8. See also Refugee International 'Zimbabwe exodus: Too little, but not too late' 2007, available at http://www.refugeesinternational.org/policy/field-report/zimbabwe-exodus-too-little-not-too-late (accessed 15 May 2013).

[4] Mozambique to the east, Botswana to the south-west, Zambia to the north-west, South Africa to the south and Namibia at the western tip, where the borders of Botswana, Namibia, Zambia and Zimbabwe meet at Kazungula.

[5] Paul Murry *Zimbabwe* (2010) at 3. See also International Business *Zimbabwe Mining Laws and Regulations Handbook Volume 1: Strategic Information and Basic Mining Law* (2012) at 7 – 11& 17 – 26; Zimbabwe Government online 2014, available at http://www.gta.gov.zw (accessed 2 September 2014).

[6] Ibid.

[7] Prendergast M D & Wilson A H 'The great dyke of Zimbabwe – II: Mineralization and mineral deposits' in Prendergast M D & Jones MJ (eds) *Magmatic Sulphides - The Zimbabwe Volume* (1989) 21 at 612.

[8] Ibid, at 616. See also Hamilton J 'Sr-isotope and trace element studies of the Great Dyke and bushveld mafic phase and their relation to early proterozoic magma genesis in southern Africa' (1977) 18 *Journal of Petrology* 24.

[9] Stephen J Barnes 'The effect of trapped liquid crystallization on cumulus mineral composition in layered intrusions' (1986) 93*Contrib Mineral Petrol* 524 at 524 – 531. See also Prendergast & Wilson, op cit note 7 at 612 – 613.

[10] Paul Murry, op cit note 5 at 3.

In terms of natural resource endowment, Zimbabwe is richly endowed with an array of mineral resources. The country has more than 40 economic mineral resources that are mined or capable of being mined, in addition to having the second largest platinum reserves in the world after South Africa.[11] Among its mineral resources, Zimbabwe is endowed with major deposits of diamonds, platinum, gold, coal, nickel, chrome, emeralds, iron ore, graphite, nickel, asbestos, copper and cobalt.[12] The discovery of diamonds in Marange (Manicaland Province) and Devure Ranch in Bikita district (Masvingo Province) helped the country to increase its mineral resource exports.[13] The karoo sediments adjacent to river basins around the periphery of the central plateau contain commercial coal, alluvial diamonds and gold ore, and some areas have signs of gas such as coalbed methane.[14] Geological reports indicate that the country has not been fully explored for major minerals such as diamonds,[15] uranium, platinum, gold and chrome, hence the approximate quantum cannot be ascertained.

Given that Zimbabwe is richly endowed with a variety of mineral resources, it can be concluded that its potential for development is high if those resources are exploited in a manner that allows for the creation of human, financial and manufactured capital. In order to exploit these resources, Zimbabwe relies largely on foreign investment. Mineral resource exploitation and processing is capital intensive, therefore the regulatory framework for this sector requires transparency and accountability, appropriate regulation and protection of foreign investment, as well as security of tenure, which in turn provide investor confidence.

Between 1980 and 1995, the minerals sector was one of the pillars of the economy. As with many countries in Africa, Zimbabwe is highly dependent on mineral resources. The history of mineral resource exploitation shows that there have been between 4000 and 5000 mines, and

[11] The Zimbabwe Chamber of Mines, available at http://www.chamberofminesofzimbabwe.com/geology.html?start=4 (accessed 28 February 2013). See also All-Africa 'Zimbabwe: Mineral resources present a wealth of opportunities' 2009, available at http://allafrica.com/stories/200908270403.html (accessed 21 June 2012). See also International Business, op cit note 4 at 27 – 28; Godwills Masimirembwa ( former ZMDC Chairman) 'Illegal economic sanctions: Challenges on Zimbabwe's mining industry: The case of ZMDC, its subsidiaries, associate companies and joint ventures' (2011) at 5 – 6; Maxwell Maturure 'Review of the legislative and policy framework for community based natural resources management in the mining sector' 2008 *Mining Policy Sector Review* 1 at 8 – 9; T J Veasey 'A review of the minerals industry in Zimbabwe'(1997) 10 *Minerals Engineering* 1355 at 1357.
[12] Ibid, (Veasey), at 1357.
[13] Zimbabwe National Budget Statement, 2013 at 19.
[14] Zimbabwe Chamber of Mines, supra note 11.
[15] Zimbabwe has four major diamond mines, namely, Murowa Diamond Mine near Zvishavane, Marange Diamond Mines in Marange, River Ranch Diamond Mine near Beit Bridge and Devuli Ranch in Bikita.

the majority were small gold operations.[16] The domestic minerals sector once became the largest of its type in Africa north of the Limpopo River.[17] Eight major companies including BHP Minerals, Wankie Colliery and Delta Gold operated about 40 mines amongst them. The value of mineral production including gold and diamonds was significant, and it made a valuable contribution to the national GDP.[18]

Until the 1990s Zimbabwe was widely regarded as the 'breadbasket' of Africa, with high prospects for economic growth and development. Despite having a developed infrastructure and economic systems these declined rapidly from the late 1990s, ostensibly as a result of poor governance, negative external publicity and the land reform programme. The national GDP fell by more than half between 1998 and 2008.[19] However, the formation of the Unity Government and adoption of the US$, as the official currency, in 2009 significantly and steadily reversed the relentless economic decline.[20] The minerals sector was not spared by the economic quagmire affecting the country; nevertheless, the sector contributed significantly to the economy. In 2010 the sector contributed 60.1 percent, in 2011 about 25.1 percent, in 2012 about 10.1 percent, 2013 about 17.1 percent and 22 percent in 2014 to the economy.[21] It is projected that in 2015 the sector will contribute 15 percent to the economy.[22] Regardless of the predictions, variations on the performance of the sector could have been contributed to, inter alia, by international market pricing.

### 4.2.1 Political Economy

There is considerable literature about the transition of Zimbabwe from British colonialism to political independence and democracy. For the purposes of the study it is not necessary to

[16] John Hollaway 'Mineral policy in Zimbabwe: Its evolution, achievements and challenges' (1997) 23 *Resources Policy* 27 at 28.
[17] Ibid.
[18] Ibid, at 28 – 30.
[19] Ibid. Ross D Lawrence 'Difficult mineral property valuations: An example from Zimbabwe' presented at the Annual Meeting of Society of Mining, Metallurgy & Exploration, Seattle WA, 21 February 2012 at 3.
[20] Zimbabwe National Budget Statement 2011 at 243; presented to the Parliament of Zimbabwe on 25 November 2010 by Minister of Finance Tendai Biti. See generally Vitality Kramarenko, Lars Engstrom, Genevieve Verdier, Gilda Fernandez, Erik S Oppers, Richard Hughes, Jimmy McHugh & Warren Coat 'Zimbabwe: Challenges and policy options after hyperinflation', IMF 2010, available at http://www.imf.org/external/pubs/ft/dp/2010/afr1003.pdf (accessed 2 September 2011). See also 'The 2012 mid-year fiscal policy review: From crisis to austerity: Getting back to basics' 2012, presented to the Parliament of Zimbabwe on 18 July 2012 by Tendai Biti, former Zimbabwe's Minister of Finance; hereafter the 2012 Mid-Year Fiscal Policy Review, available at http://www.zimra.co.zw/index.php?option=com_content&view=article&id=1762:finance-minister-makes-a-call-for-foreign-direct-investment&catid=4:story&Itemid=85 (accessed 27 May 2013).
[21] The Zimbabwe Chamber of Mines, supra note 11.See also Zimbabwe National Budget Statement, 2013.
[22] Ibid.

canvass the issues raised in the literature, but simply to highlight the salient stages in Zimbabwe's political history and economic development.[23]

The political uncertainty and economic difficulties experienced by Zimbabwe since 2000 are not simply a struggle against dictatorship. They are also a struggle over ideas and deep-seated natural resource issues, still unresolved from the political independence process that both President Robert Mugabe's ruling party, Zimbabwe African National Union Patriotic Front,[24] and the main opposition, the Movement for Democratic Change (MDC), are vying to define and address.

Against the domestic political background where the State President yields much political power, entrusting him or her with custody of the rights to domestic mineral resources could defeat the system of checks and balances. For example, with the current polarized political environment, the decision of the State President is arguably authoritative and influences decision-making processes in the assertion of sovereignty and regulation of mineral resources. This includes the discretion to grant mining licences to potential investors (nevertheless, this is controversial as discussed in section 4.4.2 below).

#### *4.2.1.1 Political Context of Zimbabwe in Brief*

Zimbabwe's independence from British colonial and white racist rule since 1980 plays a vital role in understanding the domestic political control and ownership of mineral resources. Although the political and economic history of Zimbabwe has been reviewed by others,[25] my focus is to give a brief narrative of the manner in which domestic politics influenced mining laws and mineral resources regulation before and after political independence. Two considerations are of importance: first, the historical background of mineral resources

[23] See generally Pieter Esterhuysen 'Zimbabwe: A historical overview' in Hough M & Du Plessis A (eds) *State Failure: The Case of Zimbabwe* (2004) 24 at 27 – 46. See also Lauren Ploch 'Zimbabwe: Background' 2010, available at http://www.fas.org/sgp/crs/row/RL32723.pdf (accessed 8 September 2011); World Bank 'Zimbabwe: An overview' 2012, available at www.worldbank.org/en/country/zimbabwe/overview (accessed 3 March 2013); Rob Davis & Jorn Rattso 'Growth, distribution and environment: macro-economic issues in Zimbabwe' (1996) 24 *World Development* 395.

[24] Zimbabwe African National Union Patriotic Front, hereafter ZANU PF, is one of the political parties that were involved in the armed struggle for political independence from 1963-79 and has dominated post-colonial politics in Zimbabwe. See generally Pieter Esterhuysen, op cit note 23 at 31 – 40.

[25] See generally Jeffery Herbst *State Politics in Zimbabwe* (1990); Carolyn Jenkins 'The politics of economic policy-making in Zimbabwe' (1997) 35 *The Journal of Modern African Studies* 575; Tor Skalnes *The Politics of Economic Reform in Zimbabwe: Continuing and Change in Development* (1995).

exploitation in Zimbabwe before 1980 and second, the political influence and exploitation, as well as post-independence regulation of the resources.

Before colonization in 1890, the country's mineral endowment was known for gold, copper and iron, and was documented in various sources including reports of Portuguese traders and missionaries who were active in the Munhumutapa Empire during the 17th century.[26] Gold and iron were the most valuable mineral resources of that time. The European prospecting for gold began some few years before 17th century, and towards the beginning of 1890, extensive wagering was proclaimed.[27] The colonization of the country was largely driven by the desire to exploit gold, which was the main domestic mineral resource.[28] The late Cecil John Rhodes spearheaded British Settlers' occupation in 1890 and the country became known as Rhodesia, a British colony for about a century, and it was named in honour of Rhodes.

During colonization the major objective of the colonial government was to maximize economic advantage of whatever domestic minerals were beneficial to exploit. The colonial government exercised sovereignty by giving ultimate title of all domestic mineral resources to British Settlers. The colonial government granted easy acquisition of title to mineral resources,[29] such as surface rights, and rights of prospecting and mining.[30] The British South Africa Company (BSAC),[31] a chartered company founded by Rhodes, assisted the colonial government's imperial mission and played a major role in consolidating British rule over domestic mining activities.[32] This monopoly influenced the BSAC's financial policies on internal interference in mining.[33] Through its political affiliation, the BSAC influenced ownership of mineral resource policies and proposed the introduction of strict access to the resources.[34] The policy and regulation of domestic mineral resources were not consolidated but proceeded on an *ad hoc* basis.[35] The European settlers and their mining companies, which

[26] John Hollaway, op cit note 16.
[27] Ross D Lawrence, op cit note 19.
[28] Ibid.
[29] Ibid, at 28.
[30] Ibid.
[31] British South African Company, hereafter the BSAC.
[32] Ross D Lawrence, op cit note 19 at 28.
[33] O B E Tawse-Jolie 'The British South Africa Company: Historical catalogue & souvenir of Rhodesia' 1936-37, available at http://www.tokencoins.com/bbp.htm (accessed 11 October 2013).
[34] Ibid, at 28 – 30. See also Veasey, op cit note 11 at 1356; Giovanni Arrighi *The Political Economy of Rhodesia* (1967).
[35] Ibid, at 28 – 30.

included Rio Tinto and Lornho Mining Limited enjoyed unrestricted access to mineral resources.[36]

The initial mineral endowment of the country was apparently over-estimated and the potential for economic contribution from the resources.[37] When the colonial government re-evaluated the economic potential of domestic mineral resources, it was far less than initially anticipated; national interest became less dependent on mining but on other economic activities such as agriculture.[38] However, mining remained the mainstay of the economy and boosted the country's international status.[39]

On gaining political independence in 1980, the first black government raised concerns about foreign involvement in the minerals sector but swiftly realised that it would be premature to nationalize the sector in the absence of capital to finance exploration and mining activities.[40] Also, in light of the general African mining experience, uncertainties existed whether Zimbabwe would manage to regulate and reinvigorate the mining sector without foreign investment, as well as the required mining experience.[41] The realization came only after consideration of the fact that the minerals sector was dynamic and diversified, hence a major potential source of revenue that significantly aided the country to increase revenue and employment creation.[42] The BSAC played a fundamental role in the regulation of mineral resources for the benefit of the colonial government. The BSAC previously exercised dominion and influenced the regulation of mineral resources without checks and balances; however, the monopoly changed after the first black government took political control.

In 1982, a state-owned parastatal, the Minerals Marketing Corporation of Zimbabwe (MMCZ), was established as a tool in the regulation of the domestic minerals sector and sealed the regulatory gap that was created by the transition period between the departure of the BSAC and the coming into effect of the first black government. The establishment of the

[36] John Hollaway, op cit note 16 at 29.
[37] Veasey, op cit note 11 at 1356. See also Arrighi, op cit note 34; Dzepasi Innocent Tizora *Zimbabwe: Why ZANU PF Won 2013 Harmonized Elections* (2014) at 1.
[38] Ibid. The effect of these changes has been described and discussed extensively with reference to State Power versus the Multinationals in the context of the post-independence minerals marketing policy in Zimbabwe; see generally Jeffrey Herbst *State Politics in Zimbabwe: Perspectives on Southern Africa* (1990).
[39] John Hollaway, op cit note 16 at 28 – 29.
[40] Veasey, op cit note 11 at 1357.
[41] Ibid.
[42] Ibid.

MMCZ marked a departure from the pre-independence regulation of domestic minerals sector in which the BSAC was the sole multinational enterprise which spearheaded the regulation of the minerals sector.[43] The need to expand the mining sector and attract foreign investment lead the MMCZ to invite new entrants, mainly foreign investors such as BHP Billiton Limited, Anglo-American, Zimplats and Cluff Gold Mining Company. Various mineral explorations and exploitations helped Zimbabwe to become one of Africa's strongest economies in the 1980s.[44]

Exploitation of mineral resources in the colonial era has vestiges in two facets of the present-day Zimbabwean mining law; namely, the discovery of mineral resources is a prerequisite for title and the obligation to maintain valid title depends on work or payment derived from mining activities.[45] Although Zimbabwe inherited various mineral resource policies, it slightly amended, and redefined the desire of the colonial government. The first black Zimbabwean government administered marketing policy for domestic mining companies and the relationship between the government and mining companies gradually came into full operation.[46] There was largely continuity between the colonial and democratic eras as regards the relationship between most of the mining companies and the state. To a large extent, regulation of the minerals sector remain unchanged until the coming into operation of the Indigenization and Economic Empowerment Act in 2008,[47] which is discussed below.

The coming into effect of the Indigenization law also initiated a debate on the state of property rights, thus, causing uncertainties in the minerals sector and occasioning a set-back in the regulation process.[48] It is reported that President Mugabe and his political party, ZANU PF, vehemently deny any wrongdoing; in his address to the Occasion of the General Debate of the 66th session of the United Nations General Assembly (UNGA), he argued that ZANU PF's push to nationalize the country's mineral resources and other natural resources made Zimbabwe the target of western superpowers. He further argued that when Zimbabwe sought to redress the ills of colonialism, by fully exercising sovereignty over domestic natural

[43] Veasey, op cit note 11 at 1357.
[44] Ibid, at 1357 – 1361. See also Larence D Ross, op cit note 19 at 2.
[45] Ibid, (Larence D Ross) at 28.
[46] Veasey, op cit note 11 at 1357.
[47] Indigenization and Economic Empowerment Act 14 of 2007, (Chapter 14:33). See John Hollaway, op cit note 16 at 30; Philip M Mobbs 'The mineral industry of Zimbabwe' in the *2010 Minerals Yearbook: Zimbabwe (Advance Release)* (2012) 43.
[48] Dale Dore 'Review: Debating Zimbabwe's decline' (2006) 32 *Journal of Southern African Studies* 403 at 404.

resources in order to economically empower the indigenous people, the country was and still is subjected to unparalleled vilification and pernicious economic sanctions.[49] Furthermore, he argued that Zimbabwe has become a victim by trying to effectively implement and operationalize the PSNR principle as opposed to expounding the principle theoretically.[50]

However, the problem does not lie in the appropriation but the manner in which it was done, apparently in conflict with the minimum requirements in international law discussed in chapter 2. From the research, the majority of the politically-connected elites clandestinely claimed the country's mineral resources as private property,[51] thus potentially debasing the PSNR principle and the actions cannot be legitimately seen as enhancing the economic development of the country. It is considered in this chapter how the assertion of sovereignty over domestic minerals can be abused in order to enrich individuals at the expense of national economic development.

The above-mentioned short history of political economy contextualizes the assertion of sovereignty over mineral resources during and after the colonial period. Notwithstanding the relatively fragile political and economic situation, Zimbabwe's assertion of sovereignty over domestic mineral resources is examined and evaluated by focusing on the country's major domestic mineral laws. This is done by providing a brief overview of the relevant mining laws in section 4.3 before examining, in section 4.4, how state sovereignty over mineral resources has been operationalized, both in terms of how Zimbabwe has exercised the mandate of sovereignty over its mineral resources, as well as the manner in which it has navigated the landscape established by principles of investment and trade, and other threats to the exercise of sovereignty.

[49] Statement by His Excellency the President of the Republic of Zimbabwe, Comrade Robert Gabriel Mugabe, on the Occasion of the General Debate of the 66th Session of the United Nations General Assembly, New York, 22nd September 2011, available at http://gadebate.un.org/sites/default/files/gastatements/66/ZW_en.pdf (accessed 24 September 2012).
[50] Ibid.
[51] Vince Musewe 'The politics of possession in Zimbabwe' *Nehanda Radio: Zimbabwe News and Internet Radio*, 4 September 2013. See also Global Witness Limited 'Return of the blood diamond: The deadly race to control Zimbabwe's new-found diamond wealth' 2010 at 11 & 15 – 17; Edward Chindori-Chininga 'First Report of the Portfolio Committee on Mines and Energy on diamond mining (with special reference to Marange diamond fields) 2009 – 2023' presented in June 2013 during the Fifth Session of the Seventh Parliament. Similarly, the late King Leopold reportedly regarded the DRC in the 1870s as his personal property. See Peter Eichstaedt *Consuming The Congo: War And Conflict Minerals in the World's Most Deadliest Place* (2011) at 1.

### 4.3 Municipal Law Relevant to the Exploitation of Mineral Resources

As discussed in chapter 2, Zimbabwe's power to control and regulate domestic mineral resources is recognized and provided for by the PSNR principle. The meaning of Zimbabwe's sovereignty over mineral resources, in this context, is the ability to yield legitimate authority over the resources, more particularly as a facet of the principle of self-determination as well as non-interference, which underpins the right to development. Against the need to examine the manner in which Zimbabwe asserts sovereignty over mineral resources, it is necessary to consider the way in which sovereignty is applied through domestic mining legislation and how it is operationalized. This takes into account, for example, property and ownership rights, conditions of access to mineral resources, policing and enforcement of mining laws, beneficiation and trade, taxes and royalties, obligations towards indigenous communities, compensation for expropriation, exchange controls and repatriation of profits, equitable treatment of mining investors, strategic planning for development, dispute settlement and to guard against threats (discussed in chapter 3) on state sovereignty over domestic mineral resources.

Generally, there are more than thirty statutes and regulations governing mineral resources and mining operations in Zimbabwe.[52] Of these, approximately ten including Regulations are directly relevant to the regulation of Zimbabwe's mineral resources. These statutes are considered because of their direct significance in the regulation of major domestic mineral resources.

#### 4.3.1 Mining Laws

The principal statute regulating the minerals sector and mining development is the Mines and Minerals Act.[53] The Act is administered by the Ministry of Mines and Mining Development, and the Minister of Mines is entrusted with its implementation. The Mines Act provides general conditions relating to access, control and acquisition of mining rights in Zimbabwe. There are also other pieces of legislation dedicated to specific mineral resources, and providing additional measures for acquisition of, control and access to specific mineral

[52] See the Chamber of Mines of Zimbabwe 'Administration of the Mining Industry' 2010, available at http://www.chamberofminesofzimbabwe.com/mining-affairs/administration-of-the-mining-industry.html (accessed 21 June 2013).
[53] Mines and Minerals Act 38 of 1961, (Chapter 21:05) as amended; hereafter Mines Act. See also the Mines and Minerals (Minerals Unit) Regulations, Statutory Instrument 82 of 2008.

resources. Such statutes include the Zimbabwe Diamond Policy,[54] Gold Trade Act,[55] Copper Control Act,[56] Precious Stones Trade Act,[57] Revenue Authorities Act[58] and Minerals Marketing Corporation of Zimbabwe Act.[59] The Mining General Regulations[60] were enacted in terms of section 403 of the Mines Act, to spell out the implementation of the principal Act. The statutes set out the manner in which a particular mineral resource is regulated, and by exercising ministerial discretion in order to issue mining licences, the Minister of Mines make recommendations to the State President and Cabinet to determine who qualifies to access and exploit a domestic mineral.

#### *4.3.1.1 Mines and Minerals Act, 1961, (Chapter 21:05)*

The Mines and Minerals Act (hereafter referred to as the 'Mines Act') came into effect in 1961 and is the principal law governing the regulation of mineral resources. The Act was enacted by the colonial government and has been amended several times over the years. The scope of the current 1996 revised edition of the Act is broad; it provides for prospecting, exploration and exploitation of domestic mineral resources.[61] It further provides for the conditions and eligibility for acquisition and registration of prospecting, exploration and mining rights, as well as pegging on grounds reserved against prospecting. Furthermore, the Act provides for different types of mining leases, rights of claim to licence holders and the conditions for working on alluvial or eluvial mineral deposits,[62] as well as the manner in which title can be relinquished.[63] Also, the Act provides for control of siting of works on mining locations, royalties and mining taxes, payments to local authorities,[64] termination of

[54] The Diamond Policy operates together with Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufacturers) Regulations, Statutory Instrument 157 of 2010.
[55] Gold Trade Act (Chapter 21:03), as amended. See also Mining (Alluvial Gold) (Public Streams) Regulations, Statutory Instrument 275 of 1991.
[56] Copper Control Act 36 of 1962, (Chapter 14:06), as amended.
[57] Precious Stones Trade Act of 1978, (Chapter 21:06); hereafter Precious Stones Act, read with Precious Stones Trade Regulations of 1978, as amended.
[58] Revenue Authorities Act 17 of 1999, (Chapter 23:11), as amended.
[59] Mineral Marketing Corporation of Zimbabwe Act 2 of 1982, as amended.
[60] Mines (General) Regulations Government Notice 247 of 1977 as amended; hereafter the principal Mining Regulations. The other Regulations include Mines and Minerals (Declaration of Minerals) Notice, Statutory Instrument 91 of 1990; Mines and Minerals (Minerals Unit) Regulations, Statutory Instrument 82 of 2008; Mines and Minerals (Contracted Inspectors) Regulations, Statutory Instrument 249 of 2006 & Mines Minerals (Custom Milling Plants) Regulations, Statutory Instrument 239 of 2002.
[61] Mines and Minerals Amendment Bill (H. B. 14 of 2007); hereafter the Mines Bill, was published in the Government Gazette on 16 November 2007.
[62] See generally sections 222 – 232 of the Mines Act.
[63] See generally sections 334 - 340 of the Mines Act.
[64] Sections 255 – 275 of the Mines Act. See also sections 5 & 6 of Rural Land Act 47 of 1963 (Chapter 20:18), as amended.

entitlement to share in royalties, conditions for expropriation of mining locations, as well as offences and penalties, and the general administration of the Act.

The Mines Act confers powers on the Minister of Mines,[65] which include decision-making and determinations relating to granting and cancellation of mining licences. In exercising the discretion and to make recommendations to grant, renew or cancel licences, the Minister may delegate the powers in order to authorize the correction of any error in the administration of this Act, as may be necessary, to the Secretary of the Ministry of Mines.[66] However, the extensive powers conferred on the Minister could allow him or her to act unilaterally without consultations.

The Mines Act provides for the administration of the Act, by conferring on the Secretary of the Ministry of Mines authority to oversee and regulate, as well as carry out the activities contemplated in the Act.[67] Further, the Mines Act provides for the appointment of office bearers such as Mining Commissioners, Director of Geology Survey, Director of Metallurgy, Chief Government Mining Engineer, Regional Mining Engineers and Mine Surveyors, and Chief Mine Surveyor.[68] These functionaries are empowered to exercise their duties in the administration of the minerals sector. Furthermore, the Act provides for the establishment of mining commissioners' courts[69] and vests the mining commissioner with powers to convene a court in order to determine any mining complaint in any district to which he or she is appointed.[70] The commissioner is entitled to hear and determine in the simplest, speediest and cheapest manner, all claims, actions, demands, disputes and questions arising within his or her jurisdiction, as well as to make orders and costs as may be necessary in the circumstances.[71]

The Mines Act provides for establishment of the Mining Affairs Board[72] and provides for its composition, duties and functions.[73] The Board has statutory powers to investigate issues

[65] Sections 6(2) – 9, 341(3) & 342 of the Mines Act.
[66] Ibid.
[67] Section 341(1) of the Mines Act.
[68] See generally section 343 of the Mines Act. See also powers and functions of the mining commissioners in sections 344 – 359 of the Mines Act.
[69] Section 345(1) of the Mines Act.
[70] Sections 342 & 346(1) of the Mines Act.
[71] Section 346(2) of the Mines Act.
[72] Mining Affairs Board, hereafter the Mining Board.
[73] Sections 6 – 13 of the Mines Act.

relating to mining applications, and to summons any mineral resource applicant, title holder of a mining location or any person who has a temporary right of control over any piece of land to answer certain questions.[74] The Act imposes penalties on any person who obstructs authorized officials to perform duties on behalf of the Mining Board. The duties include but are not limited to examining and investigating mining locations.[75] Also, the Act provides for registration of approved prospectors,[76] conditions for cancellation or suspension and the effects thereof,[77] as well as renewal and expiry of registration.[78] Further the Act provides for acquisition and registration of mining rights,[79] prospecting rights[80] and payment of royalties.[81] Since the Act is the principal mining law, it provides general conditions relating, for example, to the rights of access to, acquisition of mining rights and exploitation of domestic mineral resources. Additional requirements are provided for by subordinate Acts, which, as indicated above, apply to specific minerals.

The Mines Act creates various offences and penalties for contravening its provisions.[82] The offences include making it illegal to mine[83] or prospect for minerals without a valid permit or licence,[84] failure to comply with the requirement for prospecting[85] and unauthorized pegging.[86] In some cases, the Act leaves the discretion and the extent of the penalty to a specific statute relevant to a particular mineral resource. Further, the Act criminalizes conduct which obstructs the functions of the Mining Affairs Board.[87] Being the principal mining law, one can argue that the Mines Act creates a framework which governs, amongst others, exploration, mining and the general regulation of the minerals sector, as well as offences for its violating.

[74] Section 11 of the Mines Act.
[75] Section 13 of the Mines Act.
[76] Section 14 of the Mines Act.
[77] Section 17 - 18 of the Mines Act.
[78] Sections 16 of the Mines Act.
[79] See generally Part IV (sections 20 – 62) of the Mines Act.
[80] Section 20 – 26 of the Mines Act.
[81] Sections 27, 47, 63 – 85 & 243 – 254 of the Mines Act.
[82] See generally sections 368 – 391 of the Mines Act.
[83] Section 377 of the Mines Act.
[84] Sections 368 & 369 of the Mines Act.
[85] Section 370 of the Mines Act.
[86] Section 372 of the Mines Act.
[87] Sections 13 of the Mines Act.

#### *4.3.1.2 Precious Stones Trade Act, 1978 (Chapter 21:06)*

The Precious Stones Trade Act of 1978[88] (hereafter Precious Stones Act) is a key legislation that provides a legal framework for the regulation of precious stones. The Act has been amended several times over the years to address new challenges relating to precious stones. The Act provides for possession and dealing in rough diamonds, as well as emeralds and matters incidental to the aforesaid.[89] Also, the Act defines dealing in precious stones as including buying and selling, pledge, exchange, giving or receiving. Regarding the scope of the Act, it includes conditions for the issuance of licences, renewal and their cancellation, and the conditions in which licence holders should deal in or possess precious stones.[90] The Act gives the Minister of Mines authority to issue and renew licence to investors who intend to deal in precious stones, as well as cancel any licence in certain conditions.[91] Further the Act requires licence holders to keep up-to-date registers of all precious stones transactions that were undertaken by licence holders.

The Act defines precious stones as rough and uncut diamonds, emeralds or any other substance found within the country, which qualifies to be declared a precious stone.[92] The Act prohibits dealing in or possess precious stone(s) unless one is a licenced dealer, permit holder, holder of a mining location, a "tributor"[93] who has lawfully recovered precious stone(s) in terms of any domestic law of the country or an employee or agent of any of the holders referred herein, who is authorized by his employer or principal to possess or deal, on his or her behalf, in precious stones.[94] The Act provides the conditions under which a licenced dealer or permit holder and miners may deal in or possess precious stones.[95] The terms and conditions vary depending on the nature of the permit or licence.

The Act allows the Minister to delegate his or her authority to the Secretary of the Ministry of Mines to issue or alter a dealer's licence on the condition an applicant has no criminal

[88] See generally sections 3 – 10 of the Precious Stones Act, read with Precious Stone Regulations issued in terms of section 19 of the Act. The Precious Stones Trade Amendment Bill (HB5: 2007) will repeal the current Act when it comes into law.
[89] See the Preamble to the Precious Stones Act.
[90] Section 7 of the Precious Stones Act.
[91] Section 7(1) of the Precious Stones Act.
[92] Section 2(1) of the Precious Stones Act.
[93] In terms of section 2(1) of Precious Stones Act, a tributor refers to the lessee or assignee of the rights of the holder of a mining location.
[94] Section 3 of the Precious Stones Act.
[95] Sections 4 & 5 of the Precious Stones Act.

conviction in terms of the Act.[96] The Secretary may issue or renew a permit to acquire, possess or dispose of precious stones but not trading.[97] The Act gives the Secretary powers to amend the conditions of a permit, and on breach of those conditions, or upon a criminal conviction for contravening any provision of the Act, or for any justifiable good reason, may cancel the permit.[98] In addition, the Act provides the Minister of Mines with excessive powers which are not regulated; he can make any decision without consultations.

The Minister may exercise discretion and make Precious Stones Regulations in order to spell out the implementation of the objectives of the Act.[99] However, no such Regulations have been drafted so far. The Act prohibits licensed dealers who do not have approval from the Secretary of Mines, from holding interests in mining locations registered for precious stones.[100] Further the Act provides for conduct which qualifies as offences, for example, dealing in or possession of precious stones without a valid licence.[101] Also, providing false statements with the intention to mislead the Minister of Mines is punishable in terms of the Act.[102]

With regard to the regulation of diamonds, and to a certain extent, however, the coming into force of the Diamond Policy in 2012 supersedes the Precious Stones Act and renders it less relevant to the regulation of domestic diamonds.

#### *4.3.1.3 Zimbabwe Diamond Policy, 2012*

The Zimbabwe Diamond Policy[103] is a first step towards enacting a new diamond Act. The Policy embodies a shift in regulatory approach toward the domestic diamond industry. The Precious Stones Act[104] (discussed above) read together with the Mines Act reinforces the regulation of domestic diamonds. The preamble to the Diamond Policy has three key objectives; namely, (i) to ensure sustainable development of the diamond sector and its economic contribution to the national GDP; (ii) to facilitate optimal exploitation of diamonds,

[96] Ibid, subsections (2) – (5) of the Act.
[97] Section 8(1) of the Precious Stones Act.
[98] Ibid, subsection (2)(a)-(b) of the Act.
[99] Section 19 of the Precious Stones Act.
[100] Section 10 of the Precious Stones Act.
[101] Ibid, sections 3(2), 7 & 8.
[102] Section 15 of the Precious Stones Act.
[103] Zimbabwe Diamond Policy, 2012; hereafter the Diamond Policy.
[104] In terms of section 2 of the Precious Stones Act, precious stones include rough or uncut diamonds, other than those suitable for industrial purposes.

ensuring security and accountability in order to achieve full realization of the economic potential of the diamonds, and (iii) to facilitate the establishment of an environment conducive to domestic and foreign investment.[105] These factors broadly highlight the reasons underpinning the drafting of the Policy. Further, the Policy provides for the establishment and composition of the Diamond Board which is responsible for advising the Minister of Mines on issues relating to domestic diamonds.[106]

Of interest is the scope of the Diamond Policy and its relevance to the regulation as well as exploitation of domestic diamonds. The scope covers widely all stages and processes of the diamond value chain; namely, exploration, exploitation, transportation, marketing, beneficiation, value addition, capacity building, and security.[107] The major objective of the Policy '[…] is to promote the sustainable development of the diamond industry for the benefit of all Zimbabweans […]'.[108] Further the Policy encourages local beneficiation and value addition prior to exporting the diamonds, as well as sustainable development of the sector and its downstream activities.[109] In order to do this, the Policy provides strict access to diamonds; however, like any other domestic mineral resource, ownership vests in the State President.[110] The Policy reiterates that the State holds 100 percent ownership of all diamond deposits and, if the state wishes, may invite investors to partner in their exploitation.[111] Furthermore, the Policy provides factors that underpin Zimbabwe's sovereignty, and could as well assist in the regulation and exploitation of domestic diamonds.[112] The establishment of the Sovereign Wealth Fund is provided for in the Policy,[113] which entails that all diamond revenues collected by the national treasury shall be deposited in the Fund.[114] The funds shall be invested in the sectors of the economy to enable citizens to benefit from diamond

[105] See Preamble to the Diamond Policy.
[106] Part 6.1 – 6.4 of the Diamond Policy.
[107] See the Diamond Policy at 1.
[108] See part 4.1 (a) – (j) of the Diamond Policy.
[109] Ibid, at (f). See also Chindori-Chininga Report, op cit note 51 at 19 – 20.
[110] Ibid, part 5.1 read together with section 2 of the Mines Act.
[111] Ibid.
[112] Part 3.1(ii) of the Diamond Policy.
[113] Ibid, part 6.11 – 6.12.
[114] Veneranda Langa (Senior Parliamentary reporter) 'Senate rejects Mugabe as trustee of Sovereign Wealth Fund' *Newsday*, 25 September 2014; Reporter 'Senate rejects Mugabe' *NewsdzeZimbabwe*, 25 September 2014.

resources.[115] Provision for policing, offences and penalties are provided for in the Policy, and if appropriately enforced, it can support and enforce the regulation of diamonds.[116]

However, in line with international best practice for the diamond industry, the Diamond Policy has provisions that potentially restrict state sovereignty; for example, by prescribing mandatory minimum requirements for regulation and security control as well as terms and conditions in order for Zimbabwe to be able to trade its diamonds freely on international markets.[117] Although the Policy is a remarkable departure from the regulation of diamonds in terms of the Precious Stones Act, the success of implementing the Policy depends largely on political will. Appropriate enforcement of the Policy is fundamentally desirable in order to reinforce the PSNR principle against the backdrop of allegations of corruption in the minerals sector, as discussed below.

The Policy provides for state ownership and control of domestic diamonds.[118] Regardless of the fact that in principle the State holds total ownership,[119] one needs to distinguish between dominion in the minerals themselves and the right to exploit them; here the 'controlling stakes' becomes important.[120] Although diamond ownership vests in the State President, awarding the right to exploit them is also the discretion of the President with the help of the Minister of Mines, as well as the Mining Board. In this regard, consistency with provisions of the Diamond Policy becomes an issue vis-a-vis state sovereignty over mineral resources, as well as concluding investment agreements that are beneficial to the country. However, policy inconsistencies coupled with some weaknesses in the Diamond Policy have the potential to weaken and restrict state sovereignty over domestic diamonds. Under such circumstances, and overreliance of the Diamond Policy on a weak and outdated principal mining law (Mines Act) could be its biggest weakness and affect Zimbabwe's sovereignty over diamonds.[121]

[115] Ibid. See also part 3.1(iii) & part 5.36 of the Diamond Policy.
[116] Centre for Natural Resource Governance (CNRG) 'An Analysis of Zimbabwe's Diamond Policy' 2013 at 2, available at http://www.eisourcebook.org/cms/Zimbabwe%20Diamond%20Policy%20Analysis%20-%20Centre%20for%20Natural%20Resource%20Governance.pdf (accessed May 2013).
[117] Ibid, part 2.3, 2.5, 3.1(iv), 4.1(c) & (g). See also para 3 of the Preamble to the Diamond Policy.
[118] Ibid, part 5.3.
[119] Ibid. See also CNRG, supra note 116 at 4.
[120] National Report 'Indigenization law silent on Chiadzwa mining firms' *The Financial Gazette*, 30 May 2013.
[121] CNRG, supra note 116 at 5.

As shall be discussed below, corruption, illegal mining deals have the potential to undermine and weaken state sovereignty (as discussed in chapter 3 above).[122] It is crucial for Zimbabwe to exercise sovereignty through appropriate and consistent legislative measures in order to ensure the legality of regulation and exploitation is supported by legitimate operationalization of aspects of international law in domestic law, this can be a catalyst to attract foreign investment.[123]

#### *4.3.1.4 Gold Trade Act, 1940, (Chapter 21:03)*

The Gold Trade Act[124] is dedicated to the regulation and trade of domestic gold. The preamble to the Gold Act provides the founding provision, which is to 'prohibit the possession of gold by unauthorized persons and to regulate dealings in gold, and for other purposes connected with the forgoing'.[125] The Act provides licensing for gold and the conditions for acquisition of the licences. Three categories of licences are issued to applicants upon payment of the prescribed fee; namely, gold dealing licence, gold recovery works licence and gold assaying licence.[126] The Act provides that the Minister of Finance as the authority responsible for issuing gold licences. However, the Minister may delegate his or her authority to the Secretary of the Ministry of Finance to issue the licences.[127] The Act prohibits gold dealing, whatsoever, unless the dealer or his agent is a holder of a gold licence or an authority, grant or permit issued in terms of the Mines Act to work on domestic alluvial gold deposits.[128]

The Gold Act provides conditions for cancellation of licences. Accordingly, holders of gold licences are obliged to comply with the requirements and obligations of licensing; failure to do so may lead to criminal sanctions or cancellation of the licence.[129] The Act also provides for forfeiture and the procedure for confiscation for gold; for example, where the licence has been cancelled, or where the holder of the gold is unauthorized.[130] Further, the Act provides

[122] Ibid. See also Staff Reporter 'Mineral earnings increase but nothing flow into treasury' *The Zimbabwe Mail,* 27 June 2012; Patrick Chitumba & Sifundiso Ndlovu 'Helicopter crashes, farmer buries wreck' *Bulawayo24 News,* 21 May 2014.
[123] Ibid.
[124] Gold Trade Act 19 of 1940, as amended; hereafter Gold Act, read together with Gold Trade Regulations issued in terms of section 31 of the Gold Act.
[125] See preamble to the Gold Act & sections 3 – 12 of the same Act.
[126] Section 13 & 14 of the Gold Act.
[127] Ibid, section 16.
[128] Section 3 of the Gold Act.
[129] Section 14 – 22 of the Gold Act.
[130] Sections 79, 129 & 258 – 273 of the Mines Act. See also sections 27 – 29 of the Gold Act.

timelines to perform certain duties; for example, holders of gold mining licences shall, not later than the 10th of every month, deliver to a registered gold buyer or dealer all gold in his or her possession except gold which has been exempted by the Minister of Mines or a mining commissioner, by special authority.[131] In the event of a criminal conviction related to gold, the conviction automatically has the effect of cancelling any licence issued in terms of this Act.[132]

Failure to comply with provisions of the Gold Act is an offence.[133] Accordingly, the Act penalizes gold permit holders for malicious placement of gold,[134] as well as smelting or changing the form of any manufactured article which contains gold unless the person has been authorized by the Minister of Mines.[135] Where there is reasonable suspicion of unlawful possession or dealing in gold, the Act authorizes and grants the police powers of entry and search any premises or persons.[136] And as such, a holder of a gold licence is legally expected always and on demand to produce, and show it to any police officer. The Act provides for offences and mandatory penalties to be imposed on the offender.[137] Also, the Act empowers the Minister of Mines to enact Regulations in order to spell out the implementation of the Act.[138]

While taking into account the general provisions contemplated in the Mines Act, it can be argued that the Gold Act provides additional measures that are relevant to safe keeping and trading of gold. As such, the Act penalizes any conduct that has the potential of undermining lawful control and regulation of domestic gold.

#### *4.3.1.5 Copper Control Act, 1962, (Chapter 14:06)*

The Copper Control Act[139] has three major objectives, namely, (i) to provide for licensing of dealers in copper and to regulate the business activities of such dealers, (ii) to control and regulate the sale of copper and (iii) to make provision for the suppression of illegal dealings

[131] Section 6(1) of the Gold Act.
[132] Section 23 of the Gold Act.
[133] Section 9 of the Gold Act.
[134] Section 11 of the Gold Act.
[135] Section 12 of the Gold Act.
[136] Section 29 of the Gold Act.
[137] Section 30 of the Gold Act.
[138] Section 31 of the Gold Act.
[139] See generally sections 3 – 13 of the Copper Control Act 36 of 1962, as amended; hereafter Copper Act, read with Copper Control Regulations issued in terms of section 14 of the Copper Act.

in copper.[140] The Act prohibits dealing in or possession of copper without a valid licence.[141] In order to legalize dealing in or possession of copper, the Act provides that the Minister of Mines is the competent authority to issue a dealer's licence, and the decision to grant or refuse issuing licences is at his discretion.[142] A licence is valid for one year and it is subject to renewal upon fulfillment of the conditions for renewal as well as payment of the prescribed fee.[143] After a licence is granted to an applicant, it is not transferrable to any party.[144] The holder of a dealer's licence issued in terms of this Act, and who fails to uphold his or her obligations is potentially liable for contravening the provisions of the Act.[145]

The holder of a dealer's licence is obliged to keep an updated register of all copper transactions relevant to his or her daily business. The data to be recorded include the nature and weight of the copper which was purchased, when the transaction was concluded, the name and address of the person from whom the copper was purchased. In the case of any copper sold or disposed of by the dealer, details such as the nature and weight of such copper, the date, and place of the person to whom the copper was sold or disposed of, is required.[146] The sale of copper to any person is prohibited unless the parties have the necessary licence to deal in copper and have been cleared by the Minister of Mines to sell or buy it.[147] After purchasing or receiving the copper, and before processing it, the dealer is legally allowed to keep it for not more than four days.[148] The Act restricts hours during which copper may be kept or purchased. The Act prohibits purchase of copper between 9pm and 7am; the reason could be for security purposes, transparency and accountability; contravention of this provision is an offence.[149] Possession of copper which is reasonably suspected to have been stolen is an offence in terms of the Act.[150] The consequence of a conviction for any offence in terms of the Act could lead to cancellation of a dealer's licence and confiscation of the copper in his or her possession. In addition, a fine and /or imprisonment for a certain period to be determined by the court may be imposed.[151]

[140] See Preamble to the Copper Act.
[141] Section 3 of the Copper Act.
[142] Section 4(1) of the Copper Act.
[143] Ibid, subsections (2) & (3).
[144] Ibid, subsection (4).
[145] Ibid, subsection (5).
[146] Section 5 of the Copper Act.
[147] Section 6 of the Copper Act.
[148] Section 8 of the Copper Act.
[149] Section 7 of the Copper Act.
[150] Sections 9 & 10 of the Copper Act.
[151] Section 13 of the Copper Act.

In order to spell out the implementation of the Copper Act, the Minister of Mines may make the necessary Regulations.[152] However, to date no Regulations have been enacted under this Act. As considered in the themes identified in section 4.4 below, the focus is on the manner in which Zimbabwe exercises sovereignty in the regulation of domestic mineral resources including copper. The manner in which sovereignty is exercised reinforces the operationalization of international law principles discussed in chapter 2, which could be seen as supporting Zimbabwe's sovereignty over domestic mineral resources.

#### *4.3.1.6 Indigenization and Economic Empowerment Act, 2007 (Chapter 14:33)*

For the purposes of this thesis, the Indigenization and Economic Empowerment Act of 2007[153] is considered as far as it reinforces sovereignty over domestic mineral resources. The major drive of the indigenization law is to assist indigenous Zimbabweans to work towards, and derive economic benefits from domestic natural resources, including mineral resources.[154] In the context of the minerals sector, this could refer to rendering support in addressing the challenges faced by the minerals sector, as well as strengthening the regulatory capacity, improving community engagement, transparency and accountability in revenue collection, management and use. Economic indigenization is given legal status by the Indigenization Act, which is the principal law concerning economic empowerment of indigenous Zimbabweans.[155]

The Indigenization Act has two broad objectives, which are relevant to the study, summarized as '[…] to provide for support measures for the further indigenization of the economy [and] to provide for support measures for the economic empowerment of indigenous Zimbabweans'.[156] Underpinning both objectives could be the need to redress

[152] Section 14 of the Copper Act.
[153] Indigenization and Economic Empowerment Act 14 of 2007; hereafter the Indigenization Act, (came into effect on 17 April 2008).
[154] Natasha Odendaal 'Zimbabwe mining sector grows, but challenges remain' 2011, available at http://www.miningweekly.com/article/zimbabwe-mining-sector-grows-but-uncertainty-and-challenges-remain-2011-10-14-1 (accessed 2 November 2011).
[155] In terms of section 2 of the Indigenization Act, 'indigenous Zimbabwean' refers to 'any person who, before 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest'.
[156] The Preamble to, and section 3 of the Indigenization Act. There are basically five broad objectives summarized as follows; to provide for support measures for the further indigenization of the economy, to provide for support measures for economic empowerment of indigenous Zimbabweans, to provide for the establishment of the National Indigenization and Economic Empowerment Board and its functions, to provide

historical economic imbalances and prejudices to indigenous people caused by colonialism. The Indigenization Act gives the Minister responsible for economic empowerment powers to review and approve indigenization and empowerment plans and their enforcement.[157] In order to spell out the indigenization policy, the Indigenization and Economic Empowerment (General) Regulations of 2010[158] were enacted and took effect on 1 March 2010. Within five years of coming into effect of the indigenization law, the Regulations set to achieve its major objective – a minimum of 51 percent indigenous shareholding in all foreign-owned mining companies operating in the country.[159] To ensure compliance with this minimum requirement, the principal Regulations were amended by the Indigenization and Economic Empowerment (Amendment) Regulations,[160] which came into effect on 25 March 2011. The 2011 Regulations specifically included, within the ambit of the indigenization policy, foreign companies operating in the mining sector.

The adoption of the indigenization policy ostensibly broadens and enables new indigenous participants in the minerals sector, to establish collective ownerships and economic interests, which could reinforce Zimbabwe's sovereignty over domestic mineral resources discussed in chapter 2. In the process to exercise sovereignty, however, the indigenization policy can be seen as a law supporting the interests of politicians and the elite to control domestic resources. The challenges which adversely affect the potential for foreign investment, as well as the programme being largely considered as an empowerment of already rich politically connected individuals at the expense of the community come to the fore. As discussed in chapter 6 below, the loopholes and weaknesses in the indigenization policy have the potential to affect objectives of the empowerment law; if not addressed these could contribute to corruption and leave many ordinary indigenous Zimbabweans to the walls of poverty.

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for the establishment of the National Indigenization and Economic Empowerment Fund, to provide for the legal measures upon which the indigenization programme shall be based. See the Preamble to, and section 7 of the Indigenization Act. For functions of the Board, see sections 8 – 10 of the Indigenization Act.

[157] Sections 4 & 5 of the Indigenization Act.

[158] Indigenization and Economic Empowerment (General) Regulations, Statutory Instrument 21 of 2010; hereafter the Principal Regulations.

[159] Section 3(a) of the Principal Regulations.

[160] Indigenization and Economic Empowerment (General) (Amendment) Regulations (No. 3) 2011; hereafter the 2011 Regulations.

## 4.4 The Assertion of Sovereignty and Operationalization of International Law Principles in Support of State Sovereignty over Mineral Resources

With reference to the mining laws introduced and outlined in the afore-going sections, the following sections examine the manner, in which state sovereignty is exercised through the operationalization of aspects of international law principles which support state sovereignty over mineral resources discussed in chapter 2 and the threats in chapter 3, regarding property rights, access to mineral resources, mineral resource policing, beneficiation and trade, mining taxes and royalties, obligations towards indigenous communities, principles facilitation investment and trade in mineral resources, foreign exchange and repatriation of profits, compensation for expropriation and dispute settlement. These themes are important as far as they determine the manner which Zimbabwe exercises sovereignty over domestic mineral resources and highlight the loopholes that allow for perverse application of the principle of PSNR, as well as contradictions in the exercise of state sovereignty that establish the conditions for principles of trade and investment to override permanent sovereignty over mineral resources.

### 4.4.1 Property and Ownership Rights

At the outset, a distinction must be drawn between (i) property rights in the minerals themselves throughout the value chain, and (ii) the property associated with exploration, and exploitation rights, which include the manner and extent to which Zimbabwe can grant or impose rights of tenure on mining companies. The different types of rights shows the assertion of sovereignty and the operationalization of PSNR, whereby the government of Zimbabwe flexes its sovereignty muscle in order to define classes of rights. As the owner of mineral resources, the State President has the right to alienate property rights associated with exploitation of the minerals and regulate the alienation as well as the income derived from the resources.[161] Accordingly, the right to property which is embedded in the minerals themselves is fundamental and critical aspect to potential investors against the backdrop of weak protection of such rights.[162]

[161] See generally sections 2 & 3 of the Mines Act. See also Chris Armstrong 'Against permanent sovereignty over natural resources' (forthcoming in Politics, Philosophy and Economics) 2014 at 6, available at https://www.academia.edu/1105120/Against_Permanent_Sovereignty_over_Natural_Resources (accessed 31 July 2014).

[162] Alex T Magaisa 'Property rights in Zimbabwe's draft Constitution' 2012, available at http://newzimbabweconstitution.wordpress.com/2012/08/03/property-rights-in-zimbabwes-draft-constitution (accessed 1 October 2013).

The preamble to the Constitution of Zimbabwe[163] acknowledges the natural resource endowment and the Mines Act specifically provides for inherent state ownership and custody of all domestic mineral resources.[164] The fact that dominium over all domestic minerals vests in the State President, and held in trust on behalf of all Zimbabweans, shows that ownership and property rights in the minerals themselves cannot be transferred. In his representative capacity, the State President is exclusively and absolutely vested with ownership rights to all mineral resources found within the Republic and this right is protected by the Constitution and the Mines Act.

In order to exploit domestic mineral resources, Zimbabwe requires foreign investment. In the assertion of sovereignty, the state may grant an investor the right to explore or exploit specific minerals, by granting exploration or mining licences for a certain period of time subject to renewal.[165] However, a holder of mining rights does not have ownership but merely legitimate rights of access to a resource subject to the conditions underpinning the issuance of the licence. Regardless of the fact that holders of exploration or mining rights do not have ownership rights, however, they enjoy domestic protection in terms of the law after registration of their licences; thus, obtaining security of tenure. Accordingly, it is very necessary to register these rights because this contributes to security of tenure. Further the registration of mining licences in terms of Part IV of the Mines Act[166] converts the right contained in the licence to secured property rights, and therefore the investor enjoys security of tenure. This is the correct domestic legal position regardless of the Mines Act being inexplicit about it.

Since ownership of mineral resources vests in the State President, this is an assertion of sovereignty over the resources, which is also underpinned by regulating the allocation of mining or exploration licences to foreign investors of Zimbabwe's choice. Property rights are a driver that can promote protection of the investments and security of tenure. However, security of tenure can be threatened in various ways, one of which would be changing the law on the extent of foreign versus indigenous shareholding in firms already holding exploitation rights.

[163] Constitution of Zimbabwe, 2013; hereafter the Constitution.
[164] Ibid, Preamble to the Constitution. See also section 2 of the Mines Act.
[165] For example, Articles 3 & 16 of the Mines Act.
[166] See generally sections 3 & 20 – 62 of the Mines Act.

With reference to the Mines Act and Indigenization law discussed above, mineral resources are never owned by individuals since all the rights of ownership are vested in the State President.[167] This amounts to a strong assertion of state sovereignty over minerals. It also shifts the space of engagement between the State and foreign investors to the nature of property in exploitation rights. In Zimbabwe, the form in which the State has asserted its sovereignty over exploitation rights, but thereby also threatening security of tenure, has been to specify indigenization requirements amongst existing rights holders. This creates tension between what supports and restricts the assertion of sovereignty. The investor community generally views states that provide security of tenure in mineral exploitation rights favourably. The fragile political situation and inconsistences in the application of economic indigenization policy, however, render the security of tenure insecure. For example, this could be noted in the uncoordinated manner in which the indigenization policy was implemented under the leadership of former Minister, Saviour Kasukuwere. Unconfirmed reports allege that Kasukuwere threatened some mining companies for not complying with the indigenization law.[168] This created uncertainty which scared investors and threatened security of tenure in the mining sector. The insecurity shaped unfavourable conditions for foreign investment and even the established mining operations were less productive; thus paradoxically rendering the assertion of sovereignty over domestic mineral resources weak and ineffective.

Although Zimbabwe has a legal framework for protection of property rights relating to mining rights and other rights that can be awarded in terms of the Mines Act, and other mining laws, investors' security of tenure is weak. The country is ranked 171 out of 213 countries, denoting a low ranking according to the *World Bank Doing Business Report 2014*.[169] This negatively impacts on foreign investment in the minerals sector, which may in the long run weaken state sovereignty.

[167] Section 2 of the Mines Act.
[168] Zimbabwe News 'Zimbabwean Black Empowerment Group vows to enforce indigenization rules' *Voice of America/Zimbabwe*, 9 July 2014; Gibbs Dube 'Zimbabwe minister threatens shutdown for firms not complying with indigenization' *Voice of America News*, 26 July 2010; Lance Guma 'Indigenization Minister Kasukuwere owns nine farms' *SW Radio Africa*, 7 June 2011; Peter Wonacott 'Zimbabwe's redistribution push faces test, Minister to press foreign miners for majority control amid concerns domestic-ownership law will alienate investors' *Africa News*, 12 March 2012.
[169] World Bank 'Ease of doing business index' 2014, available at http://data.worldbank.org/indicator/IC.BUS.EASE.XQ (accessed 30 June 2014).

### 4.4.2 Access to Mineral Resources

On behalf of the people of Zimbabwe, the major issue is who decides about who gets to exploit and which domestic mineral resource, as well as how these decisions promote narrow private or broader public interests. While vested with ownership and custody of, as well as the right to search and exploit all domestic mineral resources in Zimbabwe, the State President, with the help of the Minister of Mines and the Cabinet, has a statutory duty to ensure access to mineral resources is discharged in an appropriate and transparent manner. However, the question is who actually decides the allocation of mineral resource rights? This is a complex issue to determine in the absence of guidance in the primary sources. The right to grant exploitation rights vests in the State President who is the custodian and the owner of domestic minerals on behalf of Zimbabweans. Accordingly, those who possess and exercise political powers actually have the capacity to decide who gets what, when and how.[170] The Minister of Mines in consultation with the Cabinet plays a crucial role in assisting the State President to arrive at an appropriate decision on whether to grant rights of access to a mineral resource to an investor. There is no requirement that consultations prior to coming up with a decision be transparent. It is not unreasonable to believe that the allocations may be politically biased.

As a result of the lack of guidance in the Mines Act, it is not clear whether the decision-maker has to consider conditions such as the ability to meet a minimum capital requirement, the level of professionalism and competence of the applicant, as well as the applicant's record on tax evasion. Further the Mines Act does not specify economic considerations or development criteria. In this way, the Act does not maximize the positive impact of mineral endowment as an asset that is capable of promoting economic development and is also attractive for foreign investment. All the work on economic development criteria and empowerment that should have been borne by the principal mining law is therefore shouldered by the Indigenization Act.

The Mines Act provides for the acquisition[171] and maintenance[172] of mining and mineral rights, as well as how they may be relinquished.[173] It provides for six types of mining licences

[170] Farai S Mtondoro,Godwin Chitereka, Mary-Jane Ncube & Andrew I Chikowore 'Preliminary findings from a study conducted by Transparency International Zimbabwe (TI-Z) 2013 at 4, available at http://searchworks.stanford.edu/view/10184689 (accessed 23 August 2014).
[171] Sections 20 – 62 of the Mines Act.

depending on the nature and purpose of the application. The six titles are divided into two broad groups, namely, exploration rights (first group) and mining rights (second group). The first category can be subdivided into further two groups, namely, Exclusive Prospecting Orders[174] and Special Grants for exploration in reserved areas.[175] The second category comprises of four rights; namely, mining claims,[176] mining leases[177] and special mining leases,[178] as well as special grants. Special grants are further subdivided into grants licences issued for coal and energy minerals in terms of Part XX of the Mines Act.[179] Further special grants are issued for all domestic mineral resources except coal and energy minerals, which are issued in terms of Part XIX of the Mines Act.[180] Upon registration of the right, the holder of the right to prospecting or mining has legally protected and enforceable rights against the State.[181] The permit gives the holder[182] legal authorization and access to the resource defined in the permit.

Although the Mines Act provides for acquisition of mining licence,[183] however, this is subject to compliance with the indigenization policy.[184] There are situations where state mining companies are not able to exploit certain resources without the input of foreign investors due to various reasons; for example, the capital requirement and specialized technology due to geological structure. Under such circumstances, joint ventures are necessary as in the Zimbabwe-Essar deal which was established to mine iron ore and manufacture steel. However, the fact that parties to a joint venture deal can each hold 50 percent control does

[172] Sections 197 – 221 of the Mines Act
[173] Sections 305 & 399 – 400 of the Mines Act.
[174] See generally sections 86 – 94 of the Mines Act. Exclusive Prospecting Orders, hereafter EPO. In terms of section 2 of the Mines Act, EPO is an order issued under Part IV of the Act. Any analysis of this definition shows that it is vague and cannot be ascertained. From the contextual meaning, it can be said an EPO confers mining rights on mining companies to explore for specific minerals in any defined location in the Republic subject to payment of a certain fee for a specific period of time. The EPO is obtained through an application to the Mining Affairs Board and on payment of a certain deposit per hectare or part of a hectare per month.
[175] See generally sections 291 – 296 of the Mines Act.
[176] Permit to a mine is called a Mining Claim. Since a Mining Claim covers a small area, usually several claims are grouped to form a block of claims. Ordinary claims are up to 25hactres and special claims are between 26 and 150 hectares. A block of mining claims can be converted into a Mining Lease for simplicity of administration. There are two types of claims: precious metal or mineral claims and base mineral claims. See generally 'Mining in Zimbabwe – overview' 2013, available at http://www.mbendi.com/indy/ming/af/zi/p0005.htm#10 (accessed 2 October 2013).
[177] See generally sections 135 – 157 of the Mines Act.
[178] Sections 158 – 168 of the Mines Act.
[179] Sections 297 – 307 of the Mines Act which relate to specific permits for fossils.
[180] Sections 291 – 296 of the Mines Act.
[181] Sections 20 – 26 of the Mines Act.
[182] Ibid, section 5 - defines a holder as a person in whose name the mining location is registered. In terms of section 61, the permit can be acquired by any corporation, individual or partnership.
[183] See generally sections 20 - 62 of the Mines Act.
[184] See discussion on indigenization law in section 4.3.1.6 above.

not necessarily mean a foreign investor is exempted from the indigenization law and other municipal legal requirements completely. Investors are required to meet the requirements in terms of the Companies Act,[185] as well as conditions required in order to obtain an Investment Certificate issued by the Zimbabwe Investment Authority.[186] Further, the Mines Act spells out the general conditions that ought to be fulfilled in addition to those required in terms of specific statutes regulating the acquisition of the mining rights for specific minerals such as diamonds, gold and precious stones.[187] Only after fulfilling the requirements of the indigenization law and other statutory requirements, is a foreign investor legally allowed to be part to a mining joint venture.[188]

With regard to becoming an indigenization partner, the Indigenization Act generally requires any foreign investor intending to invest in the country to do so subject to becoming a 49 percent partner while the indigenous partner holds 51 percent. The Indigenization Act read with Indigenization Regulations of 2011 set out minimum requirements for foreign-owned mining companies doing business in Zimbabwe, by amending section 4 of the principal Regulations of 2010 which required foreign companies with a net value of less than US$500 000 to be exempted from the indigenization law.[189] However, the amended 2011 Regulations now requires at least 51 percent[190] of the controlling business interest of a foreign mining company, operating in the country with a net value of at least US$1, to be ceded to indigenous Zimbabweans.[191] The implementation of the 51 and 49 percent requirement, however, is negotiable particularly where the investment is strategic and unique to the country. Through this mechanism, the Zimbabwean state ostensibly radically increased the leverage it might bring to negotiations over shareholding.

The indigenization policy thus acts not only as a potential threat to security of tenure of existing rights holders, but also as an access barrier to new ones. Further, while the objectives of the Indigenization Act are laudable, potentially creating opportunities for Zimbabwean citizens to benefit from their natural resources and determine their own economic destinies,

[185] See generally Zimbabwe's Companies Act 47 of 1951.
[186] See generally sections 13 & 14 of the Investment Authority Act 4 of 2006.
[187] Tumai Murombo 'Law and the indigenization of mineral resources in Zimbabwe: Any equity for local communities?' 2010 *Southern African Public Law* 568 at 569.
[188] See section 4.3.1.6 above on the discussion of economic indigenization.
[189] Section 4 (1) of the Principal Indigenization Regulations, 2010. See also section 4(a) of Indigenization & Economic Empowerment (General Amendment) Regulations No. 2, Statutory Instrument 116 of 2010.
[190] Section 3(1)(a) – (c) of the Indigenization Act.
[191] Sections 2 & 4 of the Indigenization Regulations, 2011.

however, most indigenous Zimbabweans are incapable of meeting the 51 percent shareholding capacity due to lack of capital. As a result, only a handful of Zimbabweans are able to meet the financial requirement and benefit from the policy.

However, it is not an overstatement that the presence of many faces and politics in decision-making over the allocation of rights of access to domestic mineral resources to investors, and in the absence of clear and transparent mechanisms, gives those involved in the process '[…] unfettered say in the allocation of […] mineral resources in accordance with their preferences. [Accordingly, the] allocation can be done through corrupt means as is manifesting in Zimbabwe's mining sector'.[192] In the exercise of political power, the powerful elites, though a relatively small group which includes top and influential politicians and military bosses, influence the allocation of rights of access to domestic mineral resources in a shrewd and self-serving manner. They can clandestinely make the allocation of rights of access to a mineral a private affair and shield the process from public scrutiny. The lack of any articulated principle for allocation of rights in the Mines Act facilitates this. Abuse of political power in relation to access and allocation decisions cause the plunder of domestic minerals for personal economic benefit while national economic interests are ignored.

Whether the allocation of the right of access to mineral resource may be challenged successfully in courts is not clear. The lack of clear criteria for the granting of such rights emasculates the judiciary, an institution that could bring some objectivity through the process through judicial review. The executive may simply argue that decisions to award rights of access are based on the best interests of the state and therefore devoid of unfair discrimination. This can be the basis upon which the state defends its decision against any court application challenging the decision. As noted above, the decision to grant or refuse to grant rights of access is the sole prerogative of the state, which is vested in the State President on behalf of the people of Zimbabwe. Accordingly, it is imperative that the assertion of sovereignty can be challenged; however, prospects of a successful court challenge are minimal.

The absence of clear criteria for granting access to domestic mineral resources, with strong centralization of these powers in the State President and the Cabinet, creates conditions

[192] Farai S Mtondoro et al, op cit note 170 at 4 - 5.

conducive to exploitation rights being granted in a manner that advances private rather than public interests. Appropriate access to, and regulation of mineral resources could translate to exploitation of the country's minerals, and derived economic benefits, that in the long run spurs economic development and the distribution of benefits to a broader range of people. Zimbabwe is richly endowed with mineral resources, but the legal framework for allocation exploitation rights has adversely helped in creating economic classes and widening the gap between the rich and poor.[193] The powers of determining access and allocation have been operationalized in a way that potentially debases the supporting international principles discussed in chapter 2; tainting the primary and rightful meaning of the principles of PSNR, self-determination and the right to development. Regardless of the Mines Act spelling out the conditions that must be considered in the regulation of mineral resources, the criteria for allocation of licences to foreign investors in order to access domestic minerals remains unknown to the public. There is no transparency and accountability yet the resources are held in trust by the state for the benefit of Zimbabweans.

### 4.4.3 Mineral Resource Policing and Enforcement of Mining Laws

Mineral resource policing and appropriate enforcement of mining laws is the primary vanguard against illegal mining, smuggling and corruption, as well as conflicts relating to access and control of the minerals value chain. Accordingly, the Mines Act and subsidiary Acts discussed above provide for conduct or behaviour which constitutes offences in the regulation and policing of domestic mineral resources. For example, the Mines Act classifies and criminalizes behaviour which deviates from the intention of the legislature, and includes prospecting without a licence or in prohibited areas, illegal pegging, theft of ore, fraudulent acts, false declarations and failure to disclose the discovery of precious stones.[194] The Gold Act and Precious Stones Act criminalize conduct which contravenes both Acts including unauthorized dealing in gold or precious stones, possession of gold or precious stones without licence, and failure to keep an up-to-date register of all transactions in gold or precious stones. Accordingly, these offences support the state to assert sovereignty over domestic mineral resources because fear of sanctions encourages compliance with the law. However, there has to be a framework which supports enforcement of the offences and penalties with a view to realizing self-determination and the right to development.

[193] Staff Reporter 'People suffering under ZANU PF - Mawere' *The Zimbabwe Mail,* 23 July 2013.
[194] See generally sections 368 – 392 of the Mines Act.

The conditions that should be in place for the offences to be effective necessitate not only discussion of the enforcement apparatus in the Acts but also the state of the criminal justice system generally. The conditions have to include the presence of, and respect for the rule of law, and all citizens and institutions should be accountable regardless of their positions in the society. Strict application of the law and transparency ensure the objectives to enact the offences are effectively realized. Accordingly, the entire judicial system and process require capacitating enforcement officers, including judicial officers and the courts, as well as reviewing conditions of service with a view to curbing corruption that adversely affects transparency and effective delivery of justice. These conditions are undoubtedly important drivers for the offences under the mining laws to be effective and support the exercise of state sovereignty over domestic mineral resources.

On the enforcement and policing apparatus in the Mines Act, the Chief Mining Commissioner and Mining Commissioners or any person duly authorized in terms of the Mines Act, is expected at all reasonable times, to have access to any location of a mining company or offices for the purposes of inspecting books and records as well as reports relating to acquisition, disposal and removal of minerals or mineral-bearing products as may be necessary for the purposes of ascertaining any returns, solemn declarations or other relevant documents in terms of the Act.[195] On the one hand, the Chief Mining Commissioner and Mining Commissioners have powers to act as adjudicators over simple mining disputes, and on the other hand, as regulators and inspectors. They are very important officers in the regulation and enforcement of mining laws in order to ensure compliance. The commissioners are assisted by other law enforcement agents such as customs officials at designated ports of entry and exit, Mineral Unit and Border Control officers, as well as police officers; together they are responsible for, and investigate cases relating to smuggling and unlawful possession of, and illegal dealing in minerals. With regard to the number of inspections per mining location, there is no specific requirement in the law but administrative measures require that inspectors check mining companies' books and production registers at reasonable intervals. However, the presence of suspicions could mean inspections take place more regularly in order to ensure total compliance with the law. Accordingly, the inspections have the potential to assess the extent to which mining companies consistently comply with the legal requirements in their operations. Where there is reasonable suspicion for illegal

[195] See generally sections 201, 250 & 252 of the Mines Act.

possession or dealing in minerals, any police officer, mining commissioner or mining inspector may, without a search warrant, enter and search any premises or search any persons. The search is necessary to investigate and gather evidence or detect any offence relating to breach of any mining laws, as well as to arrest any suspects.[196]

With regard to deadlines prescribed by each Act, it is peremptory for every registered miner, not later than the tenth day of each month, to deliver to the mining commissioner returns in the prescribed form showing, in respect of all minerals other than precious stones, production output and comprehensive details of the disposal. Precious stones that have been exploited from the miner's registered site must be accounted for, including production output and quantity, as well as the quality.[197] For accountability purposes, each licence holder is obliged to keep an up-to-date register and returns on prescribed forms, which he or she is entitled to record any transaction timeously. Mining companies are obliged to furnish to a mining commissioner documents such as certificates, affidavits and supporting detail which confirm production output and disposal of the resources.[198] For accountability purposes, holders of gold licence are obliged to keep true and correct records relating to all gold deposited with, received, dispatched or disposed of by them.[199] The fulfilment of the requirements by mining companies ensures compliance with mining laws. Full compliance supports PSNR with a view to realizing self-determination as well as the right to development in the long run. In the event of contravention of the monthly returns provision, a miner is held criminally liable and sentenced to a fine not exceeding US$200 or imprisonment for a period not exceeding six months, or both such a fine and imprisonment.[200] However, the maximum fine of US$200 is too lenient and may not deter miners from covering-up the loopholes in the preparation of monthly returns. This a threat to sovereignty over natural resources in that the likelihood for repeat offenders to commit the same offences is very high because they benefit more than what they lose. Also, the fine and the alternative imprisonment term are not concomitant. The leniency in the sentence and disproportion between the fine and the imprisonment term could weaken policing, which is a factor that also weakens sovereignty over domestic mineral resources.

[196] Section 14 of the Precious Stones Act.
[197] Section 251 (1)(a) of the Mines Act.
[198] Ibid, at subsection (1)(b) – (c).
[199] Section 8 of the Gold Act.
[200] Ibid, subsection (1)(a).

In order to ensure compliance in royalty payments, the Mines Act prohibits disposal of minerals or mineral-bearing products from the location or any location registered in the name of a miner, until outstanding royalties have been paid, or until a reasonable, acceptable and binding payment arrangement has been mutually agreed.[201] Where a registered miner in respect of whom the prohibition order was issued by the mining commissioner, fails to observe the order, or any person who has knowledge of the order receives any mineral from the location referred to in the order, contravenes the provision of the Act.[202] The Mines Act imposes a fine not exceeding US$500 or imprisonment for a period not exceeding one year, or both such a fine and the imprisonment.[203] However, the penalties appear to be too lenient and do not deter potential offenders.

Arguably, two factors underpin the need for policing; first, to ensure those awarded mining licences comply with the full spectrum of relevant domestic laws.[204] The second factor is that policing helps to curb illegal mining and unlawful dealings in mineral value chain, and that those who have not been licenced, do not access any mineral resource, whatsoever, as well as to ensure the state derives maximum financial benefits through payment of the required fees and taxes by licenced miners. Since it is illegal to access domestic mineral resources without valid licences, effective policing is the most safeguard measure to protect the resources.[205] In this regard, policing is a method to assert sovereignty. This is wholly supported by the international law principles discussed in chapter 2.

However, effective policing is affected by weak and outdated laws, as well as poor enforcement. For example, the Mines Act has ostensibly overstayed its purpose as it has been overtaken by modern regulatory requirements as well as enforcement challenges in the domestic mineral value chain. Although the Act has been amended several times, however, the fact that it came into force in 1962 and applies 35 years after obtaining political independence certainly mean the challenges of the 1960s are not the same as those encountered in the 21 century. For example, appropriate policing and enforcement are drivers which support assertion of sovereignty. Specific implementation and enforcement

[201] Subsections 253(1) & (2) of the Mines Act.
[202] Ibid, subsection 3.
[203] Ibid. See also First Schedule (sections 2(1) & 280) of Standard Scale Fines, as substituted by the Finances Act 3 of 2009.
[204] See generally sections 197 – 221 of the Mines Act.
[205] See generally sections 3 – 30 of Gold Act. See also sections 3 – 18 of the Precious Stones Act; sections 3 – 13 of the Copper Act.

requirements are fundamental in order to give value to provisions of the laws. However, in the absence of strong checks and balances, the Mines Act grants excessive powers to the state President and the Minister of Mines to exercise discretion and they are capable of making unilateral decisions which negatively affect the sector, thus, debasing the PSNR principle and undermining the rule of law in a manner that negatively affects the criminal justice system.[206] For example, granting of special diamond mining rights to Chinese investors to mine the diamonds in Marange without appropriate legal procedures is clearly an abuse of power and it is unlikely that proper enforcement actions will then be taken against such investors.[207]

The mandatory penalties for illegal dealing in or possession of gold, which were introduced to the Gold Trade Act by the Finance Act of 2006, raise questions regarding the disproportionality of the prescribed offences: A penalty of 5 years imprisonment or a fine of US$200. This does not take into account the amount of the gold. Further amending the Gold Act penalties without doing the same to the Precious Stones Act as well as the Diamond Policy cause inconsistencies in the delivery of justice.[208] The inconsistency does not assist to affirm sovereignty and curb leakages in the minerals sector. Another concern is the omission in the Acts of reference to companies that were caught illegally dealing in or possessing precious stones. The omission opens loopholes and uncertainty regarding the appropriate criminal penalties.

The success of appropriate implementation and enforcement of domestic mineral laws as well as policing of the minerals sector is the duty of the Ministry of Mines and its agents. In order to implement and enforce the laws, the Ministry is expected, through its agents '[t]o facilitate and regulate the sustainable mining, value addition and marketing of the country's mineral resources for the social and economic well-being of Zimbabweans'.[209] This reinforces the objective to regulate minerals sector and derive economic benefits in order to enhance national economic development.

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[206] CNRG, supra note 116 at 4.
[207] Taurai Mangudhla 'Parliament should scrutinize mining deals' *The Independent*, 18 January 2013. See also Partnership Africa Canada, 'Diamonds and clubs: The militarized control of diamonds and power in Zimbabwe' 2010 at 5, available at http://www.pacweb.org/Documents/diamonds_KP/Zimbabwe-Diamonds_and_clubs-eng-June2010.pdf (accessed 3 March 2014); The Marange diamond fields of Zimbabwe: An overview 2011 at 18, available at file:///D:/Users/A0023493/Downloads/The-Marange-Diamond-Fields-Report-Oct-2011.pdf (accessed 23 March 2014). See also Chindori-Chininga, op cit note 51.
[208] See generally Criminal Penalties Amendment Act of 2001. See also David Coltart 'Zimbabwe: Precious stones Bill passed' *The Herald*, 6 September 2007.
[209] Mission Statement: Ministry of Mines and Mining Development (Zimbabwe), available at www.mines.gov.zw (accessed 23 December 2013).

While presenting the 2014 National Budget Statement, the Minister of Finance, Patrick Chinamasa, indirectly highlighted that weak or inappropriate enforcement of domestic mining laws has caused various loopholes in the minerals sector. Mining investors are reportedly taking advantages of the loopholes to deprive the state of substantial amounts of revenues.[210] Also, research shows that the Ministry of Mines is generally understaffed and under-resourced.[211] Although there are no specific details regarding the extent to which the Ministry is short of mining commissioners and inspectors as well as under-financed, the shortages are critical and adversely incapacitate the sector to competently enforce mining laws to support domestic operationalization and implementation of the PSNR principle.

Among the loopholes that are causing loss of mining revenues include malpractices in the form of under-invoicing and simulated mining equipment purchases, as well as smuggling and externalization of export proceeds.[212] Arguably, had the minerals sector been appropriately resourced and regulated, the loopholes could be minimized. Weak policing and enforcement of mining laws is adversely enhanced by policy inconsistencies which in turn undermine investor confidence. Furthermore, this undermines Zimbabwe's assertion of sovereignty over mineral resources and in turn translates to less revenue generation than would be, had there has been appropriate enforcement.

It can be argued that the mineral endowment comes with responsibilities, which require policing and enforcement, among other measures, in order to derive maximum economic benefits. Although Zimbabwe has the leverage to assert sovereignty over its minerals, however, the department in charge of policing is not adequately resourced. The current regulatory measures show that policing and enforcement are weak and inadequate to curb corruption, illegal mining and smuggling of minerals. Also, the absence of transparency and accountability as well as legal certainty in the minerals sector affects the potential economic contribution of the sector to national development. In turn, the extent of assertion of sovereignty over domestic minerals is affected negatively.

[210] The 2014 National Budget Statement, Zimbabwe, 2013 at 170 para 715; hereafter the Budget, presented to the Parliament of Zimbabwe on 19 December 2013 by Patrick Chinamasa, Minister of Finance and Economic Development.
[211] Ministry of Mines and Mining Development, Harare, Zimbabwe.
[212] Ibid, para 716.

### 4.4.4 Beneficiation and Trade

Beneficiation can be defined as adding value to minerals through industrial processes, which include crushing, separating and converting mineral ores into valuable substances. To a greater extent, beneficiation is attributed to the rise in 'resource nationalism'[213] which is reinforced by higher international market commodity prices.[214] Trading of beneficiated or value added minerals is a strategic priority for Zimbabwe, the reason being that export of value added minerals fetches higher prices compared to unprocessed mineral ores.[215]

Being an outdated mining law, the Mines Act does not specifically provide for beneficiation; however, in practice, beneficiation of minerals such as iron ore, gold and diamonds is being done. The Mines Act and other Acts discussed above only regulate access to specific domestic mineral resources. The Diamond Policy provides for local beneficiation and value addition, which are essential aspects prior to export; however, the Policy does not spell out the provision and clarity on the standard for issuance of permits to those involved in sections such as cutting and polishing.[216] The Policy only states that '[a] quota of all locally produced rough diamonds […] shall be reserved for local beneficiation', and in order to promote beneficiation the state intends to offer incentives to players in the local cutting and polishing industry.[217] Further the Policy only provides that the cutting and polishing industry has to be encouraged to optimize value in its activities.[218] Lack of clear administrative procedures in the regulation creates uncertainty and loopholes, which in turn give rise to the potential for corruption, smuggling and illicit dealings throughout the diamond value chain. Ostensibly, the Policy does not authoritatively make beneficiation mandatory in that it appeals to players in the domestic diamond industry to undertake beneficiation in return for some financial incentives. The reasons could be, inter alia, that beneficiation is a capital-intensive industrial process. However, here the purpose is not to critique the process but to highlight the reasons underpinning the need for local beneficiation. The Zimbabwe Diamond Technology Centre

[213] "Resource nationalism" can refer to state sovereignty in order to assert control over domestic natural resources within its territory.
[214] Mining IQPC 'Deloitte: Positioning for mineral beneficiation – opportunity knocks' 2014, available at http://www.miningiq.com/regional-focus/white-papers/deloitte-positioning-for-mineral-beneficiation-opp (accessed 1 July 2014).
[215] Zimbabwe Investment Authority (ZIA) 'Investing opportunities – mining' 2010, available at http://www.zia.co.zw/index.php?option=com_content&view=article&id=60&Itemid=68 (accessed 31 May 2013).
[216] Ibid, at 9.
[217] Part 5.15 – 5.16 of the Diamond Policy.
[218] Ibid, para 5.17.

(ZDTC) which is taking shape in Mt Hampden, on the outskirts of Harare is understood to provide a solution to diamond beneficiation and value addition and upon its completion, the Centre will employ about 1 200 people.[219] Arguably, this confirms that beneficiation creates employment and dovetails with the country's agenda for sustainable socio-economic transformation.

In the absence of a beneficiation policy, some raw minerals are exported resulting in low export prices, which translate into low revenues for the state.[220] The initiative to enforce beneficiation of major domestic minerals such as platinum, chrome, iron ore and diamonds is currently being pursued but there is no mandatory legislation compelling mining companies to undertake the process.[221] There is not even a clear national policy on beneficiation.[222] It is suggested that when the law is enacted for mandatory beneficiation, it will include substantial financial penalties for exporting raw materials where beneficiation and value addition options are available.[223] To compel mining companies, particularly those mining platinum, the government effected a 15 percent levy on exports of unbeneficiated platinum and there were plans to completely ban raw platinum group mineral exports by the end of 2014.[224] Also, unconfirmed reports allege that export of unbeneficiated chrome had been banned and the government is reportedly insisting on those mining major mineral resources to build refineries or lose their licences.[225] This amounts to a strong assertion of state sovereignty over mineral resources.

To ease the challenge, unconfirmed reports point out that Mwana Africa, a mining and exploration company listed on the London's Alternative Investment Market which also operates in Zimbabwe, offered its smelter in the country at an undisclosed fee for use by platinum miners.[226] This comes when the government has demanded that mining firms establish a domestic precious metal refinery plant to ensure that Zimbabwe gets maximum

[219] Fortious Nhambura 'Zimbabwe: Beneficiation the way to go' *The Herald*, 20 March 2014. See also Proceed Manatsa 'Beneficiation' *Zimbabwe Situation*, 15 June 2014; ZimSitRep 'Mining Chamber hosts beneficiation conference as government presses for refinery' *Zimbabwe Situation*, 28 January 2014.
[220] The 2012 Mid-Year Fiscal Policy Review, supra note 20 at 111 para 361.
[221] Section 247 of the Mines Act.
[222] Gift Chimanikire (former Zimbabwe deputy Minister of Mines and Mineral Development) 'Japan sustainable mining, investment and technology: Zimbabwe's mining industry policy' 2013 *Business Forum*1 at 7.
[223] Ibid.
[224] Memory Mataranyika 'Zimbabwe warns platinum firms on smelter deadline' *Miningmx News*, 20 May 2014. See also Staff Writer 'Government warns platinum firms on smelter deadline' *New Zimbabwe*, 20 May 2014; Golden Sibanda 'Zimbabwe: Beneficiation takes time – Mhembere' *The Herald*, 28 February 2014.
[225] Ibid. See also ZimSitRep, supra note 219.
[226] Allan Seccombe 'Help for Zimbabwe's beneficiation push' *Business Day Live*, 30 January 2014.

export returns from its minerals. At a conference held recently under the theme "Beneficiation: Maximizing Value from the minerals sector", however, Zimbabwe was urged to adopt an incremental approach to beneficiation.[227]

Arguably, beneficiation is not bad from the assertion of sovereignty point of view. It is vital to a developmental path that shifts the country from being a mere producer based on the exploitation of mineral resources, to one where it exports services and hardware. Further beneficiation not only increases state revenues but also provides jobs for local people. The increase in revenues and employment give the concept of sovereignty concrete meaning. Apart from the benefits derived from pursuing beneficiation, however, there are challenges affecting the process.[228] Lack of substantial capital injection is one of the major drawbacks.

### 4.4.5 Royalties and Taxes

Mining royalties are not defined in the Mines Act but can be defined as payment to the owner of mineral rights for the privilege to exploit a domestic mineral resource. In addition to specific corporate tax rates, such as income tax or corporate tax and additional profit tax, mining companies are subject to pay royalties, which arises from mining rights acquired by a mining investor to exploit a specific mineral resource based on a contract or lease agreement.[229] The royalty payment is based on a portion of earnings from production and varies depending on the type of mineral and the market conditions.[230] Unlike royalties, other forms of mining tax such as corporate tax are levied on mining companies after the deduction of all capital and operational expenses. Additional Profit tax is tax levied on profits accrued to a holder of special mining lease in terms of section 22 of the Income Tax Act read with the 22nd and 23rd Schedule of the same Act. Royalty and ordinary mining taxes are two separate

[227] Golden Sibanda, op cit note 224.

[228] One may have to compare and weigh the challenges and benefits that may arise such as; challenges - access to raw material for local beneficiation, human skills sought for expediting domestic beneficiation, lack of infrastructure, access to international markets for beneficiated products. The benefits could include the prospects for domestic employment creation, state revenue potential, tax benefits, savings on imports or export costs of beneficiated products. See J Mungoshi 'Beneficiation in the Mining Industry' presentation to SAIMM Zimbabwe Branch Conference, held in Harare, Zimbabwe on 19 July 2011.

[229] Zimbabwe Environmental Law Association (ZELA) 'An outline of the mining taxation in Zimbabwe' 2012 at 5 – 12, available at http://www.hrbcountryguide.org/wp-content/uploads/2013/10/Mining-Taxation-in-Zimbabwe.pdf (20 August 2014); PKF International Limited 'Zimbabwe tax guide 2013' available at http://www.pkf.com/media/1959044/zimbabwe%20pkf%20tax%20guide%202013.pdf (accessed 20 August 2014).

[230] See generally Zimbabwe Revenue Authority (ZRA) 'What is the basis of charging mining royalties?' 2014, available at http://www.zimra.co.zw/index.php?option=com_content&view=article&id=1883:what-is-the-basis-of-charging-mining-royalties&catid=21:did-you-know&Itemid=91(accessed 2 June 2014);Investor Words 'Mineral royalty' 2014, available at http://www.investorwords.com/18747/mineral_royalties.html (accessed 3 December 2013).

income streams for the state, which if used responsibly and transparently can contribute to economic growth and development.

Royalty and mining tax are forms of taxes, which are levied on all minerals or mineral-bearing products obtained from a domestic mining location and disposed by a miner or on his behalf.[231] Despite not being defined in the Act, the payment of royalties and taxes is provided for in the Mines Act read together with the Revenue Authorities Act.[232] In other words, a royalty is calculated as a percentage of the overall gross fair market value of minerals that were produced and sold.[233] With effect from the 1st of January 2012, the Zimbabwe government revised the rates of royalties for all its minerals.[234] The royalty payment applies to other taxes which include surface rentals,[235] capital expenditure allowance, withholding tax and income tax levied at a flat rate of 15 percent of the total profits.[236] The fiscal regime for mining provides for a withholding tax of 5 percent which is charged on dividends declared by mining companies listed on the Zimbabwe Stock Exchange (ZSE); for other companies not listed, the rate of withholding tax is 10 percent.[237] Further, an additional 5 percent withholding tax is charged on interests paid to mining investors.[238] However, from early 2012, the Zimbabwe Small-Scale Miners Council and Zimbabwe Chamber of Mines, as well as the African Development Bank urged the government of Zimbabwe to revise downward the tax rates on the basis that they were too high,[239] and the government heeded this advice. This could also mean in the process to assert sovereignty, the state does not need to be dictatorial but where necessary invite stakeholders to contribute constructively.

Section 244 of the Mines Act empowers the state to receive royalty payments from domestic mining rights holders. In the event that royalties are not paid by the due date, interest is

[231] Section 244 of the Mines Act. See also Zimbabwe Revenue Authority, supra note 230. See generally International Business Publications *Zimbabwe Taxation Laws and Regulations Handbook Volume 1: Strategic Information and Basic Laws* (2011) at 37 – 59 & 223 – 240.
[232] See generally Revenue Authorities Act 17 of 1999, as amended.
[233] Tony Hawkins 'The mining sector in Zimbabwe and its potential contributing to recovery' 2009, UNDP working paper 1 at 46.
[234] Section 245 of the Mines Act. See also Zimbabwe Revenue Authority, supra note 230. Royalties on precious minerals such as diamonds and gold were increased from 3.5 to 4 percent of gross revenue - see the Mid Term Fiscal Policy Statement, 18 July 2012; 2012 Mid-Year Fiscal Policy Review, supra note 20 at 17 – 19; The Herald 'Zimbabwe: Miners to get royalties reprieve' *The Herald*, 4 February 2014.
[235] Surface rental is a form of tax imposed at varying rates during the prospecting, exploration and development stages of a mining venture.
[236] Tony Hawkins, op cit note 233 at 46
[237] Ibid.
[238] Ibid.
[239] Tarisai Mandizha 'Government urged to revise mining fees downwards' *Newsday*, 25 February 2014; Staff Writer 'Post chamber: Government urged to review mining tax regime' *Zimbabwe Independent*, 7 June 2012.

calculated based on a rate determined by the Minister of Finance.[240] It is reported that some mining companies are not paying full taxes to the state, some are evading paying and some hide profits,[241] because they are taking advantage of a flawed revenue collection system.[242] The fact that not all revenues are remitted to the state and accounted for is potentially undermining sovereignty.[243] Arguably, tax evasion is a consequence of the state's failure to remedy and build safeguards in revenue collection. It is further reported that some mining companies are understating production output in order to pay less taxes. For example, it was alleged that Marange Resources' low revenue remittance is the tip of the iceberg.[244] Furthermore, it is reported that investigations and audits revealed that some mining companies were looting from the state through procurement, by inflating figures in order to simulate transactions.[245] This would mean the capital spent on alleged purchases is capital expenditure and therefore exempted from tax. There are indications of connivance between officials in state enterprises within the Ministry of Mines. It is reported that the connivance is well-orchestrated, while in other cases it is claimed that certain mining equipment was procured yet nothing was bought.[246] In 2012 and 2013 former MDC Minister of Finance, Tendai Biti, revealed that his Ministry received only US$364 million from diamond exports but ZANU PF members argued that the amount was far higher.[247]

To show how weak regulation undermines the assertion of sovereignty in the revenue collection, Sharife provides detail on the manner in which domestic diamonds are siphoned from the country.[248] A system of fraudulent and illicit dealings has become a catalyst of

[240] Tony Hawkins, op cit note 233 at 46.
[241] Staff Reporter 'Fight unfair Chinese labour practices, civil society urged' *New Zimbabwe,* 17 August 2014.
[242] Richard Snyder & Ravi Bhavnani 'Diamonds, blood and taxes: A revenue-centered framework for explaining political order' (2005) 49 *Journal of Conflict Resolution* 563 at 570 – 572. See also Philippe Le Billon 'the political ecology of war: Natural resources and armed conflicts' (2001) 20 *Political Geography* 561; Anita Sundari Akella & James B Cannon 'Strengthening the weakest links: Strategies for improving the enforcement of environmental laws globally' 2004 Centre for Conservation and Governance Report at 3.
[243] Try MP 'Zimbabwe is richest in sub-Saharan Africa' *The Zimbabwe Mail,* 29 May 2013. See generally Michael L Ross 'How mineral-rich states can reduce inequality' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 237.
[244] Zimbabwe News 'Bosses in Marange looting spree' *NewsdzeZimbabwe,* 3 February 2014.
[245] Ibid. See also Partnership Africa Canada 'Reap what you sow: Greed and corruption in Zimbabwe's Marange diamond fields' (2012) at 1& 5 – 6; Clayton Masekesa 'Tempers flare in Mutare over diamond looting' *The Zimbabwe Mail,* 19 May 2013; Zimbabwe News 'Not a penny for Marange trust, one year on' *NewsdzeZimbabwe,* 23 February 2013.
[246] Ibid.
[247] The 2012 Mid-Year Fiscal Policy Review, supra note 20 at 110 paras 359 & 360.
[248] Khadija Sharife 'Disappearing diamonds' *100Reporters,* 20 February 2013. See also Ray Ndlovu 'Gross mismanagement: Looting in Zimbabwe's diamond sector' *African Business Day,* 25 June 2013; Khadija Sharife & Nick Meynen 'Blood diamonds, regulation system broken – but where to look for blame?' 2012, available at http://www.ejolt.org/2012/10/blood-diamond-regulation-system-broken-%E2%80%93-but-where-to-look-for-

wholesale theft of the resources and consequently, undermines the assertion of sovereignty over domestic minerals and adversely the right to development.[249] The practice could, unless corrective measures are appropriately considered and implemented, affect the economic status and importance of mineral resources' contribution to the national GDP.[250] In the absence of influence from the Extractives Industry Transparency Initiatives,[251] since Zimbabwe is not a member, it remains a challenge to determine the actual amount of revenues that mining companies are paying and what is not accounted for. The uncertainty in revenue transparency has propagated a culture of corruption and tax evasion in the minerals sector.

In a nutshell, although Zimbabwe asserts sovereignty over mineral resources, by imposing mining royalties and ordinary taxes on the mining rights holders, tax evasion and looting of the resources undermine sovereignty and lessens the amount of revenues that could have been available for development.

### 4.4.6 Legal Obligations Toward Indigenous Communities

The Mines Act requires any mining company that intends to prospect, explore or exploit domestic mineral resources to apply for a mining permit and authorizes the state to regulate, as well as set standards and conditions for the subsequent operations. The terms and conditions could also be incorporated in mining agreements. Mining contracts incorporate basic obligations that a mining investor must comply with, such as environmental requirements in the form of Environmental Impact Assessments (EIAs), resettlement plans,[252] community development, employment of local people and revenue sharing.[253] These

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blame (accessed 23 June 2012); CNRG, supra note 116 at 3; Joseph C Bell & Teresa Maurea Faria 'Critical issues for a revenue management law' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 186.

[249] Ibid. See also Tumai Murombo 'Regulating mining in South Africa and Zimbabwe: communities, the environment & perpetual exploitation' (2013) 9 *Law, Environment & Development Journal* 31 at 35 – 47.

[250] George Soros 'Foreword' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) xi. See also Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz 'Introduction: What is the problem with natural wealth?' in Macartan Humphreys, Jeffrey D Sachs & Joseph E Stiglitz (eds) *Escaping the Resource Curse* (2007) 1 at 3 - 6; C N Brunnschweiler & E H Bulte 'Linking natural resources to slow growth and more conflict' (2008) 320 *Policy Forum* 616; Richard Snyder & Ravi Bhavnani, op cit note 242 at 570 – 572.

[251] Extractives Industry Transparency Initiatives, hereafter the EITI.

[252] See generally sections 87 – 108 of the Environmental Management Act 13 of 2002 (Chapter 20:27), as amended.

[253] Open Society Initiative for Southern Africa (OSISA) 'Existing Legal and Institutional Framework' 2013, available at http://www.osisa.org/book/export/html/5137 (assessed 27 December 2013).

conditions spell out legal obligations of mining companies towards local communities and therefore the transparency of these agreements is critical.

Provisions of the Mines Act, Land Acquisition Act[254] and the Constitution are used to acquire land for the purposes of mining. Section 73 of the Constitution provides the right to clean and environmental protection, which encompasses freedom from pollution and other degrading activities. Further the Constitution provides freedom from arbitrary evictions; thus, no one may be evicted from their homes without a valid court order.[255] Mining companies may not evict anyone from their homes for the purposes of mining unless the removal is legally justified and sanctioned by courts following due process. Furthermore, the inclusion of environmental rights in the Constitution is likely to influence the enforcement of legal obligations of mining companies towards local communities. The Mines Act provides for payment of compensation by a holder of mining rights to private landowners where mining operations are to be established.[256] The fact that land is owned by the state, holders of mining rights are required to pay compensation for developments on the land and not for the land itself. However, the criterion to determine the amount of compensation is not expressly provided for in the Mines Act. Moreover, the rights of rural communities, where most mining activities take place, are not directly compensated since the Mines Act states that compensation has to be paid to Rural District Councils, which act as the landowner.[257] In practice, some mining companies compensate indigenous communities by providing relocation expenses, building houses and providing other social services, as well as undertaking activities to reduce poverty.[258] With reference to communities that were evicted in order to make way for diamond exploitation in Marange, it is reported that compensation was not paid, however. The diamond mining companies only gave the communities a "disturbance allowance" of US$1000 per household and resettlement houses, the majority of which are reportedly built below minimum standards.[259] It is reported that the government maintained that the affected communities were not legally obliged to be compensated as the land in question belongs to the state.[260] The assertion of sovereignty could as well conflict

[254] Land Acquisition Act of 1992, as amended. See also Simon Coldham 'The Land Acquisition Act 1992 of Zimbabwe' (1993) 37 *Journal of African Law* 82.
[255] Section 74 of the Constitution of Zimbabwe.
[256] Section 188(2) of the Mines Act.
[257] Ibid, subsection (7).
[258] OSISA, supra note 253.
[259] Ibid. See also Tumai Murombo, op cit note 249 at 38 – 40 & 45.
[260] Ibid.

with the right of the people who are supposed to be the beneficiaries of Zimbabwe's natural resource endowment.

Regardless of the conflicts over compensation between government and diamond companies, on the one hand, and the Marange communities on the other hand, mining companies have obligations towards indigenous communities which are affected by mining operations.[261] Mitigating negative environmental impact through EIAs[262] and environmental plans before, during and after closure of mining operations is necessary.[263] In the event of failure to do so, the affected communities may use the provisions in the Constitution to protect their rights and hold government and the mining companies accountable through public litigation.[264]

### 4.4.7 Compensation for Expropriation

Since 2000 the practice of expropriating white commercial farms without compensation has been experienced across the country. Although the focus of this thesis is not on land, it is difficult to broach the topic of expropriation without also highlighting the expropriation of the land. Of late, the Zimbabwean government has threatened to seize foreign mining companies operating in the country unless they comply with the indigenization law.

The new Constitution of 2013 provides for protection of property rights.[265] It further goes to define property as any right or interest in property[266] and thus embraces property rights incorporated in mining licences. In Zimbabwe, mineral resources are not individually owned because they belong to the people of Zimbabwe;[267] however, one can be legally entitled to access them as discussed above. The Constitution provides for compensation in the event of

[261] For example, see Natural Resources Act 9 of 1941, as amended; Land Acquisition Act 3 of 1992, as amended; Rural District Councils Act 8 of 1988, as amended & Community Land Act 13 of 2002, as amended.
[262] See generally sections 97 – 100 of the Environmental Management Act. See also Marcello M Veiga, Malcolm Scoble & Mary Louise McAllister 'Mining with communities' (2001) 25 *Natural Resources Forum* 191at 192.
[263] Ibid, sections 87 – 96. See also Tumai Murombo, op cit note 249 at 574 - 580; Marcello M Veiga et al, op cit note 262 at 192; Maxwell Matururе 'A review of the legislative and policy framework for community based natural resources management in the mining sector' 2008 *Mining Policy Sector Review* 1 at 10.
[264] Marcello M Veiga et al, op cit note 262 at 191. See also OSISA, supra note 253. See further S K Date-Bah 'Rights of indigenous people in relation to natural resources development: An African's perspective' (1998) 16 *Journal of Energy & Natural Resources Law* 389.
[265] Section 71 of the Constitution.
[266] Ibid, subsection (1)(d).
[267] See generally section 3 of the Mines Act.

expropriation of property but the conditions underpinning the expropriation must be fulfilled before a mining investor is deprived of mining rights.[268]

In the event of expropriation of mining rights, however, it must be of national interests; for example, where it has to be proved that there was underutilization or abuse of the rights.[269] The Mining Board may investigate the activities of mining rights holders with a view to establishing the true facts and give recommendations to the Minister of Mines and the President, after consultations with each rights holder.[270] The amount of compensation does not include value of the mineral resource because ownership thereof belongs to the State President. Where the investor is aggrieved regarding the amount for compensation,[271] he or she may seek redress via the municipal judicial system or arbitration depending on the preferred dispute settlement method and forum agreed in terms of the BIT (between states) or mining contract between the parties.

The Mines Act provides for expropriation of mining locations that have not been developed or worked. The Act provides for the manner in which expropriation has to be done, which must be in accordance with the law.[272] The same Act vests the Mining Commissioner with authority to transfer the expropriated mining location to the Minister of Mines for safe custody on behalf of the state.[273] Further the Act provides that any mining location expropriated on the basis of non-use or not being worked adequately, will not lead to an obligation to pay compensation.[274] This is an exception to the general rule that expropriation must be followed by fair and adequate compensation before acquiring the property or within a reasonable time after the acquisition.[275] Where the expropriation is contested, the state must use due process to obtain an order to confirm the acquisition.[276]

When the state expropriates mining locations, in terms of the general acquisition or on the basis of non-use or under-use, it exercises sovereignty. Although the state has the mandate to

[268] See generally section 71(3)(a) – (e) of the Constitution.
[269] See generally section 319 – 333 of the Mines Act.
[270] Section 321 – 323 of the Mines Act.
[271] See generally King & Spalding 'Recent developments: Zimbabwe – what legal options are available to mining companies?' 2013, available at http://www.kslaw.com/imageserver/kspublic/library/publication/ca081313.pdf (accessed 1 June 2014).
[272] See generally sections 322 -324 of the Mines Act.
[273] Section 325(1) of the Mines Act.
[274] Section 325(3) read together with section 329 of the Mines Act.
[275] Section 71(3)(c)(ii) of the Constitution.
[276] Ibid, subsection(c)(iii).

expropriate when necessary, fair compensation must be paid. However, the provisions in the law dictating to the state how expropriation should be done can be an internal limitation on sovereignty in that arbitrary expropriations are illegal. The limitation can be binding if the state upholds the requirements of international law in this regard. Also, it can be argued that the requirement to pay compensation reduces the revenues that might be available for development. The Zimbabwe government has no capital for compensation; this alone is a factor restricting the sovereign to expropriate.

### 4.4.8 Exchange Controls and Repatriation of Profits

The rules regarding repatriation of profits discussed in chapter 2 apply to Zimbabwe because it is a member of the IMF. Being a developing state, Zimbabwe enjoys the benefits of the exception extended to developing countries regarding repatriation of profits.[277] Due to this exception, developing countries that have exchange controls can be referred to as "Article XIV countries" after the provision in the IMF Rules which allows domestic policy and measures in order to regulate exchange controls for developing states. Measures on exchange controls were a common feature in the 1990s in developing countries and protectionist movement of foreign currency across national boundaries but were largely abandoned when the coil of trade and globalization began to exert its power following advocacy for economic liberalization. In the present day, developing states which impose exchange controls use Article XIV of the IMF Rules as the exception rather than the rule.[278]

The advantages of the exception allow Zimbabwe, as a developing state, to require that a certain percentage of profits be retained in the host state. Domestic regulation of exchange controls and repatriation of profits is done by the Reserve Bank of Zimbabwe (RBZ) in terms of the RBZ Act[279] and the Exchange Control Act.[280] In terms of both Acts, repatriation of profits and how it must be done requires foreign mining investors and financial institutions

[277] See generally Article XIV of the Agreement of the IMF, 1945; hereafter the IMF Rules.
[278] See generally section 2 of Article XIV of the IMF Rules.
[279] Reserve Bank of Zimbabwe Act 5 of 1999, (Chapter 22:15), as amended; hereafter the RBZ Act.
[280] Section 5 of the Exchange Control Act, read with section 11 of Exchange Control Regulations - Statutory Instrument 109 of 1996. See also *S v Makamba* 2004 ZWSC 11, a case involving breach of certain provisions of the Exchange Control Act.

dealing in foreign currency to be holders of valid licences,[281] unless an exception is granted by the RBZ.[282]

> While all new foreign shareholders post 1992 in Zimbabwe are permitted to remit full dividends declared from current after tax trading profits, [however],these remittances are subject to approval by the RBZ or an authorised dealer and confirmation that no recourse to local borrowing will be necessary. Although [a foreign mining investor] may be able to thereby to remit 100 percent of any dividends which it may pay in the future, **the ability to do so will be dependent on the availability of foreign currency in Zimbabwe and <u>the RBZ's willingness to prioritise</u> the remittance of the foreign currency component of the company's dividend**.[283] [the words in bold is my emphasis].

The highlighted, and more particularly the underlined, show that the RBZ is the highest domestic monetary authority with discretion to approve repatriation of profits, as well as payment of current transactions. It can therefore be argued that the state asserts sovereignty regarding these issues. However, the requirement to uphold IMF Rules on repatriation of profits, and in order to remain in good standing, restricts Zimbabwe from adopting control measures to the contrary.[284] Accordingly, Article VIII of the IMF Rules compels Zimbabwe to avoid restrictions on payment of current transactions and discriminatory currency practices.[285]

Although Zimbabwe asserts sovereignty as shown above, however, "the conditions to determine willingness" can be a barrier to foreign investment in the absence of legislative clarity regarding repatriation of profits and payment of current transactions; for example, the adverse measures undertaken by the RBZ against mining companies such as the order to stop processing Zimplats' export transactions in order to compel the investor to comply with exchange control regulations.[286] However, in 2014 the RBZ was compelled to relax its strict foreign exchange regulations as part of the measures to stimulate foreign direct investment.[287] Also, foreign mining companies are under intense pressure from government to comply with indigenization law, '[…] whereby 51 percent of a company's shares must be owned by indigenous (black) Zimbabweans'.[288] In these instances Zimbabwe asserted its sovereignty.

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[281] See generally section 50 of the RBZ Act.
[282] See generally Tony Hawkins 'Zimplats export payments halted by bank' 2012, available at http://lists.fahamu.org/pipermail/debate-list/2012-June/029975.html (accessed 3 February 2015).
[283] Cambri Africa 'Risks relating to investing in Zimbabwe' at 3, available at www.cambriaafrica.com (2 June 2014).
[284] Rubens Ricupero 'Foreword' in United Nations Conference on Trade and Development – Geneva (UNCTAD) (ed) *Tax Incentives and Foreign Direct Investment: A Global Survey* (2000) ASIT Advisory Studies No. 16 at 3. Also, reference is made to the case of apartheid South Africa discussed in chapter 2.
[285] See sections 2 and 3 of Article VIII of the IMF Rules respectively.
[286] Ibid.
[287] Kudzai Chawafambira 'RBZ relaxes exchange controls' *Daily News*, 15 October 2014. See also Cambri Africa, supra note 283 at 5 – 6.
[288] Tony Hawkins, op cit note 282.

The outworking of sovereignty and taking into account the international law principles of self-determination and non-interference discussed in chapter 2, shows that Zimbabwe asserts sovereignty by adopting regulatory measures regarding how repatriation of profits and payment of current transactions has to be done, as well as compelling mining investors co comply with domestic laws.

### 4.4.9 Equitable Treatment of Mining Foreign Investors

Zimbabwe's "Look East Policy" (LEP) could lead to preferential treatment of foreign mining investors, giving preference to those from eastern countries over the west. Although there is no complaint over the issue one can argue that Chinese mining investors could be enjoying preference especially on the 51 percent indigenization requirement. The assumption is based on the preferential strategy - "LEP". The absence of detail regarding uniform application of the indigenization law to all foreign mining companies operating in the country provides no clarity whether the law is applied without bias. Ideally, it can be argued that Zimbabwe is a sovereign state and therefore cannot be compelled to treat all foreign mining investors (from different countries) the same, as well as to comply with indigenization requirements.

### 4.4.10 Revenue Transparency and Accountability

The use and management of revenue from mineral resources require transparency and accountability in order to realize the contribution of resources towards national development. Zimbabwe does not have explicit policies on mandatory transparency and accountability: This is supported by mining legislation that does not provide for declaration of mineral resource payments to the State.

The absence of domestic law or provisions for compulsory declaration of payments and publication of what mining companies pay to the state, as well as Zimbabwe not being a member of the Extractive Industries Transparency Initiatives (EITI), Publish What You Pay Zimbabwe (PWYP Zimbabwe) – a branch of the global network of civil society organizations

united in their call for transparency and accountability in the mineral value chain, and regulatory institutions.[289]

> It is largely uncontested that there is opacity in Zimbabwe's mining sector. In the previous Government of National Unity [2008-2013], there was finger-pointing between the Ministry of Finance, the diamond mining companies and the Ministry of Mines and Mining Development with respect to the receipt of diamond mining revenues. The Ministry of Finance from the 2010 to the 2013 National Budget Statements has been on record stating that there have been leakages in the flow of diamond mining revenues. Meanwhile, the Ministry of Mines and Mining Development has openly stated that it solely concerns itself with mineral production and not mining revenues. This finger-pointing and blame shifting has clearly shown that the details surrounding diamond mining revenues are murky and shrouded in secrecy.[290]

Lack of political will and high level corruption in the sector (discussed below) makes it necessary for civil society and stakeholders to pressure government and mining companies operating in the country to publish their contracts and revenues, as well as the types of taxes they are paying and the amounts, and what is exempted. This can be a strategy that can improve transparency in the minerals sector.[291]

As highlighted above, the vaunted Zimbabwe Iron and Steel Company (ZISCO), and Essar agreement has been in limbo since its signature in August 2011. The details of the agreement were not publicized '[…] save for the fact that the source of inertia has been the valuation of iron ore assets central to the deal'.[292] Also, there has been no transparency regarding mining deals that were concluded as part of compliance with the indigenization law. Whereas Zimbabwe has exercised its sovereignty, on the one hand, there is unwillingness to allow public scrutiny of the mining sector and, on the other hand, the trend in many African states endowed with mineral resources '[…] has been to open the process of granting mining claims to public participation'.[293] The variations can be a source of debate regarding the regulatory system, which is weak and devoid of transparency and accountability. This is further compounded by the fact that;

> [t]he controversy surrounding diamond mining has not been restricted to revenues accruing from the diamond mines but extends to the contracts entered into by the government and private investors in Marange. The finer details surrounding the engagement of core mining

[289] Publish What You Pay (PWYP) Zimbabwe 'PWYP Zimbabwe calls for the country's mining institutions to be more transparent' 2014, available at http://www.publishwhatyoupay.org/resources/pwyp-zimbabwe-calls-countrys-mining-institutions-be-more-transparent (accessed 3 December 2014).
[290] PWYP Zimbabwe 'A false dawn for transparency and accountability in Zimbabwe's Mining Sector' 2013, available at http://www.publishwhatyoupay.org/resources/false-dawn-transparency-and-accountability-zimbabwe%E2%80%99s-mining-sector (accessed 3 December 2014).
[291] Veneranda Langa 'Mining companies should divulge earnings' *Newsday*, 29 August 2011.
[292] PWYP Zimbabwe, supra note 290.
[293] Ibid.

> have not been made public and are the subject of a court case that has been raging since 2010.[294]

Given the background of mistrust and secrecy in the minerals sector and the value chain, one would argue that the assertion of sovereignty over resources is fraught with weaknesses that can breed corruption; and the loopholes can be a deliberate ploy in order to avoid transparency and accountability, and public scrutiny of the manner in which the revenues are used and managed. One would also argue that practice of secrecy spur self-serving interests and not the objectives of the state as entrenched in the AMV, which advocates for, among others, transparency and accountability in the regulation and exploitation of domestic mineral resources.

### 4.4.11 Strategic Planning on how to use Mineral Resources for Development

The Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset) is a strategic planning blue-print that includes how to use and manage mineral resources for development (for the period spanning October 2013 and December 2018).[295]

> In pursuit of a new trajectory of accelerated economic growth and wealth creation, [the] Government has formulated a new plan known as the [Zim-Asset]. Zim-Asset was crafted to achieve sustainable development and social equity anchored on indigenization, empowerment and employment creation which will be largely propelled by the judicious exploitation of the country's abundant […] natural resources.[296]

In order to achieve strategic planning, the Zim–Asset provides an improved planning tool for mineral resources development by developing a reliable database for the country's minerals and strengthening the Geological Survey Unit (GSU). There is also the need to evaluate the country's minerals in order to determine and develop a pattern for exploitation the resources.[297] There is the need to restore fiscal sustainability and strengthen fiscal management by combatting corruption, and fostering good governance, transparency and accountability.[298] Undertaking policy formulation, advocacy and coordination, as well as promoting investment by improving the country's "doing business or investment environment" in order to ensure optimum exploitation of mineral resources is imperative.[299]

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[294] Ibid.
[295] Government of Zimbabwe (ZIM–Asset) 'Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset): Towards an Empowered Society and a Growing Economy', 2013.
[296] Ibid, at 6.
[297] Ibid, at 108.
[298] Zim-Asset, supra note 295 at 119.
[299] Ibid, at 117.

Mineral beneficiation and value addition through establishing diamond cutting and polishing centres is fundamental.[300] This strategy, Zim-Asset notes, is the anchor that can boost revenues through value increase on the market. The private sector is encouraged to take an active role in funding and executing these activities and providing the required support regarding alignment, consistency and cohesion of policies that include mining or minerals development policy, national trade policy and indigenization policy, as well as local authority licensing and regulation policy.[301] However, the success of beneficiation and value addition is dependent on availability of primary enablers such as reliable and affordable electricity, water and infrastructure.[302]

Underpinning the above strategy and objectives, is the need to curb corruption and strengthen the State's regulatory capacity. The Zim-Asset provides for zero tolerance of corruption, and in order to achieve this goal the state has to strengthen and capacitate anti-corruption agencies through code of ethics and values, and to implement and impose stiff criminal penalties on offenders.[303] Accordingly, the requirement to implement mechanisms in order to curb corruption is an assertion of Zimbabwe's sovereignty over mineral resources.

### 4.4.12 Non-judicial Dispute Settlement

The Constitution of Zimbabwe is the supreme law of the country.[304] Among other things, it provides for the establishment of the domestic judiciary, the hierarchy of the courts and their composition,[305] as well as jurisdiction.[306] The judicial authority is derived from the people of Zimbabwe and it is vested in the courts.[307] The courts are independent (in theory) and only subject to the Constitution and municipal laws of which they are the custodians.[308] The Mines Act provides for dispute settlement; mining commissioners have powers to resolve mining issues as well as domestic courts. Apart from the judicial processes to resolve disputes, Zimbabwe acknowledges arbitration as an integral aspect for dispute settlement. Two Acts were enacted for this purpose; namely, the Arbitration Act (Trade Arbitration Act)[309] which is

[300] Ibid, at 114.
[301] Ibid, at 102.
[302] Ibid.
[303] See generally Zim-Asset, supra note 295 at 126.
[304] Section 2 of the Constitution.
[305] Sections 162 – 165 of the Constitution.
[306] See generally sections 166 – 176 of the Constitution
[307] Section 162 of the Constitution.
[308] Section 164 of the Constitution.
[309] Arbitration Act 6 of 1996, (Chapter 7:15) as amended.

dedicated to settlement of trade issues and Arbitration International Investment Disputes Act (Investment Arbitration Act)[310] for international investment disputes. The Investment Arbitration Act is directly relevant to this section because it relates to resolving mining investment issues.

The Mines Act does not provide for mining investment arbitration; however, any mining complaint or dispute has to be investigated and decided upon by the mining commissioner in the first instance.[311] The mining commissioner plays a fundamental role in the preliminary stages of a mining or mineral resource dispute settlement. The commissioner may convene a court in any part of the mining district to which he or she is appointed, or at his or her discretion and to the convenience of the parties to the dispute, may convene a court outside the mining district.[312] This is assertion of state sovereignty. The magistrates' court procedures are observed in the commissioner's court.[313] In certain circumstances, a magistrate may hear and make determinations on matters arising under the Mines Act or when a party to the dispute requests that the matter be heard by a magistrate instead of the commissioner.[314] Further, a party may appeal to the High Court or Supreme Court of Zimbabwe against the decision of the commissioner's court.[315] Depending on the circumstances and the gravity of the matter, however, the High Court of Zimbabwe has original jurisdiction in civil matters, complaints or disputes that may arise under the Mines Act.[316] However, the Mines Act is silent and does not expressly affirm that mining-related disputes between Zimbabwe and foreign investors can be referred to domestic arbitration.

Regardless of the shortfalls of the Mines Act, the Investment Arbitration Act spells out the framework and scope for, as well as the circumstances under which an investor may request domestic arbitration. As a general rule, what may be arbitrated could be any investment dispute, which the parties to a dispute agreed to submit to arbitration.[317] However, the Act provides for a category of matters that are not subject to arbitration, which include criminal cases and disputes which in terms of the laws of Zimbabwe cannot be determined through

[310] Arbitration (International Investment Disputes) Act 16 of 1995, (Chapter 7:03) as amended; hereafter Investment Arbitration Act.
[311] Sections 345 & 348 of the Mines Act.
[312] Section 346 of the Mines Act.
[313] Section 360 of the Mines Act.
[314] Section 362 of the Mines Act.
[315] Section 361 of the Mines Act.
[316] Section 345(1) of the Mines Act.
[317] Sections 4(1) & 5 of the Arbitration Act.

arbitration.[318] Further, the Act gave effect to domestic and international arbitration agreements by recognizing aspects of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[319] whereas the Trade Arbitration Act domesticated some of the modifications that were brought in by the Model Law on International Commercial Arbitration that was adopted by the UN Commission on International Trade Law.[320] Therefore one can say Zimbabwe legitimately acknowledges and upholds the law of international arbitration in dispute settlement.

With regard to the hierarchy of domestic courts, the Investment Arbitration Act seemingly gives the ICSID tribunal higher status than local courts. The Act provides that;

> [i]f any proceedings are instituted in any [domestic] court in regard to any matter which, under the [ICSID Convention], is required to be submitted to the [ICSID Arbitration Tribunal] for conciliation or arbitration, any party to the proceedings may apply to the court to stay the proceedings, and the court, unless satisfied that the matter is not required to be submitted to the [ICSID Tribunal], shall make an order staying the proceedings.[321]

From this provision, the use of "shall" is imperative and denotes that domestic courts must give precedence to any application submitted to the ICSID regardless of the fact that the same issue was pending before a local court. However, one may argue that domesticating and giving legal effect to the ICSID Convention adversely affects Zimbabwe's assertion of sovereignty.[322] Further the legal effect of domestic recognition of international arbitration freezes the competence and jurisdiction of municipal courts to exercise their constitutional mandate over the issue. Domestic courts cannot hear the issue once a decision has been made by the ICSID because the decisions are non-appealable.[323] Furthermore, domestic courts are robbed of their constitutional legitimacy and mandate; the courts become incapable of supporting the assertion of Zimbabwe's sovereignty. In other words, the ICSID tribunal acts authoritatively like the Supreme Court of Zimbabwe.

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[318] In terms of section 4(2) of the Arbitration Act, other matters that are not subject to arbitration include agreements that are contrary to public policy; matters relating to a consumer contract in terms of the Consumer Contracts Act, Chapter 8:03; matters which affects the interests of minors or an individual under legal disability unless the High Court as the upper guardian of all minors concerns thereto; matters relating to matrimonial cause or relating to status.

[319] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, adopted in New York on 10 June 1958.

[320] UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, first adopted on 21 June 1985, with amendments as adopted in 2006.

[321] Section 7 of the Investment Arbitration Act.

[322] See generally Guy Roberts 'Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court' (2001) 17 *American University International Law Review* 36.

[323] Article 53(1) of the ICSID Convention.

Depending on the nature and gravity of the dispute as provided for in the Investment Arbitration Act, a party may proceed by way of domestic or international arbitration.[324] Since Zimbabwe concluded bilateral investments agreements with some countries, reference is made to dispute settlement provisions as provided for in the BITs. For example, the Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments has provision for dispute settlement between the two Contracting States and between an investor from either Contracting State.[325] Article 8(1) of the China-Zimbabwe BIT provides that any dispute between the two Contracting States concerning interpretation or application of the BIT, the issue shall be settled by consultation through diplomatic channels. In the event that the dispute cannot be settled within a period of less than six months, '[…] it shall upon the request of either Contracting Party, be submitted to an *ad hoc* arbitral tribunal'[326] and the composition of the tribunal is provided for in terms of the BIT.[327] The tribunal is given powers to determine its own procedures and settle the dispute in accordance with provisions of the BIT, as well as principles of international law recognized by the Contracting States.[328] The decision of the tribunal shall be binding on both states and is non-appealable.[329] Also, Zimbabwe legally recognizes the importance of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[330] and the international Arbitration Tribunal established under it. As a sign for the recognition, the Investment Arbitration Act was enacted in order to domesticate aspects of the Convention.[331] Further, Zimbabwe recognizes the awards of the tribunal, which are only enforced by domestic courts after they are registered with the High Court of Zimbabwe.[332] The Investment Arbitration Act provides for the procedure which a party intending to register the award has to follow.[333] When registered, the legal effect of the award is that it becomes recognized in the country and carries legal authority as awards made by the High Court of

[324] See generally Articles 3(2), 4 & 5 of the Arbitration Act. See also Articles 8, 9, 35 & 36 of the UNCITRAL Model Law on International Commercial Arbitration of 1985, as modified by the Arbitration Act.
[325] See generally Articles 8 & 9 of the Agreement Between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments of 21 May 1996; hereafter the China – Zimbabwe BIT.
[326] Ibid, at Article 8(2).
[327] Ibid, at Article 8(3) – (4).
[328] Ibid, at Article 8(5).
[329] Ibid, at Article 8(6) – (7).
[330] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965; hereafter ICSID Convention. Zimbabwe ratified the Convention on 20 May 1994.
[331] Preamble to the Investment Arbitration Act.
[332] Section 4(1) of the Investment Arbitration Act.
[333] Ibid, at subsection (2).

Zimbabwe. Therefore the High Court has control of the award and it has to be executed as an order of the Court.[334]

Article 9(1) of the China-Zimbabwe BIT provides for dispute settlement between Zimbabwe and Chinese investors in Zimbabwe, which shall '[…] as far as possible, be settled amicably through negotiations between the parties to the dispute'.[335] In the event that the dispute is not resolved within six months from the time of initiating the settlement process, any party to the dispute is entitled to approach a competent court of the host state to hear the matter. If the dispute involves expropriation and compensation, and has not been settled within a period of six months, at the request of a party to the dispute, an *ad hoc* arbitral tribunal may be established and its composition is guided by the relevant provisions of the BIT.[336] If there are delays to constitute the panel of the arbitral tribunal, any party to the dispute is entitled to invite '[…] Secretary General of the [ICSID] to make the necessary appointments'.[337] With regard to choice of law, the tribunal has to determine its own procedures and may resort to the Arbitration Rules of the ICSID; the decision of the tribunal is final and binding on the parties.[338] With reference to Chinese mining investors operating in Zimbabwe, the BIT protects their investment interests against expropriation as well as any form of discrimination or unfair treatment.[339]

BITs create rights and duties between the Contracting States. The conclusion of the China - Zimbabwe BIT created treaty obligations binding on Zimbabwe, as the host mining state, to render fair and equitable treatment,[340] full protection and security.[341] The treatment ought to be not less favourable than that is granted to local mining investors or any other mining

[334] Section 5 of the Investment Arbitration Act.
[335] Article 9(1) of the China – Zimbabwe BIT. See also Antonio R Parra 'The enforcement of ICSID arbitral awards' 24th Joint Colloquium on International Arbitration, Paris on 16 November 2007, available at http://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf (accessed 23 June 2014).
[336] Ibid, Article 9(4).
[337] Ibid.
[338] Ibid, Article 9(5).
[339] See generally Articles 3 & 5 of the Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of 25 October 1996; Articles 2, 3 & 4 of the Agreement between the Government of the Republic of Zimbabwe and Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of 29 September 1995; Article 4 & 6 of the Agreement between the Swiss Confederation and the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of 15 August 1996.
[340] Article 3(1) of China – Zimbabwe BIT. See also Article 3 of the Denmark – Zimbabwe BIT; Article 2(1) of the Germany – Zimbabwe BIT; Article 3(1) of the Netherlands – Zimbabwe BIT & Article 4(1) of the Switzerland – Zimbabwe BIT.
[341] Article 3(1) of the China – Zimbabwe BIT. See also Article 3(1) of the Netherlands – Zimbabwe BIT; Article 4(1) of the Germany – Zimbabwe BIT & Article 4(1) of the Switzerland – Zimbabwe BIT.

investors from a non-Contracting State.[342] In the event that the obligations are breached, as referred to in chapter 2,[343] this may lead to the BIT being adversely interpreted against Zimbabwe. This is due to fact that the BIT is a treaty in character, and therefore binding only on the parties involved; Zimbabwe being the host state has obligations while the investors from China (Contracting State) have rights which Zimbabwe must protect.

The objective of the Bilateral Investment Promotion and Protection Agreement (BIPPA) between South Africa and Zimbabwe[344] was to create favourable conditions for greater investment by South African investors in Zimbabwe. In the event of a dispute arising, the BIPPA provides for settlement mechanisms and if the dispute is not settled amicably, it may at the choice of the investor, be submitted for arbitration under the rules of the ICSID or UNCITRAL.[345] However, '[d]ue to the non-prescriptive wording of Article 7' of the BIPPA,[346] one of the applicants - a South African company, Amari Nickel Holding Zimbabwe Ltd, and its other partner Amaplat Mauritius, chose the International Chamber of Commerce's International Court of Arbitration rules to be applied to the arbitration proceedings. The applicants sued the respondent for cancelling Memoranda of Understanding that were concluded by the parties for platinum and nickel concessions.[347] The two companies then sued the ZMDC for US$35 million for damages suffered as a result of the unilateral cancellation of the agreements, which include the exploration rights concerning platinum that the applicants intended to explore and then exploit in Zimbabwe through a joint venture with the Respondent. On the arbitration panel was a British barrister, Stewart Isaacs, who was nominated by the United Kingdom International Chamber of Commerce National Committee to chair the tribunal. However, the ZMDC objected to the nomination on the basis

[342] Article 3(2) of the China – Zimbabwe BIT. See also Article 3(2) of the Netherlands – Zimbabwe BIT.
[343] See generally Ioana Tudor *The Fair & Equitable Treatment Standard in The International Law of Foreign Investment* (2008).
[344] Bilateral Investment on Promotion and Protection Agreement between South Africa and Zimbabwe of 2009 was ratified on 11 May 2010; hereafter BIPPA. See also the Promotion and Reciprocal Protection of Investments Agreement between the Governments of the Republic of South Africa and the Republic of Zimbabwe, Explanatory Memorandum, prepared by the International Trade and Economic Development Division (ITED), the South African Department of Trade and Industry 2010, available at http://www.thedti.gov.za/parliament/040610_RSA_zimbabwe_Agreement.pdf (accessed 18 April 2014).
[345] Ibid, at Article 7 of the BIPPA. See also S J Berwin 'Zimbabwe fighting off foreign investor's lawsuit following cancellation of mining exploration right' 2011, available at www.iccwbo.org/arbitration (accessed 2 April 2014). See also John Kachembere '$45m govt cash seized' *Daily News Live*, 15 September 2014; Business Day 'Seized $45m sours Zimbabwe relations with Brussels' *New Zimbabwe*, 19 September 2014; Ndamu Sandu 'ZMDC to stave off Amari threat' *Newsday*, 18 September 2014; Ray Ndlovu 'Zimbabwe sends legal team to Belgium over diamond revenue seizure' *Business Day - DB Live*, 19 September 2014
[346] Ibid.
[347] *Amaplat Mauritius Limited and Another v Zimbabwe Mining Development Corporation and Others*, Case No: HC 506/2011 & (2011) ZWHHC 52.

that a British national would be biased against it and that his home country was against Zimbabwe. Also, the ZMDC claimed that it was the UK that persuaded the EU to impose targeted sanctions on President Mugabe and his ruling elite. Further the ZMDC alleged that Isaacs persuaded the South African judge to be biased against it. This was the basis upon which the ZMDC tried to have the two removed by taking the issue to court in Cape Town, South Africa, but the court ruled against it.[348] The ZMDC then approached the International Court of Arbitration in Paris, France, and again lost the case.[349] Unsatisfied with the decisions of the two decisions, the ZMDC approached the High Court of Zambia where it finally got a provisional order to stop all the arbitration proceedings until the dispute on the appointment of Isaacs and South African judge was finalized.[350]

This is classical case that might convince any potential investor that it is better to steer clear of Zimbabwe. After all, Zimbabwe through its agent the ZMDC asserted its sovereignty by cancelling the exploration and mining agreements it had concluded with the two applicants.

From the case above, it can be argued that when Zimbabwe government concluded the BITs, which it entered freely while asserting its sovereignty, and in the same process of assertion of sovereignty, it adversely restricted that sovereignty. Further, the choices of law and forum adversely rendered Zimbabwe municipal law and courts, which are the internal reasons for sovereignty to be dysfunctional. Furthermore, by appearing before the South African court, ICC International Court of Arbitration and the Zambian High Court, Zimbabwe surrendered certain portion of its sovereignty to supernatural international arbitration forums, and courts.

### 4.5 Threats to Sovereignty over Mineral Resources

Various domestic factors have the potential to further weaken the assertion of state sovereignty over domestic mineral resources. As discussed in chapter 3, a few have been chosen with a viewing to show the manner in which Zimbabwe's assertion of sovereignty over domestic mineral resources is further restricted.

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[348] *ZMDC v Amari Nickel Holding Zimbabwe Ltd & Amaplat Mauritius*, Cape Town High Court of 2012 (unreported).
[349] *ZMDC v Amari Nickel Holding Zimbabwe Ltd & Amaplat Mauritius*, International Chamber of Commerce (ICC)'s International Court of Arbitration 2013 (unreported).
[350] *ZMDC v Amari Nickel Holding Zimbabwe Ltd & Amaplat Mauritius*, HC of Zambia Case of 2012 (unreported). At the time of writing, it was not clear whether the applicants' claim for US$35million was resolved.

### 4.5.1 Illegal Mining

Illegal mining can be defined as unlawful access to, and exploitation of a mineral resource. The absence of lawful rights is inferred from engaging in mining or related activities without a valid licence or mineral transportation permit, as well as any documents that legitimizes the operations.[351] Illegal mining also includes blood diamonds because they are exploited clandestinely and traded illegally.[352] It is unlawful to exploit any mineral resource in Zimbabwe without a valid licence.

Unconfirmed reports point out that illegal mining is on the increase throughout the country. For example, unconfirmed reports say police have failed to stop thousands of illegal miners from invading Doves area in Inyathi, Bubi district following the discovery of gold deposits.[353] Further, it is reported that the uncertainty regarding the future control of Marange diamond claims has caused rapid increase in illegal diamond panning '[…] with a brutal response being meted out by security details'.[354] Furthermore, it is reported that syndicates of diamond panners are active at the diamond fields since the alluvial diamond deposits were discovered. However, according to the Center for Research and Development, the recent months have witnessed an increase in the numbers of panners and syndicates engaging in illegal mining of alluvial diamonds.[355] Since the government announced that it was planning to hand over control of the Marange diamond fields to one mining company, production has reportedly gone down. The announcement affected diamond mining companies in Marange and since then, it was reported that the companies are failing to pay their workers who are now alleged to be involved in illegal mining to make ends meet.[356] The communities surrounding the diamond fields and those who were forced to relocate have experienced poverty-stricken lives and are reportedly not benefited since the commencement of commercial mining operations.

[351] Philippe Dozolme 'What is illegal mining' 2014, available at http://mining.about.com/od/OperationsManagement/a/What-Is-Illegal-Mining.htm (accessed 3 January 2014).
[352] Ibid.
[353] See for example, 'Gold rush in Inyathi', *NewsdzeZimbabwe*, 19 July 2014.
[354] Alex Bell 'Illegal diamond panning on the rise amidst Chiadzwa uncertainty' *SW Radio Africa*, 20 June 2014.
[355] Centre for Research and Development (CRD), available at http://www.crdzim.com (accessed 20 June 2014).
[356] Alex Bell, op cit note 354.

Illegal mining potentially causes problems; it has put citizens against each other in Marange diamond fields before the state used force to reclaim the area, and indigenous people against the Chinese miners along the major rivers across the country. Illegal miners, among them foreigners such as Chinese and Nigerians, have taken advantage of weak enforcement capacity and corruption in the mining sector, as well as the overall regulatory structures.[357] Undeniably, illegal mining undermines state sovereignty because the operations are unauthorized and unregulated, as well as not compliant with domestic laws.[358] Exacerbating the situation is the fact illegal miners use illegal channels to siphon the resources out of the country, thereby depriving the state the right of control over processes and revenues.[359] This undermines the assertion of sovereignty over domestic minerals and the potential to derive economic benefits to spur national development through the exploitation of minerals.

Also, illegal mining is reportedly associated with some politicians, who are using their agents to unlawfully engage in mining and trade of minerals.[360] The practice has the potential to undermine national development, as well as restrict the minerals sector's potential contribution to the economy. The Mines Act is not explicit about artisanal mining. Regardless of the silence, however, Zimbabwe attempts to navigate illegal mining by criminalizing the activities through legislative and executive actions.

### 4.5.2 Corruption

Unconfirmed reports allege that some politicians use their influence and intimidation in order to derive self-serving economic benefits from mining companies. In addition, influential officials in government and the Ministry of Mines have been accused of demanding bribes.[361] To escape attention and public scrutiny, these politicians use agents or runners in the mining

[357] Mouhamadou Kane 'Ghana takes action against illegal Chinese miners' *Institute for Security Studies, Africa*, 27 August 2013.
[358] Ibid.
[359] Ibid. See also The 2014 National Budget Statement, presented to the Parliament of Zimbabwe on 19 December 2013 by the Minister of Finance and Economic Development, Patrick A Chinamasa.
[360] Bernard Chiketo 'Zimbabwe's Marange diamonds: ZANU-PF's best friend?' *Think Africa Press*, 4 February 2013. See also Andrew Mambondiyani 'Biti mines into details of the Zimbabwe diamond industry' *Think Africa Press*, 3 August 2011.
[361] Owen Gagare 'ZANU PF ministers demand $10 million bribe' *Zimbabwe Independent*, 14 December 2012. See also Zvamaida Murwira 'Ex-ZMDC boss in $6 million scandal' *The Herald*, 18 September 2013; The Editor 'Mugabe's legacy rests on uprooting corruption' *The Standard*, 22 September 2013; Xolisani Ncube 'Stop the rot, Mugabe urged' *The Zimbabwe Mail*, 30 September 2013; Transparency International - Zimbabwe 'Diamond now the hub of corruption in mining', available at http://www.transparency.org.zw/index.php/media-centre/articles/65-diamonds-now-hub-of-corruption-in-mining (accessed 13 September 2013); Farai S Mtondoro et al, op cit note 170 at 2 – 6 & 12 – 15.

or trade of the minerals.[362] Former Minister of Mines, Obert Mpofu, allegedly dismissed calls for transparency and accountability in the mining sector arguing that one has to reap where he sows.[363] Further the Parliamentary Portfolio Committee on Mines and Energy (PPC) was in April 2010 and August 2010 denied access into the Marange diamond fields in order to conduct on-site inspections of the mining companies' operations.[364] The basis for denying entry to the PPC was allegedly that it needed police clearance because the site was protected in terms of the Protected Places and Areas Act.[365] However, it is reported that the Marange diamond fields are not legally declared a protected area in terms of the Protected Places and Areas Act. Regardless of the inconsistencies, the Kimberley Process Certification Scheme (KPCS) monitor, Abbey Chikane and international monitoring groups were allowed access and, without any restrictions, free entry into the diamond fields.[366] News reporters were barred from, and activities in the diamond fields are shielded from public scrutiny. The only body that attempted to uncover the facts on the ground with the intention of reporting to Parliament was the PPC on Mines and Energy. However, when permission was granted, the publication of the first report of the PPC on Mines and Energy over Marange diamonds was not debated in Parliament. As reported, it is alleged that the findings were very controversial and the cause for the assassination of the chairperson of the PPC on Mines and Energy, Chindori–Chininga, a few days after he presented the adverse report before Parliament.[367]

In its investigation on Foreign Affairs, Industry and International Trade, the PPC found that another parastatal, former Ziscosteel entered into partnership with a foreign investor, Global Steel Holdings Limited, without a public tender.[368] It is reported that Mpofu, who at that time was a Minister of Industry and International Trade, professed ignorance of the legal procedure as required by law.[369] Entering into joint partnership without public tender violates

[362] Farai S Mtondoro et al, op cit note 70 at 7.
[363] Partnership Africa Canada, supra note 245 at 1. See also Newsday 'Shut up on diamond money' *Newsday*, 28 July 2012.
[364] Chindori–Chininga, op cit note 51 at 6 – 7.
[365] Section 5 of the Protected Places and Areas Act, 1996 revised edition.
[366] Chindori–Chininga, op cit note 51 at 7. See generally Transparency International –Zimbabwe 'Diamonds now hub of corruption in mining' 2012, available at http://www.transparency.org.zw/index.php/media-centre/articles/65-diamonds-now-hub-of-corruption-in-mining (accessed 28 January 2013).
[367] It was reportedly stated that "Baba Jukwa" warned the late Chindori-Chininga few weeks before his assassination that he was in danger. See generally Letters to the Editor 'Exactly how Chindori-Chininga died: Baba Jukwa' *ZimEye*, 22 June 2013; Lance Guma 'MP Chindori-Chininga dies in car crash' *Nehanda Radio: Zimbabwe News and Internet Radio Station*, 19 June 2013.
[368] Ibid.
[369] Second Report of the PPC on Foreign Affairs, Industry and International Trade on the management of contracts between Ziscosteel and Global Steel Holdings Limited, presented to Parliament in March 2007 during the Second Session of the Sixth Parliament of Zimbabwe.

certain provisions of Zimbabwe's Procurement Act, which require a state enterprise wishing to form a joint partnership with private investors, to request the Government's Procurement Board to publicly invite tenders on its behalf.[370] Against this background, it can be argued that there was deliberate contravention of the law and analysis shows that joint mining operations could have been formed in opaque ways with little regard to the relevant domestic laws. The fact that Zimbabwe is touting for joint mining ventures to exploit domestic mineral resources could be concluded that plans are as little more than exchanging one form of resource plunder.[371] Therefore it may not be an overstatement to allege that corruption is promoted by deliberate circumvention of the legitimate processes, and lack of transparency and accountability.

Unconfirmed reports alleged that joint diamond mining companies that have been awarded mining rights are directly linked to the ruling party and military elites.[372] The clandestine manner in which mining negotiations and contract deals have been concluded leave the door open for corruption. Also, the executive and its officers are generally not willing to be held accountable to parliament.[373] Where state mining entities seek partnership with investors, there must be tenders to the public prior to formation of joint mining ventures; as required by the Procurement Act. However, reports show that the joint mining venture between ZMDC, on one the hand, and Mbada Diamonds and Canadile Miners, on the other hand, were not subject to public tender.[374] It is alleged the ZMDC was given names of the two mining partnership companies, on the basis that they had been approved by the Ministry of Mines.[375] It is further reported that Mpofu was tasked to spell out the procedure that was adopted in selecting the two companies, in the absence of public tenders, but there was no legitimate response.[376] It is not the first time under Mpofu's leadership of a government ministry to bypass procurement or tender procedures. Furthermore, it is reported that Mpofu admitted

[370] For example, section 31(1)(a)(i) of the Zimbabwe Procurement Act 2 of 1999, (Chapter 22:14) as amended. See also Global Witness Limited, supra note 51.at 11.
[371] Taurai Mangudhla 'Parliament should scrutinize mining deals' *Zimbabwe: The Independent*, 18 January 2013.
[372] Global Witness Limited, supra note 51 at 2. See also NewsdzeZimbabwe 'Mutasa: Mnangagwa looted Marange diamonds' *NewsdzeZimbabwe*, 1 April 2015.
[373] Chindori-Chininga, op cit note 51 at 5.
[374] Global Witness Limited, supra note 51 at 11 – 12.
[375] Notes of the ZMDC chief executive officer, Dominic Mubaiwa's testimony to the Parliamentary Portfolio Committee on Mines and Energy (PPC) hearings, 8 February 2010. The PPC is a Standing Parliamentary Investigating Committee responsible for examining the expenditure, administration and government policy. In terms of Standing Order 167, the committee has powers to call anyone, except the State President, to testify before it.
[376] Ibid. See generally Chindori-Chininga, op cit note 51 at 5 – 6& 12 – 17.

before the PPC that he was aware of the shady business deals in the mining sector, especially in Marange diamonds, but he tried to justify this by arguing that his own research showed that 'people in the diamond business globally are drug traffickers, smugglers or plain crooks'.[377] Although Mpofu tried to justify the shady deals in the mining sector by comparing to global trends, as alleged, this is an indirect acknowledgement of corruption in the sector. Arguably, Mpofu's remarks suggest an extremely worrying trend underlying the rationale for establishment of joint mining ventures, namely, looting of the resources.[378] Also, Sharife's report detailed the orchestrated and clandestine manner in which high-value minerals, like diamonds, are being siphoned from the country.[379]

Furthermore, it is reported that about US$300 million collected by ZMDC and MMCZ, the two state entities which directly fall under the Ministry of Mines, did not reach the national treasury.[380] Although former Minister of Finance, Tendai Biti, ordered the Auditor-General and the Zimbabwe Revenue Authority to carry out an audit, no one was held responsible.[381] Against this background, transparency and accountability becomes a very important tool; the state has an inherent duty to ensure that revenues are controlled and held in trust for national benefit. It appears; however, that lack of political-will and failure to regulate the regulators undermine transparency and accountability, thereby facilitating orchestrated corruption in the sector.[382] It was also reported that the Minister of Finance, Chinamasa, made a startling admission that the government was incompetent to curb corruption on the basis that the offence is very sophisticated for law enforcement officers to detect and investigate.[383] The intricacy is exacerbated by the fact that both, the briber and the bribed, illegally acquire some financial benefits, therefore none of them report to the police.

[377] Proceedings of the PPC on Mines and Energy, supra note 375. See also Global Witness Limited, supra note 51 at 14.
[378] Ibid. See also Khadija Sharife. op cit note 248; Khadija Sharife 'Report on how Zimbabwean diamonds disappear', *The Zimbabwe Mail*, 22 February 2013; Alex Bell 'Zimbabwe: New report details how Zim diamonds are disappearing' *SW Radio Africa*, 22 February 2013; A Correspondent 'Chinese company talking all diamond money – Biti' 2013 at https://www.zimeye.org/?p=53710 (accessed 23 February 2013); Bernard Mpofu 'Minerals kept secret – Mutambara' *Newsday Zimbabwe*, 28 July 2012.
[379] Ibid.
[380] Chindori-Chininga, op cit note 51 at 7 – 8. See also Mining Review 'US$300 Million From Zimbabwe Diamond Sales Missing' 2011 at www.miningreview.com/node/19120 (accessed 12 April 2012);Cable News Network (CNN) 'Inside the Marange Diamond Fields' *CNN Documentary*, 16 March 2012; Partnership Africa Canada, supra note 245 at 1.
[381] Ibid.
[382] The 2012 Mid-Year Fiscal Policy Review, supra note 20 at 115.
[383] Staff Reporter 'Corruption: Chinamasa says government clueless' *New Zimbabwe*, 24 September 2014.

In a nutshell, Zimbabwe is losing mineral resource revenues through various ways including but not limited to corruption, illegal mining and smuggling. These threats have weakened and undermined the assertion of sovereignty over mineral resources, as well as the operationalization of PSNR. Corruption has also restricted the revenue base through negative effects on taxable income and opened loopholes in the tax collection system.[384]

### 4.5.3 Internal Conflicts

In contrast to the cold war period, present day domestic conflicts are less about seizing the reins of a state than about controlling or plundering natural resources.[385] Internal conflicts in Zimbabwe are not caused by armed conflicts but policy differences regarding the manner in which natural resources have to be regulated in order to avoid resource plunder. Resource conflicts in Zimbabwe have their origin in long-standing and unsettled domestic disputes. The need to redress this as a matter of urgency and without proper structures in place may spoil the good intentions of resource regulation thereby causing and promoting self-serving interests, and illegal access to the resources.[386]

The major post-independence Zimbabwean conflict over mineral resources occurred in the Marange diamond fields.[387] The discovery of alluvial diamonds in Marange in 2006 could have influenced some people to engage in illegal diamond mining. It is reported that thousands of people were involved in diamond panning and illegal trade. When the government became aware that it was losing potential revenue from untapped Marange diamonds, the first step was to control the diamond fields, by sending the army and police. It was reported in 2007 that police officers who were manning the diamond fields allegedly used force to compel illegal diamond miners to work in syndicates and get bribes, or beat and killed those who refused to follow their orders.[388] The 2008 economic hardships pushed many

[384] World Bank, supra note 169. See also the World Bank 'Corruption & Fiscal Stability' 2011, available at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,contentMDK:20222094~menuPK:384473~pagePK:148956~piPK:216618~theSitePK:384455~isCURL:Y,00.html (accessed 13 May 2013).
[385] Ibid.
[386] Ibid. See generally Mzukisi Qobo 'Outline of Intra-State conflict in Zimbabwe and regional challenges' 2009, available at http://www.idrc.ca/en/ev-132675-201-1-DO_TOPIC.html (accessed 9 October 2014).
[387] Global Witness Limited, supra note 51 at 6 – 8. See also Victoria Eastwood & Robyn Curnow 'Inside Zimbabwe's Marange diamond field' *Cable News Network* (*CNN)*, 16 March 2012.
[388] For more detail of human rights abuses in the Marange diamond fields from 2006 to 2009, see Human Rights Watch 'Diamonds in the rough' 2009, available at http://www.hrw.org/en/node/83957/section/1 (accessed 2 May 2013).

ordinary Zimbabweans to the diamond fields in the hope of finding alluvial diamonds.[389] It is reported that state control of the diamond fields initially failed because of the large numbers of illegal miners and as a last resort, force was used to control and stop illegal diamond mining.[390]

Unconfirmed reports provide detail on the operation that was undertaken by the police, army and security agents known as 'Operation Hakudzokwi', which translates to "You Shall Never Return".[391] This meant that the illegal miners would not return to the diamond fields after the operation. It is reported that five military helicopters armed with automatic rifles fired live ammunition and teargas at the unarmed illegal miners in the diamond fields and at the same time about 800 soldiers on the ground fired their assault rifles at the miners indiscriminately.[392] The massacre reportedly took place between October and November 2008, and was investigated and reported on the BBC, Human Rights Watch and Global Witness, amongst others.[393]

The Marange diamond blood purge is an example of internal conflict, which arguably is illegitimate and incorrect way for asserting of sovereignty over domestic minerals.[394] This story shows the excesses, tensions and challenges as well as the changing face of assertion of state sovereignty. Was the use of force against unarmed and poor civilians reasonable and necessary in order to assert sovereignty over the diamonds? Would this be considered a legitimate way to exercise sovereignty and self-determination to benefit all Zimbabweans? The method that was used to claim control is unquestionably unreasonable as well as an albatross in the history of the regulation of natural resources in post-independent Zimbabwe.

It is reported that the purge in order to control the diamonds was very gross and attracted international attention and condemnation. The reaction by the Kimberley Process in order to bring stability included suspending Marange diamonds exports until Zimbabwe was

[389] Ibid. See also Global Witness Limited, supra note 51 at 6 – 8.
[390] Ibid.
[391] Khadija Sharife, op cit note 378. See also Hilary Anderson (BBC Panorama) 'Soldier tell of Zimbabwe diamond field massacre' *BBC News-Panorama*, 8 August 2011.
[392] Ibid.
[393] See the chronology of events section - Partnership Africa Canada, supra note 245 at (i) & 1.See generally Abiodun Alao & Funmi Olonisakin 'Economic fragility and political fluidity: Explaining natural resources and conflicts' (2000) 7 *International Peacekeeping* 23 at 29 – 31; Paul Collier *Economic Causes of Civil Conflict and their Implications for Policy* (2000) at 3 – 4.
[394] See generally Heinz Welsch 'Resource abundance and internal armed conflict: Types of natural resources and the incidence of new wars' (2008) 67 *Ecological Economics* 503.

Kimberley Process compliant. Zimbabwe was ordered to withdraw its military and police from the diamond fields, and to allow for an independent investigation of the alleged gross violation of human rights. Further Zimbabwe was compelled to freeze the introduction of any new diamond mining companies into the diamond fields. A Joint Work Plan was established to assist Zimbabwe to comply with the minimum requirements of the Kimberley Process.[395] To ensure compliance, the Kimberley Process appointed a monitor over Marange diamonds who had to be very watchful in order to prevent exports of the diamonds as well as to report any breach to the Plenary Meeting of the Process. The measures that were adopted by their nature restricted Zimbabwe's sovereignty over the control of the diamonds. On the one hand, the measures are justified in order to ensure appropriate regulation of the resources, and on the other hand, they interfered with Zimbabwe's sovereignty. Regardless of the conflicting interests, one can argue that the interference could be an indication that Zimbabwe failed to appropriately regulate its diamonds.[396] Further the interference shows that sovereignty is not absolute but has to operate within the legitimate confines of international law.[397]

While the limits of sovereignty are debatable,[398] it is vital for Zimbabwe to balance the assertion of sovereignty with legitimate and appropriate regulation of domestic mineral resources.[399] By virtue of the operation of the international law principles which support sovereignty over mineral resources discussed in chapter 2, gives Zimbabwe exclusive rights and control over domestic mineral resources. However, weak regulation of mineral resources might lead to conflict over access to the resources. This in turn may cause the assertion of sovereignty to be challenged or weakened as shown by the interference by the Kimberley Process.[400]

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[395] Global Witness Limited, supra note 51 at 4. See also Mutuso Dhliwayo & Shamiso Mtisi 'Towards the development of a Diamond Act in Zimbabwe: Analysis of the legal and policy framework on Diamonds and Zimbabwe's compliance with the Kimberley Process Certification Scheme (KPCS) minimum requirements'2012, available at http://hrbcountryguide.org/wp-content/uploads/2013/10/TOWARDS-A-DIAMOND-ACT-IN-ZIMBABWE.pdf (accessed 2 August 2014).

[396] Ibid. See also Shamiso Mtisi, Mutuso Dhliwayo & Gilbert Makore 'Analysis of the Key Issues in Zimbabwe's Mining Sector: Case of the Plight of Marange and Mtoko Mining Community' 2011 at 39 – 41.

[397] Global Witness Limited, supra note 51 at 2.

[398] See generally Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (2004) at 156, 196 – 204 & 207 – 226. Further, see Robert Jackson (ed) *Sovereignty at the Millennium* (1999).

[399] Elena Blanco & Jona Razzaque *Globalization and Natural Resources Law: Challenges, Key Issues and Perspectives* (2011) at 5 – 16.

[400] Para 1 of the United Nations General Assembly (UNGA) Resolution 1803(XVII) of 1962; Article 1(2) of the International Covenant on Civil and Political Rights (1966); Nico Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) at 164 – 168; Global Witness Limited, supra note 51 at 6 – 8; Shamiso Mtisi, Mutuso Dhliwayo & Gilbert Makore 'Analysis of the Key Issues in Zimbabwe's Mining Sector: Case of the Plight of Marange and Mtoko Mining Community' 2011 at 39 – 41, available at http://www.internal-

### 4.5.4 IMF and World Bank Conditionalities

The World Bank and IMF, the US and Europe compelled most African states to adopt a "thatcherite free-market" and free-trade best known as 'structural adjustment'.[401] The IMF and World Bank influenced Zimbabwe to take advantage of liberalized trade opportunities ushered in by globalization in the 1990s.[402] As a result, Zimbabwe adopted an Economic Structural Adjustment Programme (ESAP) after the World Bank and the IMF, as well as some developed countries from the west, promised substantial aid during the first year of its implementation.[403] While in the middle of the implementation process, problems arose from different perspectives, both domestic and international. On the domestic spheres, challenges included those caused by labour unions, private sector and strikes for improved work conditions.[404] From the international perspective, Zimbabwe faced challenges from its bilateral and multilateral donors, which included the World Bank and IMF.[405]

It is reported that the IMF and World Bank courted Zimbabwe during the 1980s but the African state resisted the economic and political changes suggested by the industrialized world. In 1990s, Zimbabwe acceded to the influence to lift the restrictions on imports such as tariffs on foreign products destined for the domestic market in return for substantial aid.[406] However, after being lured to adopt the ESAP programme by the two international financial institutions, Zimbabwe faced economic challenges within a short period after adopting the programme. The challenges were exacerbated after the two institutions withheld aid in an effort to force Zimbabwe to adopt further economic and political reforms.[407] Surprisingly, a year after the implementation of ESAP, the World Bank and IMF, as well as other international donors backtracked on the conditions they initially agreed on and demanded substantial economic reforms that by far altered the original conditions for the agreement.[408]

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displacement.org/8025708F004CE90B/(httpDocuments)/1DD3341690E24DF7C125784E002E708C/$file/EXTRACTIVE+INDUSTRIES+HANDBOOK+(1).pdf (accessed 7 October 2011).

[401] Colin Stoneman & Joe Hanlon 'IMF policies wreak havoc in Zimbabwe' 1992, available at http://www.greenleft.org.au/node/2056 (accessed 2 June 2013).

[402] Rangarirai Machemedze 'Zimbabwe and the IMF: Time for shifting from neo-liberal paradigm to people centered development alternatives' 2008, available at http://www.sarpn.org/documents/d0000758/P852-Zimbabwe_IMF.pdf (accessed 2 June 2013).

[403] Colin Stoneman & Joe Hanlon, op cit note 401.

[404] African Development Bank Group 'Zimbabwe - economic structural adjustment programme: Project performance evaluation report (PPER)' 1997 at 11 – 24.

[405] Ibid, at 12. See also Rangarirai Machemedze, op cit note 402.

[406] African Development Bank Group, supra note 404 at 19 – 20.

[407] Colin Stoneman & Joe Hanlon, op cit note 401.

[408] Rangarirai Machemedze, op cit note 402.

Furthermore, only a small fraction of the promised aid was actually given to Zimbabwe. The justifications were that substantial reforms were required for the donor community to be able to give the full aid.[409] Underpinning this unprincipled departure and breach of the initial agreement is that donors urged Zimbabwe to renegotiate a more liberalized market with the IMF and World Bank or risk losing the promised aid.[410] While taking into account the conditions that were advocated by the World Bank and IMF, as well as the negative effects caused by ESAP during period of implementation, various sectors of the domestic economy including the minerals sector were adversely affected.[411]

The fact that the World Bank, IMF and other international donors insisted on further reforms, which include scaling-down the public service employees and government departments is absolutely critical point as this contributed to weak policing and enforcement, and in turn to corruption and illegality. Also, liberalizing the economy as prerequisite for aid[412] can be dictatorial interference in Zimbabwe's domestic affairs in the name of trade liberalization.[413] The IMF and World Bank's conditionalities interfered with, and undeniably restricted Zimbabwe's assertion of sovereignty.

In conclusion, Zimbabwe today faces economic problems as a result of manifold chain of events ignited by the ESAP adopted in the 1990s at the behest of the World Bank and IMF.[414] The conditionality policy was a trigger event of the major cause of the economic crises in Zimbabwe. However, Newburg is of the view that alleging this per se, as it is commonly manifested would be misrepresentation of the reality.[415] I somewhat agree to this, but strongly maintain that the IMF and World Bank conditionalities were the prime cause of economic challenges in Zimbabwe.

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[409] Ibid.
[410] Colin Stoneman & Joe Hanlon, op cit note 401.
[411] Pieter Esterhuysen, op cit note 23 at 27 – 46.
[412] Saliwe Kawewe 'Zimbabwe Since 1990' 2012, available at http://patachu.com/zimbabwe-since-1990(accessed 17 November 2013).
[413] Andre Newburg 'The changing roles of the Bretton Woods Institutions: The evolving concept of conditionality' in Mario Giovanoli (ed) *International monetary Law: Issues for the New Millennium* (2000) 81 at 83. See also Barbara Stallings 'International influence on economic policy: Debt, stabilization, and structural reform' in Stephen Haggard & Robert R Kaufman (eds) *The Politics of Economic Adjustment: International Constraints, Distributive Conflicts, and the State* (1992) 41 at 41.
[414] Rangarirai Machemedze, op cit note 402. See also MacDonald Dzirutwe 'IMF says Zimbabwe's economy is "fragile", urges reforms' *Nehanda Radio*, 23 June 2014.
[415] Andre Newburg, op cit note 413 at 82.

## 4.7 Conclusion

The chapter has discussed the importance of mineral resources to Zimbabwe's economy, the provisions in mineral laws and themes that support, as well as the restriction of the assertion of sovereignty over domestic mineral resources and the manner in which this is done. The chapter also discussed the operationalization of international law principles in the various themes in support of state sovereignty over mineral resources. Although Zimbabwe is endowed with abundance of mineral resources, their economic contribution to the national GDP is negatively affected by various factors, which include lack of firm property rights, illegal mining, corruption, weak policing and enforcement of the relevant laws.

Although indigenization policy is a step towards economic empowerment and giving the PSNR principle practical meaning to assert sovereignty; however, threats to state sovereignty remains the biggest challenge for Zimbabwe to derive maximum economic benefits from its mineral resources. Owing to lack of transparency and accountability, a handful of politically-connected elite are illegally amassing economic benefits while majority of indigenous Zimbabweans are living in dire poverty. The biased way in which the minerals sector is regulated breeds threats to sovereignty; this is a challenge which undermines the assertion of sovereignty and economic growth and development. Accordingly, lack of transparency and appropriate use of PSNR in the regulation of mineral resources cause bottlenecks and restricts and weakens sovereignty. As a result, loss of mining revenue is exacerbated by the porous legal framework, weak tax collection system and enforcement of the relevant laws due to institutional failure among others. Further, the Mines Act is outdated and does not address new challenges in the sector, as well as provide an ideal framework for regulation to meet modern mining standards.

# CHAPTER 5

# SOVEREIGNTY, MINERAL RESOURCE REGULATION AND ECONOMIC DEVELOPMENT: THE CASE OF DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

## 5.1 Introduction

As with the chapter on Zimbabwe, this chapter examines how the DRC has operationalized principles relevant to the exploitation of minerals for development. The chapter provides a brief profile of the DRC, its political economy, the economic importance of its mineral endowment and its contribution to national development. It then considers the manner in which state sovereignty over mineral resources is exercised. This is done through analysis of key domestic mining laws, as was the case with Zimbabwe. The key categories of the analysis are, property and ownership rights, access to mineral resources, mineral resource policing and enforcement of mining laws, beneficiation and trade, legal obligations toward indigenous communities, compensation for expropriation, exchange controls and repatriation of profits, equitable treatment of foreign mining investors, revenue transparency and accountability, and strategic planning for development. The challenges faced by the DRC in regulating its mineral resources are considered, whilst taking into account threats to its mandate of sovereignty over mineral resources.

## 5.2 Country Profile

Positioned in west-central Africa, formerly Zaire, the DRC straddles the equator, and is located in the center of equatorial central Africa with one third of its provinces lying within the northern part and two-thirds in the southern part of the equator.[1] The DRC, often called the "Congo" or "Congo-Kinshasa", to distinguish it from the neighbouring Republic of the Congo (often known as Congo-Brazzaville), is landlocked, except for a coastline of approximately 37 km containing the mouth and lower reaches of the Congo River, which

[1] Dunia Zongwe, Francois Butedi & Clement Phebe 'The legal system and research of the Democratic Republic of Congo (DRC): An overview' 2007, available at http://www.nyulawglobal.org/globalex/democratic_republic_congo.htm (accessed 28 June 2012). See also Osita Afoaku *Democratic Republic of Congo: Countries at the Crossroads* (2010) at 1.

connects the country to the South Atlantic Ocean.[2] The DRC is the second-largest country in Africa after Algeria[3] and shares common borders with nine other countries; the Central African Republic to the north, South Sudan to the northeast, Uganda, Rwanda, Burundi and Tanzania to the east along Lake Tanganyika, then Zambia to the southeast, Angola to the southwest and the Republic of the Congo to the northwest.[4]

The country has a population of approximately 72 million;[5] however, research failed to establish whether this includes displaced peoples from conflicts elsewhere in the region. The country is the ancestral homeland for over 200 ethnic groups, most descended from individual kingdoms established long before the Europeans arrived in the late 1800s.[6]

Regarding physical landforms, there are three major ones; namely, the DRC Basin,[7] the Congo River, and the Great Rift Valley. The Basin covers most of the central and west parts of the DRC and is surrounded by plateaus, which stretch to reach huge expanses of dense forests.[8] Lying north of the Equator, the Ruwenzori Mountains, is a range on the border with Uganda, which extends between Lakes Albert and Edward.[9] Running through the Basin is the Congo River, which is the only major river to flow into the Southern Atlantic and an important means of water transport.[10] The last major landform is the Great Rift Valley that was formed due to tectonic actions;[11] the DRC's 'Great Lakes' were also formed through tectonic activities. The Great Rift Valley can be described as three landforms in one; a valley with some dormant volcanoes, a chain of lakes such as Lake Albert, Lake Edward and Lake

[2] Georges Nzongola-Ntalaja, op cit note 1 at 27. See also Encyclopedia of the Nations, available at http://www.nationsencyclopedia.com/economies/Africa/Congo-Democratic-Republic-of-The.html#ixzz1buYn5X45 (accessed 21 October 2011).
[3] Central Intelligence Agents (CIA) 'The World Factbook' available at https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html (accessed 21 October 2011).
[4] Encyclopaedia of the Nations, supra cit note 4 at 4.
[5] The figures are based on the CIA 'World Factbook' 2011 estimates. It is reported the last official census in the DRC was conducted in 1981, making existing demographic records unreliable and outdated.
[6] The DRC, available at http://www.infoplease.com/ipa/A0198161.html (accessed 2 October 2011).
[7] The DRC Basin is often referred to as the 'Congo Basin'; hereafter the Basin.
[8] Georges Nzongola-Ntalaja, op cit note 1 at 27.
[9] See generally Cecilia Pennacini & Hermann Wittenberg, *Rwenzori: Histories and Cultures of an African Mountain* (2007).
[10] Ibid. See also The World Bank 'DR Congo: Country brief' 2011, available at http://web.worldbank.org/wbsite/external/countries/africaext/congodemocraticextn/0,,menuPK:349476~pagePK:141132~piPK:141107~theSitePK:349466,00.html (accessed 12 December 2011).
[11] Recent tectonic activity were experienced in the 2002 eruption of Mt. Nyiragongo, the 2002 and 2006 eruption of Mt Nyamuragira, which caused severe human catastrophe and damage to property.

Tanganyika. The country is largely mountainous along the western front,[12] and the major rivers offer abundant sources for potential generation of hydroelectricity.[13]

Regarding mineral resource endowment, the DRC is richly endowed with an array of resources including substantial reserves of cobalt, cadmium, diamonds, gold, manganese, germanium, uranium and bauxite, silver, zinc, iron ore, coltan, coal and copper[14] and its fertile soils harbour a wide variety of minerals with often very high quality.[15] Further, the DRC is likely to be the world's largest producer of cobalt ore, copper and industrial diamonds.[16] The volcanic region straddling the border with Rwanda contains lavas from which several new types of mineral resources have been found.[17] The northern parts of Kivu province has protrusions of carbonatite or *lueshe* which are rich in pyrochlores while along the DRC-Rwanda border is the region of dormant volcanos containing lavas with several new silicates.[18] The northern parts of the country including the Oriental province are where the famous gold exploitations of Kilo-Moto can be found. Most mining activities are found in the regions stretching from the Oriental to Katanga provinces.[19] The Katanga region is reportedly to have the second largest world deposits of copper, estimated to be in excess of 70 million tonnes and some of the world's richest deposits of cobalt.[20] On the western part closer to the border of the country with Congo- Brazzaville, the west of the capital Kinshasa encloses

[12] The World Bank, supra note 12.
[13] Georges Nzongola-Ntalaja, op cit note 1 at 27.
[14] For detailed information on minerals in the DRC, see Marie Mazalto 'Governance, human rights and mining in the Democratic Republic of Congo' in Bonnie Campbell (ed) *Mining in Africa: Regulation and Development* (2009) 187 at 188. See also Hubert André-Dumont 'Democratic Republic of the Congo: Getting the deal through mining' (2008) at 44. See also the minerals of the Democratic Republic of Congo, available at http://euromin.w3sites.net/Nouveau_site/gisements/congo/GISCONe.htm (accessed 7 March 2013).
[15] Ibid.
[16] Four key mineral resources are tantalum (extracted in the form of coltan), tin (which comes from of cassiterite), tungsten (which comes in the form wolframite), and gold are the primary minerals at the core of conflict in the eastern part of the country. These minerals are used in the fabrication of electronics components, such as computer and mobile phones, and a wide variety of other industrial products.
[17] Various mineral resources such as andremeyerite, combeite, götzenite, delhayelite and trikalsilite are also found in the DRC. See Wardell Armstrong 'Artisanal mining in the DRC: Key issues, challenges and opportunities' draft prepared for discussion at the DRC Donor Coordination Meeting, August 2007.
[18] See generally Thomas R Yager 'The mineral industry of Congo (Kinshasa)' in *U.S. Geological Survey Minerals Yearbook—2008* (2010) 1. See also Brotherhood of Railroad Signalmen 'Conflict minerals and the Democratic Republic of Congo: Responsible action in supply chains, government engagement and capacity building' (2010) 1, available at http://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf (accessed 8 March 2012).
[19] For example, Katanga province (copper and cobalt mainly), North and South Kivu Provinces (gold, tin, Colombo-tantalite), East-Kasai (diamond), and Ituri in the Oriental Province (gold). See Hubert Andre-Dumont 'Democratic Republic of the Congo' (2011) 57, available at http://www.mcguirewoods.com/news-resources/publications/international/mining-drcongo.pdf (accessed 17 January 2012).
[20] The largest world reserves of copper are Chile with an approximate 88million tonnes. See also World Bank 'Evaluation of DRC mineral resources' 2006, available at http://www.worldbank,org (accessed 2 February 2012).

deposits of zinc and lead vanadate, where there are deposits of copper silicate on the massif of Niari.[21] Mineral wealth is the DRC's greatest natural asset and is profoundly concentrated in the northeast part of the country, including North and South Kivu provinces. Other provinces do not contain many minerals with the exception of the diamondiferous deposits, the eluvium and alluvium of the region of Mbuji-Maji (mostly industrial diamonds) and gold mines of the Upper DRC, in the Kilo-Moto.[22] Also, the DRC has onshore petroleum deposits that it has yet to exploit on a commercial scale; however, petroleum does not form part of the study.

It is argued that mineral resource exploitation activities are presently concentrated in the northern and eastern parts of the country, where the Copper-Belt extends from the Republic of Zambia into the country near Lubumbashi because this is the region where most minerals are found.[23] Given the level of mineral endowment, the DRC is a potentially eminent mining territory - the centre of various exploitations of most diverse minerals,[24] and also one of Africa's richest mining countries. The mineral endowment and the remarkable nature of the DRC have been associated with conflicts. For that reason, the endowment is often referred to as the "geological scandal" or "the curse of raw materials",[25] an indication that it does not really serve the Congolese people.

Since the colonial era mineral resources, such as gold found in 1903 in the north-east of the country and diamonds discovered in 1907 in the Kasai region, have been the basis upon which a number of foreign extractive companies have entered the DRC.[26] Since then, mining has been the DRC's main source of exports and foreign exchange under the political leadership of Belgium. Following the ushering in of political independence in 1960, the new government did not change much of the existing mining and regulatory structures. Instead, the state nationalized most of the existing mining companies including major companies such

[21] Euromin 'The minerals of the Democratic Republic of Congo' at http://euromin.w3sites.net/Nouveau_site/gisements/congo/GISCONe.htm (accessed 7 March 2012). See also Thomas R Yager, op cit note 20.
[22] Ibid. See also Hubert Andre-Dumont, op cit note 21 at 57. See further Humanitarian Information Unity 'Democratic Republic of the Congo mineral exploitation by armed groups and other entities', available at https://hiu.state.gov/Products/DRC_MineralExploitation_2011June14_HIU_U357.pdf (accessed 7 March 2012).
[23] Mbendi 'Mining in Democratic Republic of the Congo – overview' 2013, available at http://www.mbendi.com/indy/ming/af/zr/p0005.htm (accessed 20 June 2013)
[24] Ibid.
[25] Kankwenda Mbaya 'Mineral resources, the state and industrialization in Zaire' in Kankwenda Mbaya (ed) *Zaire: What Destiny?* (1993) at 319. See also Peter Eichstaedt *Consuming the Congo: War and Conflict Minerals in the World's Deadliest Place* (2011) at 135 – 136. See further Marie Mazalto, op cit note 16 at 189.
[26] Wardell Armstrong, op cit note 19 at 3.

as the Belgian company, *Societe des Mines d'Or de Kilo-Moto* (SOKIMO), which later became the *Office des Mines d'Or de Kilo-Moto* (OKIMO).[27] During the 1960s and 1970s, the DRC, then Zaire, was the world's leading producer of minerals such as copper and cobalt. Before gaining political independence, a Belgian mining company, *Union Miniere du Haut* Katanga (UMHK), exclusively operated the country's copper and cobalt mines but after independence, the desire to open up investment opportunities in the DRC attracted new entrants into the mining sector.[28]

When the late Mobutu Sese Seko came into power, his government nationalized the UMHK in 1966 and renamed it *Generale' des Carriers et des Mines* (Gecamines).[29] Copper concessions were managed by Gecamines and during that period, it was a major state-owned mining company. Gecamines was very productive and viable enterprise, however, from the 1980s, it had viability problems and finally collapsed in early 2000 due to, *inter alia*, the collapse of the mine of Kamoto and ethnic riots in Shaba, mismanagement and liquidity problems, as well as aging infrastructure and equipment.[30] Gecamines had partnerships with foreign mining companies operating in the country such as AngloGold Ashanti, Mwana Africa, Moto Gold Mines, Barrick Corporation and Banro Corporation.[31]

Prior to adopting Law 007 of 2002 (the Mining Code), the DRC mining law was based on a concession system and was not regulated by any form of domestic law; this could be the reason Gecamines had the leverage to exercise its discretion without accountability to the state. Although there are efforts by the government to revive Gecamines, the company is currently in partnership with some foreign companies operating in the country such as Phoenix, Arizona-based Freeport McMoRan Copper and Gold Incorporation (FCX: US) and London-based Glencore Xstrata Plc (GLEN).[32] The main mining companies operating in the DRC are listed in Canada, the US and Australia,[33] and are gradually being joined by some Chinese and Indian mining companies.

[27] Ibid.
[28] Ibid.
[29] Gregory Mthembu-Salter 'Indian mining companies in the Democratic Republic of the Congo' (2012) 35 *SAIIA Policy Briefing* 1.
[30] Ibid.
[31] Wardell Armstrong, op cit note 19 at 3 – 4.
[32] Michael J Kavanagh 'Gecamines of Congo may take action against partners after audit' *Bloomberg News*, 7 October 2013.
[33] Gregory Mthembu–Salter, op cit note 31 at 1.

The DRC has been experiencing problems in its minerals sector; chief among which are problems in the allocation of mineral resources and mining contracts between 1996 and 2003.[34] This led to intense parliamentary debates regarding the irregularities affecting transparency and accountability in the sector. In order to redress this, and ensure transparency, the DRC government established a parliamentary commission in 2005, known as the Lutundula Commission,[35] to investigate the allegations. In its findings, the Lutundula Commission noted that although Gécamines approved joint-mining agreements, the decision was not economically viable. As a matter of fact, joint-mining ventures faced management problems that eventually contributed to the collapse of such entities.[36] In some cases, the Commission established that management committees running public enterprises had negotiations in which the Kinshasa authorities interfered with, had no transparency, collaboration and cohesion.[37] Against these findings, there has been little success in expanding the viable mineral production activities in the country.

### 5.2.1 Political Economy

As shown below, the DRC is a fragile Republic riddled with post-independence conflicts.[38] Regardless of this, a report by Garrett and Mitchell shows that the late 1960s and early 1970s were periods of exceptional economic growth,[39] and the exploitation of mineral resources has traditionally brought economic benefits to the country.[40] Prior to the 1997 armed conflict, the DRC government tightened its fiscal policy and managed to curb inflation. Nevertheless, the

[34] Iere Partie '*Assemblee Nationale Commission Speciale Chargee De L'examen De La Validite Des Con Vent Ions A Caract Ere Economique Et Financier' Conclues Pendant Les Guerres De 1996-1997 Et De*' 1998, available at http://www.congonline.com/documents/Rapport_Lutundula_pillage_2006.pdf (accessed 2 December 2013). See also International Crisis Group 'Escaping the conflict trap: Promoting good governance in the Congo' 2006 Crisis Group Africa Report 114, available at http://www.crisisgroup.org/~/media/Files/africa/central-africa/dr-congo/Escaping%20the%20Conflict%20Trap%20Promoting%20Good%20Governance%20in%20the%20Congo.pdf (accessed 3 December 2013). Claude Kabemba 'Is a genuine and transparent process of mining contracts renegotiation possible in the DRC?' available at www.revenuewatch.org (accessed 23 December 2013).

[35] Lutundula Commission, hereafter the Commission.

[36] Barry Sergeant 'Behind the DRC mining contracts review' 2007, available at http://www.mineweb.com/mineweb/view/mineweb/en/page36?oid=39266&sn=Detail (accessed 9 March 2012). See also Congo Mining Newsletter 'Congo government rejects firing of Gecamines CEO' 2007, available at http://www.un.int/drcongo/mining.htm (accessed 13 March 2012).

[37] Ibid.

[38] President Joseph Kabila is currently the head of the state and the DRC government, and government forces are fighting rebel groups which include the Lord's Resistance Army (LRA), the Allied Democratic Forces (ADF), the Mai Mai militia, the Democratic Forces for the Liberation of Rwanda (FDLR) and the National Congress for the Defense of the People (CNDP).

[39] Marie Mazalto, op cit note 16 at 189.

[40] Hesselbein Gabi 'The rise and decline of the Congolese State: An analytical narrative on state-making' 2007 Crisis States Research Centre, Working Paper No: 21.

gains were lost as a result of lack of foreign aid and investment due to armed conflicts. Although armed conflict is a major contributor to economic hardship, it is not the sole factor.[41] Other factors include the country's poor infrastructure, ineffective legal system, corruption and lack of transparency as well as illegal mining.[42] Official meetings between the DRC and the IMF and the World Bank to develop comprehensible fiscal policies and strategies have been on hold partly due to the prevailing fragile political environment.[43]

Diplomatic attempts by the Southern African Development Community[44] to create a permanent political settlement appear to be failing. For example,

> [t]he Pretoria Accord, a peace agreement signed between the warring factions in 2002, paved the way for free elections in 2006 and the Goma Agreement signed by the DRC government and over 20 armed groups in 2008 further brightened prospects for political stability and economic growth.[45]

Despite this, efforts to establish peace and permanent political stability were thwarted by lack of mutual trust from the opposition political groups and the negative influence by sections of the Congolese society.[46] The negative influence is potentially behind illegal access to, and control of natural resources including strategic minerals such as coltan which is used in modern "heartland" technologies of the information age, such as cellphones. [47]

In 2007, the DRC adopted the Governance Contract after consultations with the State President and the Minister of Mines, and recommendations by the World Bank with a view to promote, inter alia, management of public finances and transparency in the mining sector. The initiative, however, exposed major state weaknesses in the mineral value chain.[48] Regardless of the weaknesses, the mineral sector plays a significant role in the economy. Since 2001, the economy gradually recovered against a background of recurrent internal

[41] See generally Ingrid Samset 'Conflict in interests or interests in conflict? Diamond and war in the DRC' (2002) 29 *Review of African Political Economy* 463 at 466 – 470.
[42] Ibid. See also US Department of State 'Background note: Democratic Republic of the Congo' Bureau of African Affairs 2011, available at http://www.state.gov/r/pa/ei/bgn/2823.htm (accessed 12 February 2012).
[43] Encyclopedia of the Nations, available at http://www.nationsencyclopedia.com/economies/Africa/Congo-Democratic-Republic-of-The-OVERVIEW-OF-ECONOMY.html (accessed 12 February 2012).
[44] Southern African Development Community, hereafter SADC.
[45] Motorex Limited 'Country profile: The Democratic Republic of the Congo' ICSG Secretariat briefing paper, 2010, available at http://www.metorexgroup.com/ir_cp_drc.html (accessed 29 February 2012).
[46] See generally Ted Dagne 'The Democratic Republic of Congo: Background and Current Development' 2011, available at http://www.fas.org/sgp/crs/row/R40108.pdf (accessed 3 October 2013); Human Rights Watch 'DR Congo: End illegal exploitation of natural resources' 2006, available at http://www.hrw.org/news/2006/02/19/dr-congo-end-illegal-exploitation-natural-resources (accessed 12 January 2014).
[47] Padraig Carmody, op cit note 1 at 131 - 138. See also Peter Eichstaedt, op cit note 27 at 137 – 152
[48] See generally the World Bank 'Democratic Republic of Congo: Growth with governance in the mining sector' Report No.434002-ZR (2008).

conflicts.[49] However, the underlying indicators did not measure all aspects of "doing business" and factors that affect the competitiveness of the minerals sector. After the introduction of various economic measures, the DRC's ranking improved as reported in the 2011 Doing Business Report.[50] The budget deficit, which had worsened in 2009 due to internal conflicts and the global economic crisis gradually improved in 2010 as a result of increased government revenue. An improvement in "doing business" ranking could be an indication that the DRC created an environment relatively conducive for operating businesses.[51] The improvement could help to consolidate the "Heavily Indebted Poor Countries Initiative"[52] and bring investor confidence in the DRC's minerals sector.[53] Despite the current political and economic challenges faced by the DRC, the economy relatively gained from mineral exports estimated at US$6.6 billion in 2008[54] and the trend gradually increased in the subsequent years.[55] The minerals sector contributed substantially to the economy[56] and in 2010, the national GDP growth increased to 6.1 percent from 2.8 percent in 2009. The mining sector contributed approximately 11.8 percent to the national GDP.[57]

In 2009, the DRC signed a Poverty Reduction and Growth Facility with the IMF and received approximately US$12 billion in multilateral and bilateral debt relief.[58] The adoption of the World Bank project "Growth with Governance in the Minerals Sector" sought to increase

[49] World Bank, supra note 12.
[50] International Finance Corporation & World Bank 'Doing business - economic ranking: The DRC' 2011, available at http://www.doingbusiness.org/rankings (accessed 6 March 2012). See also International Finance Corporation 'Doing business' (2012), 10 -13, available at http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Profiles/Country/ZAR.pdf (accessed 6 March 2012).
[51] Ibid, at 5.
[52] Heavily Indebted Poor Countries, hereafter HIPC. See US Department of State, supra note 44.
[53] World Bank, op cit note 50.
[54] See generally IMF 'Democratic Republic of the Congo: Poverty Reduction Strategy Paper—Progress Report 2010; (hereafter Poverty Reduction Strategy Progress Report 2010). See also World Bank 'Project information document: Concept stage' Report No. AB3834 at 1, available at http://www.worldbank.org (accessed 2 March 2012).
[55] Among the agricultural produce coffee, palm oil, rubber, cotton, sugar, tea, and cocoa are accordingly cultivated. The agricultural industry engages about 66 per cent of the population with provisions for crops like cassava, plantains, maize, groundnuts, and rice. See US Department of State, supra note 44. See also Stefaan Marysse, op cit note 1 at 17; Catherine Ragasa, Suresh C. Babu & John Ulimwengu 'Institutional and capacity challenges in agricultural policy process: The case of Democratic Republic of Congo', discussion paper 01066 (2011) International Food Policy Research Institute at 3 – 4 & 12, available at http://www.ifpri.org/sites/default/files/publications/ifpridp01066.pdf (accessed 9 March 2012).
[56] Afribiz 'Democratic Republic of Congo: Mineral industry overview' 2011, available at http://www.zimbio.com/Kinshasa+Congo/articles/RLvDbGwBVMv/Democratic+Republic+Congo+Mineral+Industry (accessed 6 March 2012).
[57] Ibid.
[58] The conditions under pinning acceptance and signing the IMF agreement are considered in the section 5.6.4 dealing with IMF and World Bank Conditionality below.

transparency and accountability,[59] as well as improve production output and lowering costs. The other objectives were, inter alia, to strengthen institutional capacity and regulation, and create an enabling environment for investment in the minerals sector.[60] The gradual increase in mining production output was largely attributed to measures adopted to ensure transparency and accountability in the sector. However, production declined in 2011 partly due to recurrent armed conflicts,[61] which disrupted mining activities in the northern and eastern parts of the country.

Partnerships with emerging economies such as China and India[62] in mining, technology transfer and social development have presumably helped the DRC's prospects to revive its economy, albeit for a short term because there are no permanent industries established in the country. One can conclude that the post-independence era has generally been characterized by political instability, and unequal business partnership practices owing to lack of investment, competition and economic challenges.[63] The fact that the DRC is endowed with an array of mineral resources could not alone bring tangible economic benefits; this could be attributed to the government's apparent failure to exercise its sovereignty in order to consolidate peace and political stability.

#### *5.2.1.1 Political Context of the DRC in Brief*

The struggle for regulation and control over mineral resources in the DRC is a continuation of fighting against external influence and domination, which dates back to the 1880s when King Leopold II[64] of Belgian colonized the country.[65] From 1884 to 1885, and at the Berlin

[59] The World Bank 'Democratic Republic of Congo – growth with governance in the mineral sector technical assistance project' 2010, available at http://www.worldbank.org/en/news/loans-credits/2010/07/01/democratic-republic-of-congo-growth-with-governance-in-the-mineral-sector-technical-assistance-project (accessed 2 October 2013).
[60] World Bank 'Democratic Republic of Congo: Monthly operational summary Africa region - January 2012' available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CONGODEMOCRATICEXTN/0,,menuPK:349502~pagePK:51173040~piPK:51191638~theSitePK:349466,00.html (accessed 4 March 2012). See also Padraig Carmody, op cit note 1 at 66.
[61] African Economic Outlook 'Congo, Democratic Republic: Overview' 2011 at 3 –8, available at http://www.africaneconomicoutlook.org/en/countries/central-africa/congo-democratic-republic (accessed 12 February 2013).
[62] Padraig Carmody, op cit note 1 at 5.
[63] Nicholas Garrett & Harrison Mitchell 'Trading conflict for development: Utilising the trade in minerals from Eastern DR Congo for development' 2009 Crisis States Research Centre at 5. See also Roger Kibasomba 'Political leadership and state building in a post-war DRC' in Sagaren Naidoo (ed) *The War Economy in the Democratic Republic of Congo* (2003) 67 at 79; B Godsell 'Six strategies for African development' in D Rimmer (ed) *Action in Africa: The Experience of People Involved in Government, Business and Aid* (1997) 32.
[64] King Leopold II, hereafter Leopold.

Conference in German, the European powers recognized Leopold's claim to the Congo basin. Under his leadership, the Congo experienced a ruthless colonial history. For example, from 1892 to 1894, the Eastern Congo experienced wars between Leopold's regime and the East African Arabs who controlled the area including natural resources.[66] Leopold took personal control of the Congo territory and exploited mineral resources through harsh autocratic governance which included slave labour.[67] Regardless of these atrocities, however, Leopold was recognized as the legitimate authority and in control of the Congo and all domestic natural resources.[68] Conversely, the international outcry and pressure against Leopold's dictatorial practices compelled him to transfer control of the Congo to the Belgian government in 1908.[69]

The above shows that the political history of Belgian colonization of the Congo is loaded with capitalist interests and the desire for mineral resources, which is traced back to the establishment of Leopold's personal rule in 1885.[70] The upsurge of the Congo people's nationalist sentiments and the growing demand for black majority rule weakened Belgium's political control. The 1959 political events in the Congo caused serious uprisings against the government in Leopoldville (now Kinshasa).[71] In 1960, Congo became politically independent and ushered in black majority rule with Patrice Lumumba as Prime Minister.[72] Due to fear of sabotage, Belgium sent troops ostensibly to protect its mining and economic interests in the Congo.[73]

With the help of Belgium and the US, the late Lumumba was overthrown and the late Kasavubu became the leader of the Congo.[74] In 1965, Kasavubu was over-thrown and the late Mobutu Sese Seko became the leader of the Congo. During his reign, it is reported Mobutu considered the country and its natural resources his private property,[75] and unilaterally

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[65] Georges Nzongola-Ntalaja, op cit note 1 at 13 – 15.
[66] Ibid.
[67] See generally Thomas Turner *The Congo Wars: Conflict, Myth & Reality* (2007) at 1 – 23. See also The Enough Project 'The Democratic Republic of the Congo: Roots of the crisis' available at www.enoughproject.org/files/pdf/crisis_roots_congo.pdf (accessed 2 February 2013).
[68] See generally Georges Nzongola-Ntalaja, op cit note 1 at 16 – 41.
[69] Ibid, at 35.
[70] Ibid.
[71] Ibid, at 41 – 54. See also the Enough Project, supra note 69.
[72] Ibid, at 88 – 89 & 95 – 106.
[73] BBC News Africa 'Democratic Republic of Congo profile' available at www.bbc.co.uk/news/world-africa-13286306 (accessed 2 July 2013).
[74] Georges Nzongola-Ntalaja, op cit note 1 at 116 – 118.
[75] Ibid, at 121 – 139, the general account of the overthrow of Kasavubu.

renamed Congo as "Zaire" in 1971.[76] During his 32 year-rule, Mobutu enjoyed partial support from the US and Belgium, and in return granted them unlimited mining concessions.[77] The cold war tension also played into the Congo leadership wrangle and economic interests, with the US fearing that charismatic Congo nationalists would cause the secession of the Congo from Belgium control, by taking advantage of the former Soviet Union's influence in Central Africa.[78] Taking this into account, Mobutu used domestic mineral resources to co-opt potential rivals, and to enrich himself as well as those in his administration through a patronage system, described as fervently corrupt, such that one can conclude that his government's principal objective was to loot minerals and other public goods.[79] Mobutu's regime acquired economic benefits illegally at the expense of national interests. This was evidenced by high levels of corruption during Mobutu's administration; for example, it is reported he illegally amassed more than US$5 billion from the country and much of this loot moved to international banks and investments.[80]

Two reasons underpinned the ouster of Mobutu from office in 1996: Firstly, the Great Lakes region regarded Mobutu as the main supporter of opponents of his neighbouring countries and his long standing relationship with National Union for the Total Independence of Angola (UNITA) rebels, and his support for the Allied Democratic Forces (ADF) of Uganda justified the involvement of Angola and Uganda respectively.[81] Secondly, Mobutu blocked all democratic processes that emanated from the 1992 National Sovereign Conference,[82] resulting in the local non-armed opposition leadership championing for his removal.[83] However, the political history of the DRC since the removal of the late Mobutu from power could be an example of economically motivated interferences by foreign states as well as corporations.[84] From the beginning of the 1996 conflict, the late Laurent Desiree Kabila mobilized financial resources for his military operations by granting "lucrative contracts in

[76] Ibid, at 141.
[77] Georges Nzongola-Ntalaja, op cit note 1 at 106 – 112 & 141 – 142.
[78] The Enough Project, supra note 69. See also Sagaren Naidoo 'Economic motivations for the DRC conflict' in Sagaren Naidoo (ed) *The War Economy in the Democratic Republic of Congo* (2003) 1 at 2 – 4.
[79] The Enough Project, supra note 69.
[80] Ibid.
[81] Sagaren Naidoo, op cit note 80 at 4. See also Georges Nzongola-Ntalaja, op cit note 1 at 225 – 227; Stefaan Marysse, op cit note 1 at 21.
[82] Georges Nzongola-Ntalaja op cit note 1 at 189 – 190. The purpose of the Sovereign National Conference was to, inter alia, address and find solutions to the key problems affecting the DRC, then Zaire. The concern was to remove obstacles which have prohibited the country from establishing political and economic justice, and to construct a new constitutional frame-work in terms of a system of accountable government.
[83] Ibid, at 225 – 227. See also Sagaren Naidoo, op cit note 80 at 4.
[84] Sagaren Naidoo, op cit note 80 at 4 – 6. See also Georges Nzongola-Ntalaja, op cit note 1 at 225 – 227; Gerard Prunier, op cit note 1 at xxix; Stefaan Marysse, op cit note 1 at 21

the east of the DRC".[85] Although the late Kabila was just a rebel leader in control of a small part of the DRC; it is reported that Rwanda, Uganda and international corporations such as Bechtel, American Mineral Fields and De Beers Consolidated Mines Limited supported him.[86] The conflict was influenced by various domestic and international players that ostensibly intended to control the DRC's mineral resources.[87]

The assassination of Kabila and the anti-Kabila conflicts were allegedly influenced by some governments, which hoped to maintain monopoly and access to mineral resources required for industrial processes in their home countries.[88] Under these circumstances, perhaps one may conclude that external interferences in the DRC affairs contributed to political and economic instability since obtaining political independence in 1960. Although the DRC has abundant mineral resources, the potential to exploit them may have been deeply paralyzed by fragile politics and instability. Presumably, weak central authority that cannot implement successful political reforms due to challenges, referred above, has affected appropriate regulation and state sovereignty over domestic mineral resources.[89] It could therefore be argued that the DRC's post-independence political instability has damagingly and adversely contributed to failure by the successive regimes to regulate domestic minerals resources.

Notwithstanding the fragile political situation, the DRC government has attempted to exercise its sovereignty over mineral resources in various ways. One of the ways is through adopting various domestic mining laws. In the following sections, the researcher examines and

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[85] Montague Dena 'Stolen goods: Coltan and conflict in the Democratic Republic of Congo' (2002) 22 *The South African Institute of Security Review Journal* 103.

[86] The Corporations, Rwanda and Uganda formed an alliance with the *Alliance des Forces Democratiques pour la Liberation du Congo* (AFDL). See generally Arne Schollaert & Dirk Van de gaer, 'Natural resources and conflict' (2009) 44 *Environmental resource Economics* 145.

[87] Osita Afoaku, op cit note 3 at 1.

[88] Ibid. See also Georges Nzongola-Ntalaja, op cit note 1 at 228 – 232; Sagaren Naidoo, op cit note 80 at 8; Padraig Carmody, op cit note 1 at 3. See further UN News Centre 'Security Council debates measures on illegal exploitation of natural resources in DR of Congo' 2001, available at http://www.un.org/apps/news/story.asp?NewsID=2431&Cr=congo&Cr1=resources (accessed 12 February 2013). See for example, UNSC Report of the Panel of Experts of 2002, infra note 358. See also Human Rights Watch *Democratic Republic of Congo: The curse of gold* (2005) at 118 – 120; Thomas Turner, op cit note 69 at 150 – 161; Michael A Lundberg 'The plunder of natural resources during war: A war crime?' (2008) 39 *Georgetown Journal of International Law* 495 at 498 & 505. Ruben De Koning 'Conflict minerals in the Democratic Republic of the Congo: Aligning trade and security interventions' The Stockholm International Peace Research Institute (SIPRI), policy paper No. 27 (2011) at v, available at http://books.sipri.org/files/PP/SIPRIPP27.pdf (accessed 1 March 2013).

[89] See generally speech by President Joseph Kabila on the Occasion of the General Assembly Debate of the 66th Session of the UN General Assembly, New York, 22nd September 2011. See also Kankwenda Mbaya & Mabika Kalanda 'Introduction' in Kankwenda Mbaya (ed) *Zaire: What Destiny*? (translated from the French by Ayi Kwei Armah) (1993) xi at xv.

evaluates the DRC's mineral laws in light of the international law principles conferring a mandate upon the state to exploit the resources for development, principles governing international investment and trade (outlined in chapter 2 above), and the manner in which the DRC has navigated the threats outlined in chapter 3.

## 5.3 Municipal Law Relevant to the Operationalization of the Mandate over Mineral Resources

In considering the relevant domestic mineral laws, reference is made to various themes which reinforce, weaken or restrict state sovereignty over domestic regulation of the available mineral resources.

### 5.3.1 Municipal Law Relevant to the Regulation of Mineral Resources

There are approximately ten pieces of statutes including Regulations that are relevant to the regulation of mineral resources. These include certain provisions of the DRC Constitution of 2005; Law No: 007 of 11 July 2002 (the Mining Code); Mining Rules enacted by Decree No. 038 of 26 March 2003; the 16 Annexes to the 2003 Mining Regulations, including the Artisanal Mining, Protection of the Mining Environment; the Tax and Customs Regimes for Mining and the Exchange Rate Regime.[90] These are relevant to the regulation of domestic mineral resources.

### 5.3.2 Mining Laws

The mining sector is regulated through national legislation and Mining Regulations. In a strict sense, the legal framework for the regulation of mineral resources consists of certain applicable provisions of the DRC Constitution, Law No.007, the Mining Rules enacted by Decree No.038 and the 16 Annexes to the Mining Regulations. Of these four, Law No 007 and the Mining Rules (Mining Regulations) are considered to be the main pieces of legislation in the mining sector and they are directly relevant to the study.

#### *5.3.2.1 The DRC Constitution, 2005*

The DRC Constitution, as amended, is the supreme law of the country and all laws in force are subordinate to it. Although the Constitution is not strictly relevant to the regulation of

[90] Legislation, available at http://mines-rdc.cd/fr/index.php?option=com_content&view=article&id=76 (accessed 1 July 2013)

mineral resources, there are some provisions relevant in the context of this thesis. The Preamble to the Constitution provides for, and has provisions which could be attributed to the pillars of state sovereignty over mineral resources. In particular, the principle of self-determination, PSNR and non-interference in the domestic affairs of states are entrenched in the Preamble to the Constitution.[91] The DRC may exercise the mandate derived from the PSNR principle, by granting concessions to mining investors, and it is inherently the state's responsibility to determine the terms and conditions of accessing domestic mineral resources,[92] discussed in section 5.5.2 below.

Article 58 of the Constitution confers upon the Congolese people the right to enjoy national wealth, including economic benefits derived from mineral resources. To achieve this, the state has a constitutional duty to ensure equitable distribution of national wealth[93] and uphold the right to development, discussed in chapter 2. In order to derive economic benefits and ensure equal distribution across the country requires appropriate control and regulation of the resources, as well as transparency and accountability in the mineral value chain.

#### *5.3.2.2 Law No: 007 of 11 July 2002 (The Mining Code)*

Law No: 007 of 2002[94] is the expression of the DRC's new mining law, which came into effect on 11 July 2002. The Mining Code is the principal mining law which is dedicated to a single mining system and, it regulates and controls access to domestic mineral resources through a system of licensing. The Code repealed the previous mining law, which was based on a concession system. As discussed below, the scope of application of the Code is set out in section 2; this includes prospecting, exploration, exploitation, processing, transportation and export of all domestic minerals. Further, basic principles relevant to the regulation of domestic mineral resources are set out in Section II of the Code. Also, the Code introduced a clear distinction between the conditions for granting, revoking and the renewal of mining or quarry permits and provides for operational terms.[95] Regardless of this, it needs to be highlighted that at the time of writing this thesis the Mining Code was under review.[96]

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[91] See generally paras 4, 6, 7 & 8 of the Preamble to the Constitution.
[92] Article 9 of the Constitution.
[93] Article 59 of the Constitution.
[94] Law No: 007 of 11 July 2002; hereafter the Mining Code or the Code.
[95] See generally Articles 129 – 154 of the Mining Code.
[96] See the reports available at http://www.mineweb.com/mineweb/content/en/mineweb-fast-news?oid=161549&sn=Detail (accessed 23 October 2013).

The Mining Code provides and spells out the role of the state and supporting public institutions in the regulation of domestic mineral resources.[97] Five principal administrative bodies are outlined and entrusted with the responsibility of regulating as well as controlling access to mineral resources, mining and ancillary activities. The five main administrative bodies are; namely, office of the President of the DRC,[98] office of the Minister of Mines,[99] the Mining Registry,[100] the Directorate of Mines[101] and the Department in Charge of the Protection of the Mining Environment.[102]

Article 9 of the Code confers on the State President statutory powers,[103] which he or she cannot delegate, and such powers are exercised by Decree made on the President's own initiative. The decree can be made on the proposal of the Minister of Mines after consulting with the Directorate of Geology or the Mining Registry, to enact Mining Regulations in order to spell out the implementation of the Mining Code.[104] The State President has jurisdiction over the enactment of the Mining Regulations[105] and extensive powers to classify mineral resources in different categories and to declare a mineral resource "a reserved substance" or an area "a prohibited zone" for the purposes of mining activities.[106] However, in the absence of consultations, the unilateral decision by the State President might interfere in the regulation of domestic mineral resources. Insofar as jurisdiction is concerned, Article 10 of the Mining Code confers upon the Minister of Mines jurisdiction over granting, refusal or cancelation of mining rights. The Minister exercises his or her discretionary powers by way of a Decree with the exception of Article 10(k) of the Mining Code.[107] Further Article 10 of the Code spells out the powers and responsibilities of the Minister on issues such as exports of unbeneficiated minerals and creation of artisanal mining areas.[108]

[97] Article 8 of the Mining Code.
[98] Article 9 of the Mining Code.
[99] Article 10 of the Mining Code.
[100] Article 12 of the Mining Code.
[101] Article 14 of the Mining Code.
[102] Article 15 of the Mining Code.
[103] Paragraph 3 of Article 9 of the Mining Code.
[104] Ibid, para 2.
[105] Article 9(a) of the Mining Code.
[106] Article 9(b) – (d) of the Mining Code. For example, see Decree No. 04/017 of 27 January 2004 on the classification of zones prohibited to mining and / or quarry works, such as Shinkolobwe zone, located in the territory of Kambove, district of Upper Katanga, Katanga Province.
[107] In terms of Article 10(k) of the Mining Code, the Minister of Mines hos no jurisdiction but only make proposals to the State President with regard to classification, reclassification or declassification of reserved mineral substances, reserved substances classified as mines or quarry products or their prohibition.
[108] Article 10(b) – (c) of the Mining Code. Article 10(k) of the Mining Code provides for the proposal to the State President regarding, inter alia, the classification, declassification or reclassification of mineral resources as

The Mining Registry (the Central Mining Cadastre)[109] is an autonomous statutory body under the co-supervision of the Minister of Mines and Minister of Finance, and it was established in terms of Article 12 of the Mining Code. The Mining Registry is entrusted with duties that include collecting and administering the costs of filing applications, as well as the administration of mining rights on a "first come first serve basis". In terms of its functions, the Minister of Mines has exclusive responsibility for the administration of, granting or refusal of mining and quarry rights, withdrawal and cancellation, as well as the expiry of the rights.[110] The implication of the Minister's decision determines whether the mining rights could be established as security of tenure. Also, among its obligations, the Central Mining Cadastre maintains, on a regular basis, an update of registry books and publishes renewals of mining and quarry permits in accordance with the requirements contemplated in the Code.[111] In doing so, one may argue that the DRC asserts sovereignty over domestic mineral resources.

The Directorate of Mines is a statutory body established in terms of Article 14 of the Mining Code. The body is responsible for, inter alia, inspecting and supervising mining activities on issues such as health and safety on the mining site, labour standards, and recording statistics on production and sales.[112] The responsibilities are an important element of the assertion of sovereignty in the regulation of mineral resources and to ensure the state monitors compliance, as well as production output and sales for taxation purposes. Finally, the Department in charge of the Protection of the Mining Environment was established by Article 15 of the Mining Code. This statutory body has powers to define and implement Mining Regulations on environmental protection, rules governing exploration and artisanal miners. The Department is also involved in technical evaluation of EIAs, environmental management plans, mitigation and rehabilitation plans.[113] It can be argued that the Code sets out the requirements for environmental standards applicable to all mining activities in the DRC.

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mines or quarry as well as prohibited areas. See also the functions and duties of the Ministry of Mines in Article 7 & 10 of the Mining Regulations, respectively.

[109] Article 2(1) of the Mining Regulations.

[110] Article 12(a) – (e) of the Mining Code.

[111] Article 12 para 4 of the Mining Code.

[112] Article 14 of the Mining Code. See also Article 7(3) & (4) of the Mining Regulations.

[113] Article 15 of the Mining Code & Article 11 of the Mining Regulations.

Apart from the regulatory authorities referred above, the Mining Code recognizes Provincial Governors and Heads of Provincial Authority of Mines over areas of competence and concurrent jurisdiction spelt out in Article 11 of the Code and Article 13 of the Mining Regulations. The Provincial Divisions of Mines have jurisdiction over issuing artisanal mining cards and the establishment of artisanal mining zones in their respective provinces subject to approval by the Directorate of Mines.[114] The mandate of the Provincial Divisions of Mines includes implementing provisions spelt out in the Mining Regulations relating to exceptional granting of licences to artisanal miners.[115] However, the Central Mining Cadastre has overall authority and jurisdiction.[116]

The Mining Code introduced procedures for application, granting, renewal and withdrawal of mining or prospecting licences, and at the same time it guarantees to expedite processing of applications within a reasonable time.[117] The Code also provides an opportunity for determination of mining or prospecting applications while taking into account objectivity, transparency and credibility of the processes.[118] With regard to settlement of potential disputes relating to rights of access to mineral resources, exploitation and matters antecedental thereto; as discussed below, the Code provides three distinct ways of resolving such issues. These are domestic administrative process,[119] municipal courts[120] and domestic or international arbitration.[121] Further, the Mining Code provides for mining taxation,[122] environmental protection obligations[123] and penalty provisions for breach of any provision of the Code.[124] The Code also provides for appeal procedure before penalties are enforced.[125]

In a nutshell, the Mining Code establishes a legal framework for regulation and control of, and access to domestic mineral resources, as well as institutions entrusted with responsibilities to implement and enforce the law.

[114] Article 109 of the Mining Code.
[115] Articles 13 – 15 of the Mining Regulations.
[116] Article 11 of the Mining Code & Article 13 of the Mining Regulations. See also Decree No. 068/2003 of 03 April 2003 which relates to operations of Mining Cadastre.
[117] See generally Articles 70 – 74 of the Mining Code.
[118] See generally Articles 50 – 63 of the Mining Code.
[119] Articles 313 – 314 of the Mining Code.
[120] Articles 315 – 316 of the Mining Code.
[121] Articles 317 - 320 of the Mining Code.
[122] See generally Articles 219 – 262 of the Mining Code.
[123] Article 15 of the Mining Code read with Article 11 of the Mining Regulations. See generally Articles 404 – 476 of Decree No. 038 of 2003; hereafter the Mining Regulations or the Regulations.
[124] See generally Articles 289 – 311 of the Mining Code.
[125] See generally Articles 312 – 320 of the Mining Code.

#### *5.3.2.3 Decree No: 038 of 2003 (The Mining Regulations)*

The enforcement of provisions of the Mining Code is provided for by Mining Rules enacted by Decree No.038 of 2003[126] (as provided for in Article 334 of the Mining Code), which came into force on 26 March 2003. The Mining Regulations are divided into twenty-four broad titles and each is subdivided into various chapters.

The Mining Regulations gives the Ministry of Mines discretion in exercising its powers in order to promote sufficient and competent skills in the regulation of mineral resources. The Regulations spell out the manner in which provisions of the Mining Codes have to be implemented and the Ministry of Mines is entitled, subject to approval by the State President, to propose and develop a legal framework to enhance the country's mineral resource regulations in line with the Code.[127] This is pursuant to facilitating sound and coordinated promotion of investment in the mining sector.[128] In particular, Article 7 of the Mining Regulations gives the Ministry of Mines the right to develop the relevant legal mechanisms in order to promote sound regulation of mineral resources, their exploitation and to ensure the objectives of the legislature espoused in the Mining Code are fulfilled.

The Mining Regulations provide for the establishment and functions of the Directorate of Mines, whose functions includes inspecting, supervising and regulating mining activities, as well as health and safety standards,[129] mineral production output, transportation and trade.[130] The Regulations established *Service d' Assistance et d' Encadrement de Small Scale Mining* (SAESSCAM); the department responsible for assisting, overseeing, and supervising operations for small-scale mining. The Regulations also define the powers and duties of the Department of Geology,[131] the Department of Mines (Directorate of Mines)[132] and the Directorate for the Protection of Mining Environment.[133] Further the Regulations outline the powers of these departments and areas of concurrent jurisdiction with the Divisions of

[126] Hereafter the Mining Regulations or the Regulations.
[127] Article 7(1) of the Mining Regulations.
[128] Ibid, subsection (2).
[129] Articles 492 – 494 of the Mining Regulations.
[130] Articles 216 – 217 & 242 – 250 of the Mining Regulations.
[131] Article 9 of the Mining Regulations.
[132] Article 10 of the Mining Regulations.
[133] Article 11 of the Mining Regulations.

Provincial Mines.[134] Furthermore, the Regulations establish the Department of Investigations which is vested with the power to investigate, detect, prevent and penalize offenders, as well as enforcement of decisions against offenders who contravene any provision of the Mining Code.[135] This Department is also entrusted with the duty to investigate cases of fraud relating to, and smuggling of mineral resources.[136] In this regard, it can be argued that the DRC asserts sovereignty over domestic mineral resources through the establishment and legal empowerment of the institutions aforementioned.

The Mining Regulations sets out conditions for exploration,[137] quarrying and other forms of mining,[138] as well as for granting licences to artisanal miners.[139] In order to obtain a mining permit, the applicant has to ensure that all statutory requirements such as environmental obligations,[140] obligations towards local communities,[141] financial minimum requirements,[142] fees payment[143] and mining taxes[144] are complied with.[145] Compliance with the requirements is a precondition for an application to be placed before the relevant competent authority for determination. However, the DRC government has the right to refuse to grant or may withdraw a licence where it can be proved that the applicant or a holder of a licence previously contravened and/or continues to contravene a fundamental obligation as may be defined in the Mining Code and the Mining Regulations.

Moreover, the Mining Regulations provide for offences which are broadly categorized into two; namely, violation of exploration, quarry or mining permit holders' obligations;[146] and conduct or omissions which are classified as violations of environmental obligations imposed on title holders.[147] This includes use of mercury in contravention of the Regulations.[148] Enforcement of penalties is inherently important and underpins the assertion of sovereignty over domestic mineral resources, as well as self-determination and the integrity of the DRC

[134] Article 13 of the Mining Regulations.
[135] Article 12(a) of the Mining Regulations.
[136] Ibid, Article 12(b).
[137] Articles 43 – 63, 74, 105 – 107 & 142 – 143 of the Mining Regulations & Article 43 of the Mining Code.
[138] See generally Articles 39 – 63 & 67 – 69 of the Mining Regulations.
[139] Articles 203 – 215 & 223 – 233 of the Mining Regulations.
[140] Articles 404 – 476 of the Mining Regulations.
[141] Articles 477 – 480 of the Mining Regulations.
[142] Articles 79 – 82 of the Mining Regulations.
[143] Articles 394 – 403 of the Mining Regulations.
[144] Articles 10(2)(c) & Articles 142 – 160 of the Mining Regulations.
[145] Articles 512 – 527 & 539 – 541 of the Mining Regulations.
[146] See generally Title XXI (Articles 561 – 568) of the Mining Regulations.
[147] See generally Chapter III of Title XXI (Articles 569 – 571) of the Mining Regulations.
[148] Article 575 of the Mining Regulations.

in the regulation of the resources. It can therefore be concluded that the Mining Regulations complement the Mining Code, as legal tools that the DRC could use to regulate its mineral resources as discussed in section 5.5 below.

### 5.3.3 Economic Indigenization

Apart from provisions contemplated in the Mining Code that allow free carried interest and artisanal mining to be carried out by Congolese nationals only, the DRC does not seem to have a single and consolidated law that can be considered as "economic and indigenization law" or transformative economic development policy, which comprehensively builds upon the Mining Code and the Mining Regulations. However, in line with some countries in the region,[149] the DRC requires mining companies to comply with domestic mining laws and Regulations on issues such as safety and health,[150] environmental[151] and heritage protection.[152] The DRC government introduced a 5 percent free carried interest in all mining ventures, and in practice, 10 to 15 percent of mining companies' share interests have to be held by local partners.[153] Although this could be recognized as economic indigenization, however, the free carried interest that was introduced by the Mining Code could be as a result of political pressure on the DRC government.

Against the backdrop of the international law principles which support the assertion of state sovereignty and the right to development discussed in chapter 2, and taking into account the relevant provisions from mining laws aforesaid, the focus now turns to an analysis in accordance with the themes highlighted in chapters 2 and 3.

## 5.4 The Assertion of Sovereignty and Operationalization of International Law Principles in Support of the DRC's Sovereignty over Mineral Resources

With regard to the mining laws and provisions in the Constitution relevant to mineral resources introduced and outlined in the afore-going sections, the next sections examine how state sovereignty is exercised through the operationalization of international law principles which support state sovereignty over mineral resources discussed in chapter 2. The examination of the various themes that assert the manner in which sovereignty is exercised is

[149] Countries such as Zimbabwe, South Africa, Botswana, Namibia and Zambia.
[150] Articles 207& 210 of the Mining Code read with Articles 492 & 493 of the Mining Regulations.
[151] Articles 461 & 462 of the Mining Code. See also Articles 463 – 476 of the Mining Regulations.
[152] Article 489(b) of the Mining Regulations.
[153] Charlotte Mathews 'Mining laws' *Financial Mail*, 16 May 2013.

necessary in order to classify and demystify how the DRC operationalizes the international law principles which support sovereignty over domestic mineral resources.

### 5.4.1 Property and Ownership Rights

As discussed in chapter 2, the state in which mineral resources are located or found has the mandate and privilege derived from the PSNR principle to exercise control over the resources. As such, the DRC has sovereign control and the right to regulate domestic mineral resources, by enacting laws or provisions in domestic laws that spell out the acquisition of property rights.

The DRC Constitution[154] and the Mining Code[155] provide that the state is the owner and custodian of all mineral resources found within the Republic. State ownership of these resources is therefore protected under the Constitution, which is the supreme law of the DRC. Article 32 of the Constitution confirms that every foreigner who is legally in the DRC enjoys personal and property protection according to the conditions that are set out in treaty law and domestic laws. Also, Article 34 guarantees the right to private property. The Mining Code further spells out the manner in which state ownership is exercised and protected. In terms of Article 3 the State has exclusive and inalienable ownership rights to all mineral resources found in the Republic. However, in the assertion of sovereignty over the resources, the DRC may grant a foreign investor the right to explore or exploit a specific resource, by awarding mining rights subject to renewal for a certain period.[156] Holders of mining rights do not have real rights but only personal rights, which enable them to exploit the resources subject to the terms and conditions underpinning the issuance of mining or exploration licences. However, the fact that a holder of mining rights does not have ownership rights does not necessarily mean the rights accrued to him or her are excluded from legal protection. As discussed below, once a mining or exploration licence is granted, it is registered with the Mining Registry, thus, providing security of tenure.[157]

[154] Article 9 of the Constitution.
[155] Article 3 of the Mining Code.
[156] Title I – Chapter III of the Mining Code - Articles 17 – 22, Article 33, 43 & 47. See also Title III – Chapter I & II of the Mining Code, as well as Articles 50 – 85 of the same Code.
[157] Article 12 of the Mining Code. See also para 2 of Article 43 of the Mining Code.

Holders of surface rights have no legal entitlement to mineral resources found on or under the surface area over which they have the right of control.[158] However, they are entitled to fair compensation, if the land they have the right of control over is expropriated for the purposes of establishing mining projects. There is no special method relating to the issue of mining rights in areas covered by surface rights.[159] Further, mining laws do not impose a specific classification system for reporting mineral resources that may be found by holders of surface rights.[160] Classification of these reserves may be imposed by the stock exchanges upon which the mining companies are listed. Nevertheless, the DRC government may decide to grant investors mining licences to exploit such resources pursuant to specific applications and administrative procedures.[161] The Mining Code provides for explicit administrative and legal recourses for potential mining rights holders against surface rights holders.[162]

In the assertion of sovereignty over mineral resources and by granting mining rights to some foreign investors, the DRC government is helped by the judiciary, which reinforces the state's sovereignty through court decision-making on whether an applicant, who may have been denied mining licence through administrative actions, can be granted, following court processes.[163] In other words, where the right was not granted and the applicant was of the view that there were reasonable grounds that were not considered, the applicant can take the administrative decision on review by a competent court.

Taking the above into account, and the cumulative effect of the international law principles discussed in chapter 2, unswervingly supports the DRC's sovereignty and prerogative to regulate domestic mineral resources.[164] However, upon registration of the mining rights, an investor is granted secure rights of access to a specific mineral resource for a certain period of time, subject to payment of certain fees and fulfillment of the conditions for renewal of a mining licence. Although the legal framework covers property rights, however, protection of foreign investors is relatively weak. This could be one of the factors which situated the

[158] Section 281 of the Mining Code.
[159] Article 34 of the Constitution. See also Hubert Andre-Dumont, op cit note 21 at 70.
[160] Joseph Yav 'Mining laws and regulation in the Democratic Republic of Congo' 2011, available at http://www.yavassociates.com/blog/2011/04/17/-MINING-LAWS-AND-REGULATION-IN-THE-DEMOCRATIC-REPUBLIC-OF-CONGO.aspx (accessed 2 December 2012).
[161] Hubert Andre-Dumont, op cit note 21 at 70.
[162] See generally Articles 281 & 312 – 320 of the Mining Code, which relate to administrative appeals, appeals via the judiciary system and appeals via arbitration.
[163] Joseph Yav, op cit note 162.
[164] Article 3 of the Mining Code.

country on rank 185 on the World Bank's Doing Business Report of 2014.[165] This is an extremely low ranking which shows weak protection of property rights, which incorporates mining rights. In this regard, weak protection of property rights would seem to mean the presence of political influence to assert the state's interest over the interests of investors. This does not promote the rule of law and accordingly erodes investor confidence.

### 5.4.2 Access to Mineral Resources

The coming into effect of the Mining Code and the Mining Regulations in 2002 and 2003, respectively, influenced the DRC to allocate mining rights and the rights of access to domestic mineral resources on a 'first come, first served basis'.[166] The Mining Code provides conditions for access to domestic minerals and the Mining Regulations spells out the manner in which access has to be obtained. The ownership provision contemplated in the Constitution has been provided for and reinforced by the Mining Code,[167] making the state the sole authority entitled to decide who may be granted temporary rights of access to its mineral resources.

Article 5 of the Mining Code provides for authorizations of mining and quarry activities; any investor who is allowed to engage in non-artisanal mining of mineral resources has to be a holder of a valid mining or quarry licence. The same Article permits any Congolese national to engage in regulated artisanal mining on condition that he or she is a holder of an artisanal miner's card, issued by the relevant and competent authority.[168] However, Article 5(2) of the Code does not expressly allow non-Congolese to engage in artisanal mining. In other words, artisanal mining is only reserved for Congolese nationals; the reason is possibly to encourage locals to participate in artisanal mining since it is not capital intensive and the requirements for, and procedure to obtain an artisanal miner's card is easy. This is assertion of sovereignty, and a way to create employment by allowing citizens to engage in artisanal mining under the watchful eye of the state.

Title I of Chapter II of the Mining Code spells out the role of the State and its relevant institutions in the regulation of domestic mineral resources. In particular, Article 8 of the

[165] The World Bank 'Ease of doing business index' 2014, available at http://data.worldbank.org/indicator/IC.BUS.EASE.XQ (accessed 30 June 2014).
[166] Charlotte Mathews, op cit note 155.
[167] Article 3 of the Mining Code.
[168] Para 2 of Article 5 of the Mining Code.

Code provides that the DRC is not fully capacitated to exploit its mineral resources; instead it requires joint partnerships with private investors. The fact that investors are required to assist the DRC to fully explore and mining its mineral resources is an indication that investment plays an integral part. Regardless of the fact that foreign investment is required, the DRC has to assert its sovereignty by controlling access to the resources, by formulating and setting out conditions that investors have to comply with. The role and jurisdiction of the State is assumed through the relevant state institutions, such as the Ministry of Mines under the Minister of Mines,[169] the Mining Registry,[170] the Directorate of Mines,[171] and the Head of the Provincial Authority of Mines[172] and the Department in Charge of the Protection of the Mining Environment.[173] The jurisdiction of each state institution is spelt out in the Code and the Mining Regulations. The manner in which the DRC asserts sovereignty manifests in the provision of the terms and conditions for access to domestic mineral resource.

With regard to eligibility for access to mineral resources, the Mining Code and Mining Regulations spell out who qualifies. Article 17 of the Mining Regulations provides that every Congolese corporation and any foreign corporation duly registered in terms of the relevant domestic legislation governing exploration or mining of mineral resources is legally entitled to the right of access to a mineral resource. Prospecting or mining is allowed only upon fulfillment of all the conditions for access to mineral resources as contemplated in the Mining Code and Mining Regulations.[174] The conditions include meeting the financial minimum capacity[175] and environmental obligations.[176] The State through its agencies determines areas that can be explored for, and mining of mineral resources. In terms of Article 6 of the Mining Code, access is prohibited to explore or mine mineral resources in protected areas.[177] Further, eligibility to obtain mining and quarrying rights[178] is generally provided for in Title II of Chapter I of the Code. This includes eligibility to obtain an artisanal miner's card.[179] Article 23 of the Code provides for persons eligible to be granted rights of access to domestic mineral resources. This includes any Congolese national who has reached the age of

[169] Article 10 of the Mining Code
[170] Article 12 of the Mining Code.
[171] Article 14 of the Mining Code & Article 10 of the Mining Regulations.
[172] Article 11 of the Mining Code & Articles 13 & 15 of the Mining Regulations.
[173] Article 15 of the Mining Code & Article 11 of the Mining Regulations.
[174] Articles 17 – 22 of the Mining Code & Article 17 of the Mining Regulations.
[175] Articles 79 – 82 of the Mining Regulations.
[176] Articles 404 – 414 of the Mining Regulations.
[177] See also Articles 279 & 282 of the Mining Code.
[178] Article 23 of the Mining Code.
[179] Article 26 of the Mining Code.

majority,[180] an entity either duly incorporated in terms of the DRC laws[181] or doing scientific research.[182] Also, any foreign national who is regarded as a major in terms of the laws of his or her country, and who is capable of becoming an investor in the DRC,[183] subject to electing domicile of choice with an authorized mining and quarry agent located in the Republic, can apply to the Ministry of Mines for a mining licence which confers the right of access to a domestic mineral resource.[184]

Article 27 of the Mining Code provides for the category of persons who are not eligible for access to domestic mineral resources, whether as holders of an artisanal miner's card, trader's cardholders, mining or even quarry title holders.[185] Any person who lacks legal capacity in the context of the DRC laws,[186] or who has been condemned by a non-appealable court judgment for contravening mining and quarry laws or economic activities which involves mining or quarry rights or affiliated entities, does not qualify to have the right of access to domestic mineral resources.[187] Further persons whose artisanal miner's or trader's cards have been cancelled are temporarily excluded from holding rights of access to any mineral resource for a period of 3 years.[188] Furthermore, of those excluded to carry out any mining and related activities, the following are also included in that category by virtue of their offices; judicial officers, members of the armed forces, civil servant, police officers and security agents, as well as government employees.[189] Nevertheless, the exclusion from accessing mineral resources and related activities does not disqualify a member of the categories referred herein to participate in the capital of mining companies. Regardless of the exclusion, allowing such people to be party to the capital of a mining entity could be a weakness in the legislation that may cause conflict of interests.

[180] Article 26(a) of the Mining Code.
[181] Article 23(a) of the Mining Code.
[182] Article 23(c) of the Mining Code.
[183] See generally Law No. 08/001 of 26 March 2008, which repealed Act No. 86/007 of 27 December 1986 that relate to the stay and movement of foreigners in mining areas and liberalization of the mining sector in terms of the Mining Code.
[184] Article 23 (b) read with Articles 24 & 25 of the Mining Code.
[185] Para 1 of Article 27 of the Mining Code.
[186] See generally Article 215 of Law No. 87- 010 of 1 August 1987; hereafter the Family Law Code.
[187] Para I of Article 27(c) of the Mining Code.
[188] Para II of Article 27(c) of the Mining Code.
[189] Article 27(a) of the Mining Code.

In terms of the Mining Code, any person intending to undertake prospecting has to make a preliminary declaration with the Mining Registry.[190] Where a party is granted a prospecting licence, the permit only confers rights to search for specific mineral resources and in the event that a discovery has been made, the substance containing a mineral deposit, called the prospect, is then explored to determine the quantity of valuable characteristics of the deposit.[191] Prospecting licences do not entitle holders access to mine a mineral resource because the nature of the licence does not confer rights of access to, and exploit a resource.[192] It could therefore be arguable that in deciding on exploration, the DRC asserts its sovereignty by setting out terms and conditions for, and access to its mineral resources.[193]

Article 43 of the Mining Code is important regardless of the little it says about the criteria when deciding whether to grant rights of access to a mineral resource. Applications for exploration[194] and mining or quarry permits must take into account environmental obligations,[195] safety and health issues,[196] as well as obligations towards indigenous communities.[197] The applicant has to prove that environmental obligations such as environmental impact assessment,[198] environmental management plans,[199] mitigation and rehabilitation plans,[200] and mining taxation required by the Mining Code and Mining Regulations have been complied with.[201] The decision to grant rights of access to a mineral resource is determined by the Minister of Mines upon receiving all the necessary documentation, which must include the favourable opinion of the registrar of mines, as well as technical and environmental opinions.[202] After making a determination on the application, it becomes mandatory for the competent authority to send its decision to the Mining Registry within a reasonable time.[203] The Mining Registry is entitled to take note of the decision,

[190] Para 2 of Article 17 of the Mining Code.
[191] William Andrew Hustrulid 'Mining – prospecting and exploration' 2014 Britannica Academic edition, available at http://www.britannica.com/EBchecked/topic/384099/mining/81256/Prospecting-and-exploration (accessed 3 July 2013).
[192] Para 3 of Article 18 of the Mining Code & Article 21 of the Mining Regulations. For the Conditions of prospecting, see Articles 19 – 22 of the Mining Code.
[193] Article 9 of the DRC Constitution, 2006.
[194] Articles 50 – 108 of the Mining Code.
[195] Articles 42 of the Mining Code.
[196] Articles 207 – 210 of the Mining Code. See also Articles 492 – 494 of the Mining Regulations.
[197] Articles 275, 280 & 281 of the Mining Code. See also Articles 204, 404 – 414, 430 – 449, 477 – 480 of the Mining Regulations.
[198] Environmental Impact Assessment; hereafter EIA.
[199] Articles 450 – 465 & 576 of the Mining Regulations. See also Annexes VIII & IX to the Mining Regulations.
[200] Appendix VII of the Mining Regulations.
[201] Articles 430 – 449, 450 – 465 & 466 – 476 of the Mining Regulations.
[202] Para 1 of Article 43 of the Mining Code.
[203] Article 43 of the Mining Code.

whether favourable or not, for the purposes of notifying the applicant.[204] In the event that the Minister does not send the decision to the Mining Registry in terms of Article 43 of the Mining Code, it will be legally presumed that the decision to grant mining or quarry rights has been allowed.[205] It is imperative for the Minister, when making a determination over an application to grant access to a mineral resource, to expedite the process by ensuring that all the requirements are considered accordingly in order to avoid adverse inferences. In making a determination, the Minister represents the State and has the obligation to exercise his or her discretion in the best interests of the state. By granting an application and upon registration of the decision, the applicant is entitled to the right of access to a specific mineral resource and security of tenure is guaranteed. Therefore, the process of making determination over applications is an assertion of state sovereignty, which is supported by the international law principles discussed in chapter 2.

In the event that an application for research, exploration or mining permit has been rejected under unclear circumstances, the applicant may seek administrative[206] or judicial intervention.[207] Where an application for a mining permit is granted, or in the event of a decision to register via the judicial system as provided for in Article 46 of the Mining Code, the Mining Registry issues a permit showing the nature of the right applied for, provided an annual surface fee has been paid.[208] Upon delivery of the licence to the applicant, the Mining Registry issues a receipt of payment of the annual surface rights fee and registers the title.[209] This makes granting of rights of access to a mineral resource complete and binding, and becomes enforceable against the State. The requirement for application and determination process could show the manner in which the DRC asserts sovereignty over domestic mineral resources. Also, the process shows the ability of the state to exercise self-determination regarding access to domestic mineral resources.

In a nutshell, access to mineral resources is generally done throughout the entire DRC territory provided a party has a valid mining licence; however, there are certain areas where access is restricted or not allowed.[210] Such areas include protected areas or natural reserves

[204] Ibid, para 2.
[205] Ibid, para 3.
[206] Article 312 – 322 of the Mining Code.
[207] Article 46 of the Mining Code.
[208] Articles 47 & 98 of the Mining Code.
[209] Ibid.
[210] Article 17 of the Mining Code.

such as wetlands and wildlife, and cultural heritage sites,[211] as well as areas governed by special laws.[212] In determining the eligibility for access to domestic mineral resources, and regardless of the loopholes and weaknesses that are available in the process, the DRC could be considered to be asserting sovereignty over domestic mineral resources.

### 5.4.3 Mineral Resource Policing and Enforcement of Mining Laws

The Mining Code and Mining Regulations provide a set of policing measures in the regulation of mineral resources. In terms of Article 8 of the Mining Code, the State through its relevant institutions has the prime role in the regulation of mineral resources. To ensure compliance with the DRC mining obligations, all parties who undertake mining and related operations in the country are required to observe the law. The Mining Code and Mining Regulations created categories of conduct classified as contravening mining laws. It is an offence to mine or possess a mineral resource without a valid permit,[213] and theft of mineral ore or mineral products is prohibited.[214] Theft is generally regarded as a common law offence, however, when it is committed in respect of a mineral resource, such conduct contravenes a provision of the Mining Code which relates to theft.[215]

It is an offence to purchase and sell a mineral resource or substance without a permit, to assume custody, possess or keep a mineral resource or mineral substance without a permit[216] and also to transport mineral substance without authorization.[217] Further, it is an offence to contravene any health and safety regulations,[218] or any act or violent conduct against agents of,[219] and any conduct that is intended to obstruct the activity of the Mines Authority.[220] Any conduct which contravenes a provision of mining laws, depending on the gravity of the offence, potentially affects the DRC's ability to assert its sovereignty over mineral resources. Furthermore, illegal dealings have the potential of breaking down the operationalization of

[211] Articles 206 & 279 read together with Article 275 of the Mining Code. See also Article 489 of the Mining Regulations.
[212] Ibid, subsections (a) & (b). See also Articles 6, 279 & 282 of the Mining Code.
[213] Article 299 of the Mining Code.
[214] Article 300 of the Mining Code.
[215] Ibid.
[216] Article 303 of the Mining Code.
[217] Article 304 of the Mining Code.
[218] Article 305 of the Mining Code.
[219] Article 309 of the Mining Code.
[220] Articles 309 & 310 of the Mining Code.

PSNR, thus, disadvantaging the DRC and preventing it from benefitting from its mineral resources.

The role of the State and its institutions, such as the Mining Registry, Directorate of Mines, the Department in Charge of the Protection of the Mining Environment, Provincial Mining Authority and the Department of Investigations are of paramount importance in order to ensure that the objectives contemplated in the Mining Code and the Mining Regulations are realized. The Department of Investigations is entrusted with the duty to investigate all mineral-resource related issues and is assisted by the police to arrest and bring the offender to justice.[221] The nature of fines that are imposed for violation of provisions of the Mining Code depends on the nature of the offence; the offender can be sentenced to a custodial term without an option of a fine or could have both a fine and custodial sentence imposed. Where a fine is considered appropriate, it may be up to US$30 000 or equivalent of Congolese Francs.[222] The Parliament and the executive arm of government are involved in enacting penalties. The judicial system plays a vital role to determine and, impose appropriate fines and imprisonment terms on offenders. The government enforcement agencies from the Ministry of Mines, such as mining inspectors as well as the national police are involved in policing the minerals sector. However, as shall be discussed below, the effectiveness of the processes raises further questions against allegations of high levels of corruption in the minerals sector.

The implementation and enforcement of statutory requirements in the regulation and policing of the minerals sector is underpinned by conditions that are required to acquire mining, quarry[223] or exploration licences. The prerequisite for environmental and technical evaluations form part of the conditions. Although the Mining Code outlines the categories of offences, which include breaching of licence conditions, however, it is not clear how many offenders have been successfully prosecuted and ordered to pay fines. The fact that illegal dealings in the mineral value chain continue unabated is perhaps an indicator that policing is not effective. Arguably, one may therefore question the efficacy of the policing system and enforcement of the relevant laws.

[221] See generally Article 12 of the Mining Regulations.
[222] For example, see Articles 299 – 311 of the Mining Code.
[223] Article 35 of the Mining Code.

The provision for criminal sanctions could be deterrent measures and to ensure that all parties in the mineral value chain and the general public uphold domestic mineral laws. Fear of sanctions presumably gives the state an advantage and the ability to regulate, and control access to, as well as accountability in the sector. Although fear of sanctions is a potential deterrent, however, weak implementation and enforcement of the laws adversely affects policing.

The role of policing of mineral resources and the manner in which it is done, as well as compliance with domestic mineral laws are important aspects in the DRC's ability to assert sovereignty over domestic resources. Policing is an important regulatory tool, a safeguard measure that enables state institutions entrusted with the duty to enforce mining laws to fulfill their mandate, which include curbing endemic corruption, illegal mining and smuggling of the resources. Appropriate and effective policing has the potential to strengthen the DRC's assertion of sovereignty over mineral resources and the potential to derive maximum economic benefits. Against this backdrop and as shall be discussed in the next chapter, there is the need for the DRC to ensure effective policing.[224] Enforcement and monitoring mechanisms are tools that are used by the state to ensure the conditions leading to conclusion of the contracts between the state and various mining companies operating in the country are implemented. In the process, the DRC regulate the operations of mining investors in line with domestic laws for self-determination.[225]

The first step to ensure appropriate enforcement and monitoring is to identify each mining or permit holder's obligations and which obligations must be monitored. Although the legal framework that regulates the minerals sector in the DRC tends to be uniform across mining companies, there are relatively slight variations in the obligations of one company to another depending on the nature of the permit.[226] It then flows from Article 14 of the Mining Code; the Ministry (Directorate) of Mines is not only responsible for inspecting and supervising all mining activities but also compilation and publication of production statistics, and marketing mining and quarry products. The Directorate also monitors and inspects the entire DRC mining industry, small scale and artisanal mining; each category signifies overlap or different

[224] Louise Arimatsu & Hemi Mistry 'Conflict minerals: The search for a normative framework' 2012, Chatham House, International Law Programme paper 2012/01 at 2.
[225] Erin Smith & Peter Rosenblum 'Government and citizen oversight of mining: Enforcing the rules' 2011 Revenue Watch Institute at 4, available at http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/enforcing%20the%20rules%20full%20report.pdf (accessed 4 October 2013).
[226] Ibid, at 14.

obligations. Further the Ministry is responsible for receiving and approval of under-purchasing counters and issues opinions on the state of mining operations, compliance and implementation of the conditions prior to the issuing of mining licences.[227] Furthermore, the Ministry monitors social commitments, worker health and safety, environmental obligations, operational commitments such as work programmes and fiscal terms like taxes and royalties.[228] Against this background, the issue is whether the Ministry is capable of meeting its statutory obligations in order to ensure that all mining and exploration permits holders comply with their statutory obligations.

In order to establish the effectiveness of enforcement and monitoring capacity of the Ministry of Mines, one has to consider the multitude of statutory obligations the department has against the total number of the officials employed to discharge the obligations. Also, one has to consider the number of law enforcement officials in the mining sector and the budget the department works with. On the same issue, consideration has to be on the distance the officials are obliged to travel in order to monitor the process, and how frequency do they do so? Furthermore, one has to consider whether there are instances in which mining companies have been charged and prosecuted for contravening the country's mining laws. The absence of information on these issues entails no definite responses.

Enforcement of mining laws and monitoring mining activities could be a major challenge for the DRC. This might be exacerbated by the state's failure to attract and retain sufficiently experienced staff to monitor compliance. As a result, inferences may be drawn from endemic corruption in the minerals sector, illegal mining and resource conflicts as evidence of weak regulation and enforcement of mining laws.[229] The fact that there seem to be monitoring problems suggest that the Ministry could be understaffed, under-resourced and therefore incapacitated to do its duties.[230] In spite of the DRC's long history as a mineral producing country, research by the World Bank concluded that State institutions responsible for implementation, enforcement and supervising the minerals sector are weak and ineffectual.[231] Although the Mining Code and the Mining Regulations, theoretically, establish the organizational structure which is consistent with international practice, the State faces an

[227] Article 14 of the Mining Code. See also Article 10 of the Mining Regulations.
[228] Erin Smith & Peter Rosenblum, op cit note 227 at 7.
[229] Ibid, at 12.
[230] Ibid, at 9.
[231] The World Bank, supra note 50 at 37.

enormous challenge to strengthen the institutions at all levels and align them with their statutory obligations.[232]

Since most mining activities in the country are joint-mining ventures between the government of the DRC and private investors, this could make it complex to ensure the standards for enforcement and monitoring are effective on such entities because there could be conflict of interests.[233] The intricacy is exacerbated by the fact that the State, on the one hand, is an operator and in the other, a regulator. A cardinal point in enforcing and monitoring the implementation of mineral laws and regulation of the minerals sector is the distinction between the State's role as a regulator and as a stakeholder in joint-mining ventures.[234] However, in the DRC context, balancing these two conflicting interests is ostensibly difficult due to the challenges identified above.

It may be argued that the DRC's weak enforcement of its mineral laws is adversely affecting the regulation of mining sector across the value chain. As a result, the weakness in enforcement has negatively influenced corruption, illegal mining and smuggling as well as resource conflicts. While the DRC has potential to exercise its sovereignty over domestic mineral resources, it has not kept pace due to weak implementation, enforcement and monitoring.[235] This has weakened and restricted sovereignty of the state as far as exercising and deriving benefits as mandated by the principle of PSNR discussed in chapter 2 above. The weaknesses have economically deprived the state of its meaningful mandate to exploit mineral resources for self-determination and the operationalization of aspects of international law principles (as discussed in chapter 2 above). Also, the weaknesses adversely promote threats to sovereignty over mineral resources (as discussed in chapter 3 above).

### 5.4.4 Beneficiation and Trade

The DRC's beneficiation policy is embedded and scattered in several policy documents. For example, Article 10(c) of the Mining Code as well as Articles 218 and 219 of the Mining

[232] Ibid. See generally Commission *d'Enquête sur le Secteur Minier, Rapport, République Démocratique du Congo, Sénat* 2009, available at http://medias.lemonde.fr/mmpub/edt/doc/20091015/1254091_0859_rapport-mines-senatrdc.pdf (accessed 30 October 2013)
[233] Erin Smith & Peter Rosenblum, op cit note 227 at 9.
[234] The World Bank, supra note 50 at 29.
[235] Revenue Watch Institute 'Democratic Republic of Congo: Transparency snapshot' available at www.revenuewatch.org/countries/africa/democratic-repblic-congo/transparency-sanpshot (accessed 3 June 2013).

Regulations encourage local beneficiation. Ministerial permission ought to be sought where beneficiation can be carried out of the DRC for various reasons highlighted above. However, the provisions merely highlight the need to undertake local beneficiation but there is no coherent law dedicated to this topic. Although there are growing calls for local beneficiation, academic views as well as the legal regime which spells out beneficiation and value addition is not yet in place. It would seem one needs to connect these documents and reconstruct that policy into a coherent whole.

Regardless of the Mining Code's position regarding prospecting, exploration and exploitation of mineral resources, it also regulates processing,[236] transportation and trade of minerals substances.[237] Article 10(c) of the Code gives the Minister of Mines unfettered jurisdiction and powers to exercise discretion whether to grant leave for export of unbeneficiated mineral resources.[238] Further Article 10(j) of the Code confers jurisdiction on the Minister of Mines to authorize processing or transforming artisanal exploitation mineral products.[239] These powers have been exercised, for example, by the Minister when he granted leave for export of unrefined cobalt ore to China for beneficiation. The DRC has more than half of the world's cobalt reserves; only 5 percent was refined in the region. In contrast, China which does not have cobalt reserves produces about 40 percent of the world's refined cobalt. However, it is this dynamic that the DRC should encourage local beneficiation in order to export value-added minerals and mineral-bearing products, as well as employment creation for the locals.[240]

The Mining Regulations provides more details regarding the legal requirements for authorization of applications for export of unbeneficiated minerals.[241] There are two basic criteria for the Minister to consider when deciding whether to grant leave or not; (i) a permit holder applying for authorization must prove that it is impossible to process the mineral ore

[236] Articles 81 - 83 of the Mining Code.
[237] Para 1 of Article 2 of the Mining Code.
[238] Articles 218 & 219 of the Mining Regulations.
[239] Article 10(1)(a)(vi) of the Mining Regulations.
[240] Martin Creamer 'More beneficiation of cobalt wanted in DRC – core' 2011 Mining Indaba Review, available at http://www.miningweekly.com/article/more-beneficiation-of-cobalt-wanted-in-drc-core-2011-03-04 (12 June 2014). See also Bene M'Poko 'DRC miners will be forced to beneficiate locally' 2011, available at http://www.metalbulletin.com/Article/2877907/DRC-miners-will-be-forced-to-beneficiate-locally-MPoko.html#axzz3Cf4KTEii (accesses 2 September 2014).
[241] Article 218 para 3 (a) – (f) of the Mining Regulations.

in the country at a cost that is economically viable for the applicant's mining venture,[242] and (ii) the applicant has to establish that it is to the economic advantage of the country if the export authorization is granted.[243] In relation to (i) above, this cannot be difficult to prove in a context of the DRC because of lack of facilities, it would always be cheaper to beneficiate it elsewhere – hence it undermines the legal restrictions that are in place, thus, showing another instance in which the legislation itself has fissures.

Generally, there are no restrictions or limitations in marketing minerals and mining products from exploitation areas.[244] However, the absence of a single consolidated policy on beneficiation does not necessarily mean exporting raw mineral resources is free of legal and administrative restrictions.[245] The Minister of Mines' authorization is a prerequisite for exporting unprocessed mineral ores.[246] Therefore the Minister has extensive powers to make decisions that may influence DRC's policy on exportation of unbeneficiated minerals.

Regarding export and import restrictions, trade restrictions generally distort free trade and a direct confrontation with international trade law, as well as trade liberalization. I focus briefly on the manner in which the DRC exercises its sovereignty over domestic mineral resources through import and export restrictions. This is against the fact that the DRC has inherent regulatory autonomy over mineral resource imports and exports, subject to whatever obligations it may have taken on under the international trade regime.

As discussed in the preceding paragraphs, the DRC may have strict domestic laws regarding export of minerals, unless the potential exporter has the approval of the Minister of Mines. However, restrictions on unbeneficiated mineral exports could be one of the ways in which the DRC exercises sovereignty over domestic mineral exports and reflects the government's power to regulate and limit unnecessary exports of raw minerals.

In the absence of a consolidated beneficiation policy and effective policing, the requirement to seek Ministerial authorization before exporting unbeneficiated mineral resources and related substances may be bypassed; thus, making it possible to illegally export

[242] Article 85(a) of the Mining Code.
[243] Ibid, subsection (b).
[244] Articles 39 – 42 of the Mining Regulations. See also Hubert Andre-Dumont, op cit note 21 at 73.
[245] Article 85 para 1 of the Mining Code.
[246] Articles 218 – 222 of the Mining Regulations.

unbeneficiated minerals. Due to a lack of transparency, however, it is not clear how many tons of raw mineral exports bypass Ministerial authorization. Regardless of this, the DRC has the potential of asserting sovereignty over domestic mineral resources by making it mandatory to export beneficiated minerals. However, the "cracks" in the assertion of sovereignty over raw mineral resource exports are already apparent in the legislation.

### 5.4.5 Royalties and Taxes

It is a legal duty for every mining company operating in the DRC to pay mining taxes and royalties to the state.[247] Like Zimbabwe, the DRC's mining tax regime includes mining duties, mining royalties and taxes payable by mining companies on the concessions. In this regard, one may then ask what forms of duties, royalties and taxes are paid by private mining title holders who are engaging in various mining activities in the country.[248]

The tax and duties regime that is applicable to mining activities in terms of the Mining Code[249] is extensive and includes mining royalties, mining taxes, charges and other fees payable to the state by mining or exploration title-holders.[250] However, this does not necessarily preclude tax agencies from claiming relevant additional taxes from mining or exploration title holders.[251] When appropriate, the Mining Code provides an outline of the DRC mining taxation regime and all forms of mining taxes payable to the state.

The Mining Code guarantees stabilization in that the current mining taxes, royalties, customs, exchange controls and other charges as well as benefits applicable to all mining activities in the country remain in effect for ten years from 2002 to 2012. The stabilization of conditions was in favour of each mining title holder operating in the DRC in 2002 regardless of any subsequent amendment to the Mining Code during the ten year period.[252] However, the stabilization clause has the potential effect of undermining state sovereignty, as discussed in

[247] Article 174 of the DRC Constitution.
[248] Hubert Andre-Dumont, op cit note 21 at 71.
[249] See generally Articles 219 – 262.
[250] Article 219 of the Mining Code. See also African Metals 'DRC mining laws' 2010, available at http://www.africanmetals.com/en/properties/congo_laws.htm (accessed 3 June 2012).
[251] Article 220 of the Mining Code.
[252] Article 276 of the Mining Code.

chapter 2, in that the DRC could not freely and unilaterally amends its domestic law contrary to the clause.[253] If the state does, then, it might be liable for damages and compensation.

The mining royalty is owed from the date of commencement of effective exploitation of a mineral resource and is payable upon sale of the mineral concerned.[254] The mining royalty is calculated based on the total value of sales, less transport costs and less assays, insurance and marketing costs.[255] The current rate of mining royalty is 0.5 percent for iron or ferrous metals, 2 percent for non-ferrous metals and 2.5 percent for precious metals.[256] The distribution of the mining royalty proceeds is also provided for in terms of the Mining Code,[257] and the Mining Regulations spells out the conditions for collection and distribution of the royalties in terms of the distribution procedure contemplated in paragraph 1 of Article 242 of the Mining Code. Article 242 is critical to this discussion – especially that the royalty must be proportionally distributed to all levels of government and that local authorities must use it for basic infrastructure in the interests of the Congolese community. This is a noble idea and when implemented properly, the financial benefits derived from mineral resources can contribute significantly to the development of the DRC. However, the central challenge can be the appropriate practical implementation of the provision against the backdrop of weak central authority, as well as weak enforcement, corruption and policing.

Apart from the forms of mining taxes referred above, the DRC also imposes profit-based tax on net benefits from exploitation of a domestic mineral resource at the preferential Mining Code rate of 30 percent.[258] The rate of profit-based tax is determined in accordance with the accounting and tax legislation currently in force.[259]

Approximately two-thirds of the DRC's industrial minerals including diamond production are realized through unregulated artisanal diamond diggers. Like industrial diamonds, gold

[253] See generally Abdullah Faruque 'Validity and efficacy of stabilization clauses: Legal protection vs functional value' (2006) 23 *Journal of International Arbitration* 317.
[254] Article 240 of the Mining Code.
[255] Ibid.
[256] Article 241 of the Mining Code. See also African Metals, supra note 252 & Hubert Andre-Dumont, op cit note 21 at 71.
[257] Article 242 of the Mining Code.
[258] Article 247 of the Mining Code.
[259] Hubert Andre-Dumont, op cit note 21 at 71.

production takes place mostly through artisanal mining and is not significant.[260] However, mining production could have been negatively affected as a result of armed conflicts in the country over the years. This has a negative effect on the number of parties who pay mining royalties and taxes to the state. Thus in turn negatively affects the total amount of revenue from the mining sector.

Regarding the use of mineral resource revenues, transparency and accountability is paramount. Theoretically, the DRC has zero tolerance to corruption. This might be a potential driver that helps to curb resource conflicts since communities would benefit from the country's mineral resources. This proposal could turn the potential for "resource curse" into tangible economic benefits that enhance indigenous peoples' standards of living. Comparative research and debates on war economies balances the view that where mineral endowments form the bases for conflicts, they can also form the basis for economic growth and development.[261] However, as discussed below, corruption in the minerals sector is prevalent and militates against the national approach to exploit mineral resource for national economic benefit.

### 5.4.6 Legal Obligations Toward Indigenous Communities

Mining is inherently unsustainable towards the environment and communities adjacent to the mining site. There are a number of scientific and legal obligations and measures to mitigate the negative impacts on the environment and local communities. The legal obligations expected of the mining houses towards the indigenous community and its surrounding environment is regulated by the Mining Code and the Mining Regulations. According to Andre-Dumont, there are no specific rules applicable to protect specific populations in relation to the exercise of mining rights.[262] Despite this averment, the legal requirement is that mining companies are obliged to honour their obligations toward the communities adjacent to the mining locations or affected by mining activities.[263]

[260] Congo Planet 'Rwanda gives DR Congo back tones of smuggled minerals' available at http://www.congoplanet.com/news/1902/rwanda-returns-tonnes-of-smuggled-minerals-to-dr-congo-coltan-tin-ore.jsp (accessed 2 February 2013).
[261] See generally Sunman Hilary & Nick Bates 'Trading for peace: Achieving security and poverty reduction through trade in natural resources in the Great Lakes Region' 2007 research report, Department for International Development, London.
[262] Hubert Andre-Dumont, op cit note 21 at 74.
[263] Articles 477 – 480 of the Mining Regulations.

Where the intended mining location has the potential to affect human settlements, compensation and resettlement are issues to be considered before relocating the community. The Mining Code and the Mining Regulations require a mining company to fulfill its legal obligations toward indigenous communities adjacent to, or that are affected by mining operations.[264] Together with the DRC Land Law of 1973, these statutes recognize customary occupation of rural land and customary rights; however, there are little details provided for customary land management. In terms of the 1977 Expropriation Law, (Law No, 77 – 001), the state owns all the land that constitutes the DRC and may expropriate land held by local communities as may be deemed reasonable under mining concessions.[265] In general practice, however, mining houses that hold the mining title to the mineral resources within a certain location meet their financial obligations to compensate affected communities. However, the issue of fair and equitable compensation ostensibly remains unresolved. Imperatively, the Constitution provides certain requirements and obligations that have the potential to bind mining investors or holders of mining rights in order to protect the interests of indigenous communities. In terms of Article 34 of the Constitution, expropriation of private property for general interests or public utility basis can only take place in accordance with the general laws of the DRC and followed by equitable compensation. Article 281 of the Mining Code states that occupation of land or modification, whatsoever, rendering it unfit for cultivation, by depriving the rightful holders of enjoyment of land surface rights, is subject to fair compensation. Further a holder or lessee of mining rights is legally entitled to, upon request of the parties or community entitled to the land, pay fair and appropriate compensation equivalent to the value or rent of the land at the time of occupying it, plus 50 percent.[266] However, due to lack of information on the enforcement of the provisions, it is difficult to provide detailed analysis on the practical implications. In the interim, it is not clear whether local communities that were deprived of their land were compensated.

Environmental health and safety of the indigenous communities is considered to be of importance.[267] Article 405 of the Mining Regulations imposes statutory obligations on title-

[264] For example, see Articles 15, 75 & 157 of the Mining Code. See also Articles 404 – 414 of the Mining Regulations.
[265] Article 3 of the Mining Code.
[266] Article 281 of the Mining Code.
[267] The Mining Regulations set out, inter alia, the content of environmental impact assessment (EIA) and environmental management plans (EMPs). There are a number of annexures to these Regulations but the provisions specifically relating to the environmental are Annex II – financial surety for rehabilitation; Annex III – environmental code of conduct for prospectors; Annex VII – mitigation and rehabilitation plan (MRP); Annex VIII – guidelines for preparing an MRP; Annex IX – guidelines for preparing an environmental impact study

holders of mining rights, to develop and implement environmental plans in order to protect environmental interests and indigenous communities closer to mining locations. The Regulations make it mandatory to consult with the public, and interested and affected communities.[268] The Regulations spelt out the procedure to be taken before, during preparation for an EIA and after consultation with the public and the affected communities.[269] EIAs ought to be considered taking into account environmental provisions that provide self-contained measures spelt out in terms of Law No: 011 of 2002 (the Forest Code). While the process of undertaking EIAs requires public consultations, it is imperative that the interested and affected parties work together in order to mitigate potential negative effects of a proposed mining project. Working together could be one of the bases to establish trust and mutual relationships between mining companies and local communities. The Directorate of Mines is directly responsible for regulating, inspecting and supervising all mining activities with regard to health and safety.[270] The state's agents are responsible for regulating the activities of mining companies and towards indigenous communities.

### 5.4.7 Compensation for Expropriation

The Constitution of the DRC guarantees security and protection of individual and collective property rights.[271] Security of property is fundamental and therefore requires protection in order to secure foreign investment for exploitation of mineral resources and related processes in the mineral value chain.[272] Further the Constitution provides for expropriation but goes on to say the acquisition must have a prior payment. 'No one may be deprived of his or her property except for reasons of public utility and in return for prior payment of just compensation under the conditions established by law'.[273] This provision provides the manner in which expropriation can be done and the state has the responsibility to compensate the property holder(s) for the expropriation. Arbitrary expropriation is illegal and the

(EIS) and environmental management plan of the project (EMPP); Annex X – closure measures of mining operations; Annex XI – classification of mining waste or tailings and their characteristics (standards of effluents); Annex XII – sensitive environments (such as wetlands) & Annex XIII – method for measuring noise pollution.

[268] Article 451 of the Mining Regulations.

[269] Ibid. See also Annex IX to the Mining Regulations.

[270] Article 14 of the Mining Code. See also Articles 207 & 210 of the Mining Code read together with Articles 492 – 493 of the Mining Regulations.

[271] Article 34 of the DRC Constitution. See also General Property Law No.73/021 of 1973, amended by Law No. 80-008 of 1980

[272] Ibid.

[273] Ibid.

Constitution further provides that '[a] person's assets may only be seized by virtue of a decision issued by a competent judicial authority'.[274]

Articles 275 and 276 of the Mining Code provide compensation for expropriation. In terms of Article 275, mining or quarry installations cannot be compulsorily expropriated by the State except in exceptional circumstances set by law. As referred to in the preceding section, in the event of expropriation, fair compensation has to be paid to the holder of the affected rights or business interests at least 6 months before the compulsory execution of the decision to expropriate. The same Article provides that within 48 hours following the date of notification of the decision to expropriate, the State has to inform the affected investor of the proposed amount of compensation as well as the date on which the actual expropriation takes place. In the event of a dispute, the same provisions of the Mining Code provide the procedures to be followed in order to resolve the issue amicably.

The manner in which sovereignty is worked out with regard to expropriation is provided for in Article 34 of the Constitution. Apart from the Constitutional and the Mining Code provisions on expropriation, Land Law of 1983[275] and Law No. 77 – 001 of 1977 (expropriation law) spells out the requirements for expropriation that the acquisition should be of public interest. Where rights to minerals were acquired illegally, it is also a ground for expropriation. However, the status *quo* should be restored before consideration of appropriate remedy. 'In any case of expropriation, the DRC is required to offer fair compensation; as with many Congolese laws, these requirements are not always fully respected'.[276] However, equitable and fair compensation for expropriation is an integral legal requirement of international law that is generally accepted standard practice as discussed in chapter 2.

The Expropriation law provisions in the Land Law and the Constitution empower the DRC government with the mandate to expropriate private property for general purposes.[277] In the ordinary course of events where the expropriation is contested, the state is entitled to obtain a court order before the acquisition. It can therefore be inferred that there is an exception where the state can expropriate without a court decision; however, due to the lengthy legal the

[274] Ibid.
[275] Land Law No. 52 of 1983.
[276] US Department of State Report '2010 Investment climate statement - Democratic Republic of the Congo' March 2010.
[277] Article 34 of the Constitution.

process to obtain a court order, may further derail the fulfilment of the objectives of the acquisition. For example, the DRC government expropriated the London-listed, Canada-based resources group, First Quantum Minerals' mining interests with the former citing that it "suspected wide-scale gross misconduct" during the latter 's mining operations in the country.[278] On this basis, the DRC granted title to the expropriated interests in the mining location to a state-controlled mining company, *Société de développement industriel et minier du Congo* (SODIMICO).[279] It can be argued that in order to expropriate business rights or interests in question, the DRC government acted in the public interest on the basis that the investor failed to comply with fundamental provisions in domestic mining laws.

The expropriation of business interests or mining rights from First Quantum Minerals reiterates that mineral resources are not privately owned in the DRC. They are '[…] exclusively, inalienable and imprescriptible property of the States'.[280] Although the constitutional provision dealing with property rights does not define what constitutes property, however, in the context of the thesis one can argue that property includes rights of access to s mineral resource embedded in mining licence(s). Intrinsically, mining investors have no claim to own or possess domestic minerals but rights of access to, and use of the resources per conditions underpinning the issuance of a mining licence.

In a nutshell, the expropriation of the business interests that were conferred to First Quantum Minerals is a manifestation of sovereignty in order to redress non-compliance with domestic laws. The DRC Constitution provides for a framework for policy formulation and grounds to justify expropriation. Regardless of this, the DRC was challenged (see section 5.4.12 ((("non-judicial dispute settlement")) below) before an international arbitration for an order to reverse the acquisition or pay compensation. However, it can be argued that the requirement to

[278] See generally *International Quantum Resources Limited, Frontier SPRL & Compagnie Minière de Sakania SPRL v Democratic Republic of the DRC*, ICSID Case No. ARB/10/21. See also Expropriation News Russia – The Politics & Law of State Expropriation 'An expropriation in the heart of darkness' 2010, available at http://expropriationnews.com/2010/09/20/an-expropriation-in-the-heart-of-darkness (accessed 3 January 2015); Andrew Topf 'First Quantum gets out of Congo with $1.25 billion asset sale' 2012, available at http://www.mining.com/first-quantum-gets-out-of-congo-with-1-25-billion-asset-sale (accessed 3 January 2015).

[279] Michael Kavanagh & Franz Wild 'Congolese state miner sells stake in former First Quantum Mines' *Bloomberg Business News*, 17 August 2011. See also Dorothy Kosich 'G8 leaders take DRC to task over First Quantum Minerals expropriation' 2010, available at http://www.mineweb.com/archive/g8-leaders-take-drc-to-task-over-first-quantum-minerals-expropriation (accessed 3 January 2015). Further, see generally Cathrine Yannaca-Small 'Indirect expropriation and the righto regulate in international investment law' in Hans Christiansen (ed) *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives* (2005) 43.

[280] Article 3 of the Mining Code.

compensate the investor restricts arbitrary expropriation, and failure to raise sufficient capital in order to pay compensation can be a stumbling block for the executive to expropriate even in circumstances where the investor has been in gross non-compliance with domestic laws. On the contrary, paying compensation lessens revenue available for development. Also, one can argue that the DRC's sovereignty can be under siege because there are competing interests that have to be protected: On the one hand, to attract foreign mining investors and protect their investments, and on the other hand, the right of the DRC to regulate and exercise the mandate derived from international law principle of PSNR to benefit from exploitation of domestic minerals for self-determination.

### 5.4.8 Exchange Controls and Repatriation of Profits

Generally, the exchange control regime is made up of Acts of Parliament, Presidential Ordinances and circulars of the Central Bank. Together, these pieces of legislation constitute the "Exchange Control Regulations" of the DRC. From these three broad categories, there are four main pieces of legislation, namely, the Ordinance Law of 1967,[281] which grants regulatory authority to the Central Bank of the DRC; the Central Bank Circular (*Circulaire de la Banque Centrale du Congo*) of 2001;[282] the Law 78-017 of 1978,[283] and Decree-Law 004 of 2002,[284] which directly applies to national and foreign currencies in the Republic.[285] At the core of the regulation process and enforcement of these laws, the Central Bank of the DRC takes a pro-active role, which it derives from the Constitution.[286] Apart from these categories, the Mining Code provides for repatriation of profits and payment of current transactions. In terms of Article 269 of the Code, a foreign mining investor is allowed to repatriate from his or her DRC bank account not more than 40 percent of the receipts from exports within 15 days of receipt of same in the main bank account as provided for in terms of Article 267 of the Code (that provides for the establishment of "main account and accounts for the servicing of foreign debts"). Further, Article 270 of the Code provides for payment of exchange control duties and any foreign mining investor is required to comply with.

[281] Ordinance Law Number 67-272 of 23 June 1967.
[282] Central Bank Circular (*Circulaire de la Banque Centrale du Congo*) of 22 February 2001.
[283] Law No. 78-017 of 11 July 1978.
[284] Decree-Law No. 004 of 31 January 2002.
[285] See generally Clifford Chance 'Brief note: Doing business in the Democratic Republic of the Congo' 2013, available at http://www.congoforum.be/upldocs/Doing%20Business%20in%20the%20Democratic%20Republic%20of%20Congo%20-%20June%202013.pdf (accessed 4 January 2015).
[286] See generally Articles 176 & 177 of the Constitution of the DRC.

The exchange controls and, provisions on repatriation of profits and payment of current transactions are some of the major financial rules in the DRC.[287] Among other financial issues, the exchange control regulations are fundamental in the transfers of financial resources to, or from outside the DRC in the form of repatriation of profits and payment of current transactions. Regardless of the customer or the beneficiary, the Central Bank is entitled to receive an exchange control fee of 2 percent of the amount involved in each financial transaction.[288] The Central Bank has discretion on the fees and the maximum amount that can be transferred from the country subject to meeting the regulatory conditions.[289] For example,

> [a]ll transactions relating to transfers of income, current transfers and capital movements with a value exceeding US$10 000 require the purchase of a licence ("Model RC") at an approved bank. In the case of an amount less than US$10 000, no statement is required'. […] The entry of capital under direct investment or export pre-financing is permitted subject to subscription of a declaration RC Model. The capital must come from transactions with legitimate economic origin. For external borrowing, repayment of principal and interest are made through voluntary subscription by the "Model LR".[290]

From the quote, one would argue that the DRC asserts sovereignty through the Central Bank in order to regulate exchange controls and capital movements, as well as payment of current transactions and repatriation of profits. However, the exchange controls and repatriation of profits restrict the amount of revenues available for domestic development. Since the DRC is a member of the IMF, it is bound by the IMF Rules, including Article XIV of the Rules, which regulate exchange controls and capital movements, as well as repatriation of profits and payments of current transactions (discussed in chapter 2). The fact that the IMF Rules are cascaded to the domestic level means the DRC cannot enact laws contrary to IMF requirements. If it does, however, the move does not promote mutual relationship with its traditional donor and the chances of losing the much needed financial aid will be very high. The requirement to align domestic laws relating to repatriation of profits and payment of current transactions as well as exchange control with the IMF requirements takes away freedom to enact laws for self-determination. As much as the DRC requires capital for mining activities, the requirement to allow foreign mining investors to repatriate profits lessens revenues available for reinvestment and expansion of mining business as well as capital available for development. In the event that the DRC restricts repatriation of profits

[287] KPMG 'Democratic Republic of the Congo fiscal guide' 2012/2013 at 9 – 10, available at www.kpmg.com/Africa/en/KPMG-in-Africa/DOcuments/MC9197_Fiscal_Guid_DRC.pdf (accessed 3 January 2015).
[288] Ibid, at 10.
[289] Ibid.
[290] Ibid

and payment of current transactions, however, can cause tensions and also shun potential investments. Thus, the DRC government is in perpetual tension between the wish to encourage and attract mining investment to develop the country, and create employment, on the one hand, and the desire to benefit by capturing large share of the revenues derived from mining activities, on the other hand.

### 5.4.9 Equitable Treatment of Foreign Mining Investors

The DRC is a politically independent state and has the prerogative to decide on the conditions of access to domestic mineral resources (discussed above), by deciding on which foreign mining investors to issue mining permits in order to exploit the resources, as well as to regulate their operations in terms of domestic legislative requirements. The Lutundula Commission referred to (in section 5.2) above was established to review all mining contracts that were concluded during two conflict periods of 1996 – 1997, and 1998.[291] In its investigations, the Commission focused on all mining contracts concluded between these two periods regardless of the nationality of the foreign mining investor or where the company was registered. One can argue that the conduct of the Commission at the behest of the DRC government in order to review mining agreements concluded in the period under assessment was in fact without fear or favour. In the context of equitable treatment of mining investors, it is essentially to argue that the DRC treated all foreign mining investors whose contracts were concluded between the two conflict periods impartially because the contracts that were reviewed were considered to be prejudicial to the country.

The equitable treatment requirement that arises in order to avoid discrimination in international investment and trade law, the national treatment and the most favoured nation (MFN) requirements (discussed in chapter 2), restrict the DRC from choosing foreign mining investors who might confer investment and trade advantages over others in the mineral value chain. Further the equitable treatment requirement restricts the mandate and sovereignty of the DRC to grant investment and trade advantages to one foreign mining investor or foreign mining investors from one country over those from other countries. Both the national treatment and the MFN requirements restrict the DRC legislature and the executive from passing laws favouring nationals, thus the restriction can have an impact on indigenization laws as the government is compelled to provide the same treatment to domestic and foreign

[291] Shari Bryan & Barrie Hofmann (eds) Transparency and Accountability in Africa's Extractive Industries: The Role of The Legislature (2007) at 63.

mining investors. Accordingly, the executive and legislature are compelled to guarantee foreign mining equitable treatment standards and non-discriminatory treatment through legislative, judicial and administrative decisions or practices.

Regardless of the non-discrimination requirement, the state of the DRC economy is very weak and therefore new mining investment can be granted very favourable tax treatment. One can argue that since investing in the DRC is a risky undertaking on the basis that the political situation in that country is very delicate. The first significant investment after the deadly war can be granted nearly tax free status while investors who come to invest years later can pay more taxes. The discrimination will fair in this regard. Accordingly, the DRC can navigate the non-discrimination requirement, by taking its risky political situation to grant low taxes to mining companies already operating in the country and then grant relatively higher taxes to mining investors that invest in the country some years later. The assumption is that by then, the DRC will be politically stable and peaceful, as well as enjoying economic boom.

### 5.4.10 Revenue Transparency and Accountability

The DRC has been plagued by resource conflicts; against this background, reassertion of central government's authority and sovereignty over mineral resources is important in order to promote transparency and accountability in the minerals sector.[292] It is incumbent upon the central government to change the secretive manner of resource regulation to an open system which promotes public participation and scrutiny develops. In addition,

> [t]he DRC is a member of the International Conference on the Great Lakes Region [ICGLR], whose members committed themselves in 2010 to increasing transparency and traceability in the region's minerals trade, along with measures designed to keep armed groups from exploiting the sector. This effort has included a joint operation with Kenya to combat gold-smuggling [among other precious minerals].[293]

From the quotation, it can be argued that mineral endowment comes with responsibility that requires the DRC to regulate access and exploit the resources (in partnership with private sector) for the benefit of the citizens. The fact that the DRC is a member of the ICGLR and Extractive Industries Transparency Initiative (EITI) fundamentally requires the government to uphold its obligations in terms of the necessary reporting conditions, as well as transparency and accountability in order to remain within the contours set by the initiative. At

[292] Ibid, at 12.
[293] Natural Resource Governance Institute (NRGI) 'Democratic Republic of Congo: Transparency sanpshot', available at http://www.resourcegovernance.org/countries/africa/democratic-republic-congo/transparency-snapshot (accessed 4 January 2015).

all material times, the DRC is required in terms of both organizations to insure transparency and accountability as well as traceability of revenues derived from the resources. The mandate of the DRC government ultimately ties in with the responsibility to control and regulate domestic mineral resources – the responsibility which lies with an elected government. Regardless of these requirements, however, the DRC's over-dependence on mineral wealth and foreign aid has often propagated and encouraged authoritarian rather than a democratic system of governance. This has been exacerbated by weak legal frameworks and regulatory instructions as well as their structures.[294] Further the DRC is under pressure to comply with the requirements of organizational membership. For example,

> 'The G8 countries '[…] urge[d] candidate countries to the [EITI], including the DRC, to complete the EITI implementation process as a mechanism to enhance government and accountability in the extractive sector. The recent inclusion of coltan and cassiterite in the DRC's [European Information Technology Observatory (EITO)] reporting is a step in the right direction'.[295]

It is important to ensure transparency and accountability against the backdrop of large and unregulated inflow of revenues in state accounts, which serve as an irresistible temptation for those in positions of authority. For that reason, the absence of checks and balances that include transparency and accountably, the ruling clique's illegally and perniciously use available resource revenues to enrich themselves through corruption (see section 5.6.2 below) and political patronage in order to consolidate political power and control.[296] It is imperative to adopt and use checks and balances to curb threats to sovereignty discussed in section 5.6 below, by ensuring the revenues are used and managed transparently and responsibly.

It therefore remain important for the DRC government to,

> '[t]ake advantage of international interest and support for increased transparency and accountability in the management of extractive industries to develop more specialized knowledge of the extractive industry, and become more engaged in management and oversight issues. [Also, it is imperative to] [m]ake better use of existing legislative resources to influence policy and conduct oversight activities, from standing committees that deal directly with the extractive industry to finance and budget committees that have an impact on revenue management.[297]

From the excerpt, one can argue that revenue transparency and accountability are mechanisms to ensure the mineral revenues are channeled towards national development issues. By strengthening these two mechanisms, also strengthens the operationalization of PSNR and the mandate to exploit mineral resources for self-determination.

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[294] Shari Bryan & Barrie Hofmann (eds), op cit note 293 at 13.
[295] Dorothy Kosich, op cit note 281.
[296] Shari Bryan & Barrie Hofmann (eds), op cit note 293 at 15.
[297] Ibid, at 12.

### 5.4.11 Strategic Planning on How to Use Mineral Resources for Development

Since the DRC has the sovereignty derived from international law principles, namely, self-determination, non-interference and PSNR (discussed in chapter 2); these principles reinforces the right to development, by providing the government with the mandate to exploit the resources and derive benefits for national development.[298] The DRC's

> '[…] report on the implementation of its Poverty Reduction and Growth Strategy Paper (GPRSP) for 2009, […] was put in place for practical reasons relating notably to limitations of the statistical apparatus and weakened human and institutional capacities in formulating development policies, the delayed consequence of years of political, economic, and social instability. [299]

Regardless of the delicate political challenges owing to the instability in the country, the implementation of the GPRSP began in 2007 a year in which the DRC had;

> […] **an extremely challenging environment**, marked by marked by (i) the devastation of economic and social infrastructures, a formidable obstacle to private sector growth and development; (ii) uncertainties surrounding the preparation and staging of the first truly free and democratic elections in a climate of heightened tensions; (iii) renewed hostilities in the eastern region, bringing grave humanitarian consequences; (iv) the global food and energy crises; (v) the international financial crisis (the most serious since the Great Depression of 1929); (vi) the collapse in commodity prices and resultant contraction of government revenue; (vii) the lack of budgetary support since the 2006 suspension of the [Poverty Reduction and Growth Facility (PRGF)] program; and (viii) weak human and institutional capacities, particularly in the areas of statistics, policy formulation, and the monitoring and evaluation of policy implementation.[300] [words in bold is my emphasis].

The extract shows the DRC's background is riddled "with the episodic and recurrent resurgences" political tensions and instability,[301] and the situation underscores extreme fragility which requires all levels of the DRC government and the international community to spearhead and speed up reforms in order to create an enabling environment for conditions that usher in peace and sustained economic growth through strategic planning as well as the contribution of mineral resource exploitation for self-determination and development.

Against the background of political fragility and uncertainty due to recurrent conflicts, the DRC government requires stability and, development laws and planning, whereby mineral resource revenues have to be used and managed in line with the development vision of the state. Strategic planning through mineral resource exploitation can be used as a peace asset and to stabilize the economy, then economic growth and development, as well as poverty

[298] See generally IMF Poverty Reduction Strategy Progress Report 2010, supra note 56 at 25 - 37.
[299] Ibid, at 7.
[300] Ibid.
[301] African Development Bank 'Democratic Republic of Congo: 2013-2017 country strategy paper' 2013 at ii.

reduction plans.[302] Although the DRC has sound strategic planning on the manner to use and manage domestic mineral resources for self-determination and development strategy, as well as in order to curb resource conflicts, however, development planning is indiscriminately hampered by recurrences of conflicts as well as lack effective implementation and enforcement of mining laws. These factors systematically disempower the mandate to regulate and use the resources for self-determination, as well as to spur national development.

The initiative by the DRC government to undertake a review of mining contracts can be considered a strategy in order to ensure all prejudicial contracts were renegotiated for the benefit of both the state and investors. The review was strategic in nature in order to ensure the state did not suffer prejudice and irreparable financial loss as during colonialism (highlighted in section 1.2 of chapter 1). The review was not without its critics:

> Some participants worried that undertaking a review of contracts would further discourage investments in mining Congo's natural resources and subsequently hurt development. However, one panelist noted that Liberia's positive experience with reviewing contracts in the aftermath of its civil war served as a good example for ameliorating unfair contracts, while retaining the confidence of international mining interests. One of the critical factors in Liberia's review process was the political will for reform; it was an integral part of the transition process in Liberia.[303]

While strategic planning and influence form the Liberian experience is fundamental and a living example, it is necessary for the DRC to actively review its mining contracts concluded during the two war periods in order to ameliorate the irregularities in future contracts. Also, publicity of malfeasance of the mining companies could be a strategy that motivates investors to operate transparently. Further the strategy can be a catalyst for other mining investors doing business in the country to comply with domestic mining laws, thus giving the government room to regulate responsibly and boost chances to derive more revenues through mining taxation.[304]

Apart from the review of contracts, there does not appear to be a strategic plan for national development that references the mineral sector. The drawing of GPRSP does not provide an accurate and complete picture of strategic development plans.

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[302] Ibid, at 1 – 20. Further, see generally IMF Poverty Reduction Strategy Progress Report 2010, supra note 56 at 17 – 37.
[303] Dorina Bekoe & Christina Parajon 'Developing and managing Congo's natural resources' 2007, available at http://www.usip.org/publications/developing-and-managing-congo-s-natural-resources (accessed 5 December 2014).
[304] Ibid.

### 5.4.12 Non-judicial Dispute Settlement

The DRC Constitution provides for the legal machinery to resolve disputes arising from the territory, by establishing the framework for the country's judicial system, and spells out a hierarchy of domestic courts and their composition,[305] as well as jurisdiction.[306] The judiciary is the '[…] guarantor of the individual liberties and fundamental rights of the citizens',[307] and the executive authority has no legal basis to interfere in the manner in which the rule of law is exercised and executed.[308] Apart from the courts and tribunals established in terms of paragraph 2 of Article 149 of the DRC Constitution, there is no provision for any extraordinary or special tribunals that may be established.[309] The DRC does not have single arbitration law but provisions for arbitration in different Acts. One has to canvass the different provisions to make a coherent whole. For example, Articles 37 and 38 of the Investment Code[310] Articles 74 and 159 of the Code on Congolese Civil Procedures, the provisions in the Mining Code, as well as adhering to the Regulations on Supplementary Mechanisms in the procedures in terms of the ICSID Convention on settling investment disputes. Also, the DRC acceded to the International Chamber of Commerce Rules of Arbitration of Paris, which forms part of its arbitration rules.

With regard to solving potential mining disputes and related issues, the Mining Code spells out provisions for dispute settlement between the DRC government and mining investors. The Mining Code provides for the establishment of dispute settlement mechanisms between the state and foreign investors. Two forms of appeal are provided for, via the DRC's judicial system[311] and arbitration.[312] With regard to the domestic judicial system, the dispute is subject to ordinary court appeal[313] and the courts

> […] shall apply the procedure pursuant to substantive law as set forth in the Congolese Code of Civil Procedure, the Criminal Procedure, the procedure before the Supreme Court of Justice, as well as all the general principles of law which apply to judicial matters.[314]

[305] Articles 152 – 154 of the DRC Constitution.
[306] Ibid, Articles 149 – 169.
[307] Ibid, Article 150.
[308] Ibid, Article 151.
[309] Ibid, para 5 of Article 149.
[310] Investment Code, Law No. 004 of 2002; hereafter the Investment Code, provides for dispute settlement mechanisms.
[311] Articles 315 – 316 of the Mining Code.
[312] Ibid, Articles 317 – 322.
[313] Ibid, Article 315 read without prejudice to provisions of Article 46 of the Mining Code.
[314] Ibid, Article 316.

Article 315 of the Mining Code provides the categories of disputes that are subject to court appeals in the Republic and such matters are not subject to arbitration; these include disputes concerning compensation for expropriation, the ban on leaving the national territory, overlaps between holders of mining rights, and disputes between mining rights holders. By giving categories subject to domestic court appeals and not arbitration, the DRC asserts sovereignty in such strategic cases, by setting the record to avoid uncertainties and systematic disempowerment of its court if such cases were to be resolved through arbitration. By involving domestic courts, it could be a way to ensure formal and traditional legal structures supporting the assertion of sovereignty are involved.

Disputes between the DRC and mining investors relating to the interpretation or application of the provisions of the Mining Code may be resolved through arbitration.[315] The Mining Code provides two processes regarding arbitration, which are domestic and international arbitration.[316] The nature of the dispute determines whether foreign investors take the domestic or international arbitration route. For domestic arbitration to apply, the Mining Code provides that the dispute must arise from the interpretation or application of provisions of the Code. The arbitration shall then be based on the rules provided for in the Congolese Code of Civil Procedure.[317]

However, with regard to the choice of international arbitration, the Mining Code provides that when a dispute arises, and at the request of a party that proceeds first, (usually a foreign investor), the party may choose an international arbitration forum in accordance with the investor's home state's BIT with the DRC.[318] If the foreign investors are not from a contracting state, they may choose any international tribunal but have to notify the DRC government of such intention.[319] The rules underpinning the conclusion of the mining contract between the DRC government and the foreign investor will be applied in the dispute settlement.[320]

[315] Article 317 of the Mining Code.
[316] See generally Articles 318 & 317 of the Mining Code, respectively.
[317] Articles 159 – 174 of the Code on Congolese Civil Procedures shall apply.
[318] Para 1 of Article 319 of the Mining Code.
[319] Ibid, at para 3; the DRC government has to be informed of the name, address and regulations of the international tribunal on the date on which mining title was issues at the Mining Registry.
[320] Para 3 of Article 320 of the Mining Code.

Regardless of the choice of arbitration forum, international arbitration in which the DRC government is involved must apply domestic rules, unless expressly provided for in the BIT between the DRC and the contracting state. In terms of Article 320(3) of the Mining Code, the DRC government may waive its rights of immunity from jurisdiction and enforcement of the decision of the tribunal. By giving priority to domestic law unless expressly provided in the BIT, the DRC gives priority to the assertion of sovereignty which is supported by municipal law over foreign law. By waiving immunity from domestic jurisdiction, the DRC may also be waiving its assertion of sovereignty in a way, weakening its influence and control over the subject-matter with a view to settling competing interests between the state and the foreign investor.[321]

In *International Quantum Resources Limited, Frontier SPRL & Compagnie Minière de Sakania SPRL v Democratic Republic of the DRC,*[322] the dispute arose out of administrative steps taken by the DRC (respondent) in 2009 and 2010 to exclude the three applicants from their legitimate mining activities in the country. The respondent had cancelled the applicants' joint mining contract over a multi-billion US$ copper and cobalt tailings processing plant that the respondent had previously concluded with the applicants. The applicants initiated arbitration at the International Chamber of Commerce's International Court of Arbitration (ICC Tribunal)[323] against the respondent. The applicant alleged that the cancellation of the mining permits, and the expropriation of the various investments and assets of the applicants, was part of the agenda of reprisals orchestrated by the respondent against the group of mining investors, because on 29 January 2009, a group of mining investors led by Congo Mineral Developments Ltd sued the respondent and Gecamines in the ICC Tribunal for compensation. In an ostensible retaliation, the respondent instituted domestic legal proceedings against the applicants alleging defamation of the country's reputation in the international mining community and claimed US$ 12 billion as damages before the DRC's Court of Appeal. The claim was granted. However, the applicants challenged the decision to award the respondent US$12 billion in the ICC Tribunal.[324] The Tribunal ordered that the US$ 12 billion damages judgement granted by the DRC Court of Appeal could not be enforced by the DRC or

[321] Tai-Heng Cheng 'Power, authority and international investment law' (2005) 20 *American University International Law Review* 465 at 500 – 501.
[322] *International Quantum Resources Limited, Frontier SPRL & Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/20 - Procedural Order No. 3 (28 November 2011).
[323] International Chamber of Commerce's International Court of Arbitration; hereafter the ICC.
[324] See generally Matthew McClearn 'How First Quantum settled with ENRC for compensation over Congolese mine' *Canadian Business*, 5 June 2012.

Gecamines. The decision to order non-enforcement of the DRC's Court of Appeal could be a seen as a slap against the assertion of the country's sovereignty.

In a similar case, the DRC cancelled two other mining permits jointly held by applicants. The cancellation led the applicants to institute arbitration proceedings against the respondent at the ICSID.[325] In their arbitration application, the applicants maintained that the respondent withdrew certain mining rights in breach of the provisions of the Mining Code and of the applicable municipal law.[326] The aforesaid mining rights authorized the applicants to explore, develop and operate copper mines, especially at the Lonshi and Kishiba mines in the copper belt of the DRC. Regardless of the DRC's defence, the tribunal found in favour of the applicants on the basis that the DRC acted unlawfully.

Although the DRC exercised its sovereignty by cancelling mining permits that were issued to the applicants; presumably, the exercise of sovereignty was corrupted in that it was done to 'get back' at certain mining investors. Against this backdrop, however, it can be argued that the sovereignty was challenged when the DRC appeared and submitted to the jurisdiction of the ICSID and the ICC Tribunal in order to resolve the disputes. When the DRC appeared and submitted to the jurisdiction of the tribunals, this undermined local courts and perhaps regarded them as inferior and unreliable compared to international arbitration forums that hear and determine the disputes

### 5.5 Threats to Sovereignty over Mineral Resources

Although the mining sector is the mainstay of the DRC economy there are domestic factors threating state sovereignty over mineral resources. It is important to consider these threats in the context of domestic regulation of mineral resources and the potential way they negatively affect the DRC's ability to benefit from its mineral resources.

#### 5.5.1 Illegal Mining

As highlighted above, more than two-thirds of the DRC mineral production that include strategic minerals such as diamonds, gold and coltan comes from informal mining.[327] From

[325] *International Quantum Resources Limited, Frontier SPRL & Compagnie Minière de Sakania SPRL v Democratic Republic of the Congo*, ICSID Case No: ARB/10/21, (Procedural Orders 1 – 3).
[326] Ibid, para 7.
[327] Wardell Armstrong, op cit note 19 at 5.

the statistics, the informal mining activities contribute more to the overall mineral production in the DRC, and this is one of the factors leading up to the need to regularize informal mining.[328] Illegal mining is prevalent in the country and takes various forms that include illegal transfer of stored mineral resources. One of the well-known involved the *Societe Miniere et Industirelle du Kivu* (SOMINKI), reportedly siphoned about 3 000 and 1 500 metric tons of cassiterite and coltan respectively from Kivu province of the DRC to Rwanda between November 1998 and April 1999.[329] The UNSC and civil society reports on illegal mining of mineral resources in the DRC provide insight into the extent to which the DRC is prejudiced of its minerals, and the revenues through various illicit ways that include smuggling and corruption. Presently, the DRC mining sector can be described as disorderly with little respect for the rule of law in most mining regions in the country.[330] The informal and disorderly mining situation is largely caused by weak central authority leading up to the prevalence of illegal artisanal mining. Accordingly, the DRC government as the owner and custodian of the resources on behalf of the Congolese people has the responsibility to regulate mining activities for self-determination.

In order to bring sanity and curb illegal mining and simultaneously allow locals to participate in regulated artisanal mining, the Mining Code provides for the regularization of artisanal mining activities, by the provision of artisanal miner's card as a legal requirement for the miners.[331] In this regard, one can argue that the DRC navigates illegal mining by regulating artisanal mining.

The Mining Code provides the DRC government with the mandate to promote responsible artisanal mining regulation through licensing and registration of artisanal miners, as well as to set aside areas for artisanal work. Accordingly, all artisanal mining has to take place within the designated areas and sinking of shafts within such zones cannot be deeper than 30 meters.

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[328] United States Agency for International Development (USAID) 'Property rights and artisanal diamond development (PRADD) project: Comparative study: Legal and fiscal regimes for artisanal diamond mining' 2010 at 9 -12, available at http://www.estellelevin.com/wp-content/uploads/2013/12/PRADD-Fiscal-and-Legal-Regimes_final.pdf (2 December 2014). See also UN Security Council (UNSC) 'Report of the Panel of Experts on illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo' 2001 at 6.

[329] Ibid, at 3 & 8 – 9. See also George J Coakley 'The mineral industry of Congo (Kinshasa)' in *US Geological Survey Minerals Yearbook* (2000) 10.1; Peter Eichstaedt, op cit note 27 at 1 – 5.

[330] Wardell Armstrong, op cit note 19 at 4.

[331] Article 5 of the Mining Code.

'Artisanal mining outside of [designated zone] is technically illegal'.[332] In other words, the Mining Code distinguishes between artisanal mining, semi-mechanized artisanal mining and industrial mining. Further, the Mining Code defines artisanal mining to include all activity by which a Congolese person, in an artisanal exploration region delimited in area and depth not exceeding 30 meters, win mineral substances using non-industrial, simple tools, techniques and processes that are limited in mechanization.[333] Therefore any Congolese person wishing to participate in artisanal mining is legally required to obtain an artisanal miner's card or artisanal exploration card(s) (AECs), which is valid for one calendar year, from the Head of the Provincial Division of Mines (HPDM). The AEC(s) is renewable without limitation for another.[334] Any unregulated artisanal mining is illegal and therefore a contravention of Article 5 of the Mining Code.[335]

The Mining Code allows Congolese artisanal miners who are holders of artisanal miner's cards wishing to undertake artisanal exploration within the artisanal mining zones to form cooperatives and obtain authorization from the Minister of Mines. It can be argued that the Mining Code provides a framework defining artisanal mining and the requirements for, as well as eligibility for artisanal miner. In order to prevent mineral substances from artisanal mining being sold illegally, the Mining Code provides that holders of artisanal miner's cards are allowed to sell their produce to the National Territory provided the buying authority is a holder of a trader's card or an authorization has been issued or granted by a competent authority in terms of the Mining Code.[336] In this regard, the Mining Code provides strict compliance regarding the categories of persons who disqualify to be a buyer and to participate in artisanal mining.[337]

From the above, one can argue that the Mining Code provides a regulatory regime applicable to artisanal mining, however, apart from the few provisions in the Code, there is no enabling legislation or policy dedicated to artisanal mining. Those involved in artisanal mining are causal, seasonal (or migrants from nearby countries) and majority of them are illegal artisanal

[332] USAID, supra note 330 at 13. See also Article 109 of the Mining Code – provision of an artisanal mining area.
[333] Para 2 of Article 5 of the Mining Code. See also USAID, supra note 330 at 8.
[334] Ibid.
[335] Ibid, at 13. See generally Nyambura Githaiga 'DRC: Cutting the hydra head of illegal mining' 2011, available at http://www.issafrica.org/iss-today/drc-cutting-the-hydra-head-of-illegal-mining (accessed 3 December 2012). Gregory Mthembu-Salter, op cit note 31 at 1 – 2;
[336] Para 3 of Article 5 of the Mining Code.
[337] See generally section 26 – 27 of the Mining Code.

miners. Migrants are not eligible to for artisanal mining and their involvement is a violation of Article 27 of the Mining Code. Under such circumstances, it is difficult to ascertain the number of legal and illegal artisanal miners. It is fundamentally a legal requirement to have an artisanal miners' card in order to lawfully engage in artisanal mining; however, with the high levels of poverty many Congolese people are not able to raise the required application fee of US$25 to be eligible for artisanal mining.[338] The requirement to obtain an artisanal miner's card was intended to regulate artisanal mining and to ensure holders of the card sell their produce to the state. In other words, it is illegal to sell or process minerals won through artisanal production to unlicenced buyers. A violation of this requirement can lead to cancellation of the card.[339] By requiring artisanal miners to sell or process their minerals to registered dealers ensures all minerals won through artisanal production go into state controlled channels. This is a critical important way to navigate illegal mining and to curb revenue losses through smuggling and corruption.

The regulatory regime for artisanal mining is very reasonable on paper; however, the absence of enabling legislation and structures to regulate the activities of artisanal miners is a major breakdown of the operationalization of PSNR. Given that artisanal mining constitute more than 80 percent, there was a fundamental need to appropriately regulate the activities.[340] Few artisanal miners have acquired the cards, partly because the government's failure to print sufficient cards due to lack of printing materials and supplies, and the practice to overcharge instead of the required US$25. Poor implementation and enforcement of the card requirement is a weakness in the regulatory system and the majority of those involved in artisanal mining see no reason to have an artisanal miner's card.[341]

### 5.5.2 Corruption

In 2005, the DRC enacted an anti-corruption law which was intended to curb corruption, should it have been consistently implemented and enforced.[342] The Ethics and Anti-Corruption Commission that was established in 2003 by the transitional constitution to fight corruption was never included in the 2006 Constitution. Despite the establishment of the

[338] USAID, supra note 330 at vi.
[339] See Article 112 of the Mining Code.
[340] USAID, supra note 330 at vi.
[341] Ibid.
[342] Osita Afoaku, op cit note 3 at 18. Paolo Mauro 'The persistence of corruption and slow economic growth' 2004 IMF staff papers volume 51, No: 1, available at http://www.imf.org/External/Pubs/FT/staffp/2004/01/pdf/mauro.pdf (accessed 1 June 2013).

Anti-Corruption Commission and anti-corruption law, there are various factors that are potentially influencing corruption in the minerals sector. The factors include political instability, weak implementation and enforcement of mineral resource laws and taxation laws owing to weak central authority.[343] It is also reported that more than 80 percent of the mining companies were expected to make illegal payments to secure government mining contracts as well as to pay kickbacks to get mining licences.[344]

Despite the DRC's anti-corruption campaign, it has not achieved any significant results to reverse corruption. Inefficient mining and government supporting structures, weak administrative capacity and low salaries have adversely helped to perpetuate corruption in the minerals sector as indicated in the paragraph below.[345] This has been compounded by the potential that the DRC lacks an effective judicial system, policing and complaint mechanisms where victims of corruption may seek redress. Further the State's Auditor General, who is entrusted with the duty of reviewing expenditure, is mostly ineffective.[346] It is inherently impossible to curb corruption in the minerals sector against this dysfunctional background which militates against the sovereignty of the state over mineral resources.

It can be argued that there is a record, a catalogue of mismanagement, corruption and large-scale looting of various mineral resources, including strategic gold, coltan and diamonds. Against this backdrop, the post-independence conflict has negatively affected the economic environment and the country is among the most corrupt countries, ranked 154 out of 177 countries that were ranked by Transparency International's Corruption Perception Index of 2013.[347] As such, corruption has the potential of undermining the DRC's inherent sovereignty

[343] See generally Ivar Kolstad & Arne Wiig 'Natural resources, corruption and trust: A complex relationship' (2011) at 4 – 5, available at http://issuu.com/cmi-norway/docs/issue2011-14-natural-resources-corruption/1?e=1246952/4386635 (accessed 2 June 2013).

[344] Marie Chêne 'Overview of corruption and anti-corruption in the Democratic Republic of Congo (DRC)' 2010 at 3, available at http://www.transparency.org/files/content/corruptionqas/257_Corruption_and_anti_corruption_in_the_DRC.pdf (4 August 2014). See also the World Bank 'Congo, Dem, Rep: Country profile 2010 – enterprise survey' at 9, available at http://www.enterprisesurveys.org/~/media/FPDKM/EnterpriseSurveys/Documents/Profiles/English/Congo-Dem-Rep-2010 (accessed 11 August 2013).

[345] Ibid. See also Augustin Nguh 'Corruption and infrastructure megaprojects in the DR Congo: A recipe for failure?' 2013, available at http://www.internationalrivers.org/files/attached-files/corruption_in_the_drc_.pdf (accessed 2 July 2014)

[346] Osita Afoaku, op cit note 3 at 18.

[347] Transparency International corruption perceptions index 2013, available at http://www.transparency.org/country#COD (accessed 5 August 2014). See also Country Economy 'Democratic Republic of the Congo - corruption perceptions index' 2014, available at

over domestic mineral resources, their exploitation, and prospects of deriving economic benefits.

### 5.5.3 Internal Conflicts

Since the ushering in of political independence in 1960, internal conflicts have been experienced in the DRC between government forces and armed militia groups. It is reported that alienation, and control of, as well as access to mineral resources is the major cause for the conflicts.[348]

The presence of illegal miners, the so-called independent miners or *orpailleurs*, especially in gold mining compete with legally registered mining companies operating in the country, such as AngloGold Ashanti, which has exclusive access to, and the right to exploit gold.[349] The presence of these *orpailleurs* is illegal. The situation is exacerbated by the fact that illegal miners claim that they are naturally and historically entitled to have access to the resources and by virtue of being born in the area. In the absence of appropriate regulation and institutional control, their claims potentially further the conflict which the armed militia groups take advantage of advancing their own economic and political interests.[350] The fight to control strategic mineral resources like gold, coltan and diamonds has become a definition of daily life in places such as Mongbwalu.[351] It is reported that citizens of Mongbwalu, for example, were determined to fight for access to, and control of mineral resources found within or adjacent to their community, since the proceeds they get from illegal mining is the prime source of their livelihood. Mazalto asserts that the continuation of irregularities, lack of transparency and opportunities for civil society participation in the mineral resource regulation processes contributes to the tension in the country's mining sector between two contradictory cultures; 'opacity and corruption versus transparency and legality'.[352] Further the tension in the relationship between mineral resources and internal conflict is also

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http://countryeconomy.com/government/corruption-perceptions-index/democratic-republic-congo (accessed 5 August 2014).

[348] See generally Ruben De Koning, op cit note 90 at 1 – 42. See also Abiodun Alao *Natural Resources and Conflict in Africa: The Tragedy of Endowment* (2007) at 1 – 156; Heinz Welsch 'Resource abundance and internal armed conflict: Types of natural resources and incidences of new wars' (2008) 67 *Ecological Economics* 503; The Enough Project, supra note 69.

[349] Peter Eichstaedt, op cit note 27 at 33.

[350] Ibid.

[351] Ibid, at 30.

[352] Marie Mazalto, op cit note 16 at 207.

influence by provincial economic disparities in the country.[353] Mazalto identifies the disparities which reflect four key factors summarized as follows:

(i) the nature of the industrial economic processes responsible for developing DRC's mining resources,

(ii) economic and poverty level imbalances among the DRC provinces,

(iii) uncontrollable violence, more particularly in the mineral endowed eastern parts of the country,

(iv) the incompetence of the central authority to ensure political stability and its failure to effectively exercise control over the regulation of domestic mineral resources.[354]

Each province is affected by several challenges, which at least vary from mineral resource endowment to the benefits derived from such endowment, and the effect this has on the majority of the Congolese community welfare. These factors are potentially the core cause for tensions and eventually conflict across most local communities in the country.[355]

The UN Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Natural Wealth of the DRC of 2002 reveals that the illegal exploitation of mineral resources has two major consequences; (i) external massive financial resource influence for Rwanda armed forces and individual enrichment of top Uganda military commanders as well as influential civilians, and (ii) the emergence of illegal networks headed by influential army commanders for business persons.[356] The Report concluded that the two factors are the basis of the hostile relationship between mineral resources endowment and internal conflicts in the country. Although there are other contributing factors referred above, these two could be considered the core cause of the recurrence of mineral resource conflicts in the country.

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[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] UN Security Council (UNSC) 'Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Natural Wealth of the Democratic Republic of the Congo' S/2002/1146 of 2002 at 3; hereafter UNSC Report of the Panel of Experts of 2002. See also the Republic of Uganda 'Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001: Final Report 2002' Legal Notice No. 5/2001 as amended; Vuyelwa Kuuya 'The Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo' 2008 at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0CDQQFjAE&url=http%3A%2F%2Fbusiness-humanrights.org%2Fsites%2Fdefault%2Ffiles%2Fmedia%2Fbhr%2Ffiles%2FVuyelwa-Kuuya-on-UN-Expert-Panel-DRC-Nov-2008.doc&ei=o3cNVM_CNZHH7AblpIH4Bg&usg=AFQjCNEFN8ayx0BDnXB_eyS3I_wKF0RsZA&bvm=bv.74649129,d.ZWU (accessed 7 September 2014).

In its finding, the Panel of Experts submitted that;

> [t]he conflict in the [DRC] has become mainly about access, control and trade of five key mineral resources: coltan, diamonds, copper, cobalt and gold. The wealth of the country is appealing and hard to resist in the context of lawlessness and the weakness of the central authority.[357]

Apart from the findings, recent research shows that access to, control and regulation of valuable minerals such as tantalum (extracted in the form of coltan), tin (extracted from cassiterite) and tungsten (in the form of wolframite) is the cause of mineral resource internal conflict, particularly in the eastern part of the country.[358] The other contributing factors to the internal conflict over domestic mineral resources include the role played by some opportunistic entities, mining companies and institutions, powerful and influential individuals including some decision makers in the DRC and Zimbabwe.[359] There could be pre-existing networks for channeling illegally exploited minerals. The purported loophole and the conflict could weaken and distort the regulatory potential of the state, thereby contributing to illegal access, control and exploitation of mineral resources.

Some political leaders in the Southern African Development Community (SADC) and Great Lakes regions bear a direct responsibility for the internal conflict in the DRC.[360] The direct involvement by some countries in the conflict raises a lot of issues, including whether the intervention was genuinely intended to defend or protect the sovereignty of the DRC over its mineral resources. Among the reasons for intervening, the security of the DRC's neighbouring countries, such as Rwanda, Angola,[361] Burundi and Uganda is considered.[362] Zimbabwe and Namibia, however, intervened in the DRC war albeit not sharing the same political borders.[363] Both countries did not intervene like other neighbouring states that cited,

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[357] Ibid, at 213.
[358] STAND 'DRC – Key Issues' at http://www.stand.org/learn/aoe/drc/issues (accessed 29 July 2013). The five minerals are used in the fabrication of electronics components, such as mobile phones, computers and various industrial products. See also Marie Mazalto, op cit note 16 at 211.
[359] UNSC Report of the Panel of Experts of 2002, supra note 358 at 3
[360] Ibid.
[361] Dani W Nabudere 'Conflict over mineral wealth: Understanding the second invasion of the DRC' in Sagaren Naidoo (ed) *The War Economy in the Democratic Republic of Congo* (2003) 40 at 57 – 58. See also Jeremy M Weinstein 'Africa's scramble for Africa: Lessons of a continental war' (2000) 17 *World Policy Journal* 11 at 14.
[362] Ibid, (Nabudere) at 47 – 52 & 56 - 57.
[363] See report by Stiftung *Wissendschaft und Politik* & Conflict Prevention Network, *Zimbabwe: A Conflict Study of a Country without Direction*, Ebenhausen (1998). See also Jeremy M Weinstein, op cit note 354 at 15 – 18. See also the UN Final Report of the Group of Experts on the Democratic Republic of the Congo, UN.Doc/ S/2008/773, paras 14 - 18.

*prima facie*, their territorial security.[364] It is reportedly the intervention by both countries could have been camouflaged with a view to have access to "strategic" domestic mineral resources. In contrast to Namibia's participation, Zimbabwe's involvement was largely seen as an extension of corruption of some of its leaders who derived economic benefits in that process.[365] Unlike in Angola where the DRC conflict was perceived a threat to peace and stability, most Zimbabweans did not see any lawful and meaningful reasons for Zimbabwe to be at the helm of the DRC conflict.[366] Further the Final UN Security Council Report of the Panel of Experts implicated Zimbabwe, among other countries, in the looting of the DRC's mineral resources. However, Zimbabwe did not refute the allegations but maintained that it did a good job in the DRC and that it would not respond to malicious allegations by the British masquerading as the UN.[367] Zimbabwe's remarks are partly based on economic interests; one of the potential primary reasons for Zimbabwe's military intervention in the DRC.[368] Despite this apparently damaging official statement, it is alleged that Zimbabwe might have been cautious of the repeat of its Mozambique adverse experience where;

> [it] did all the donkey work only for South Africa to gain the peace dividends and now Mozambique has overtaken Zimbabwe as South Africa's biggest trading partner.[369]

Against such camouflaged interventions, the concern is whether the Congolese people are benefiting from their mineral resources or whether other countries are taking advantage of the fragile political situation and the apparent weak regulation and control to derive economic benefits from the exploitation of the DRC's mineral resources.

As noted above, Although DRC is known for its lucrative mineral resources that have been exploited since the colonial period, when King Leopold II of Belgium took personal control

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[364] Dani W Nabudere, op cit note 363 at 55 – 56.
[365] Gerard Prunier, op cit note 1 at 287.
[366] Zimbabwe, *Financial Gazette*, 11 January 2001. See also Gerard Prunier, op cit note 1 at 217 – 218 & 287 – 288.
[367] Zimbabwe *Financial Gazette*, 13 February 2003. Zimbabwe reportedly defended its official position on the intervention in the DRC on legalistic bases purportedly linked to the respect of SADC rules on aggrieved national sovereignty, defence of the DRC's territorial integrity and political independence. See generally Rights & Accountability in Development (RAID) 'Unanswered questions: Companies, conflict and the Democratic Republic of Congo' 2004 at 48 – 50, available at http://www.raid-uk.org/docs/UN_Panel_DRC/Unanswered_Questions_Full.pdf (accessed 28 March 2012).
[368] See generally Norman Mlambo 'Raids on Gorongossa: Zimbabwe's military involvement in Mozambique 1982 – 1992' working paper No: 3, available at http://ccrweb.ccr.uct.ac.za/archive/defencedigest/defdigest03.html (accessed 29 February 2012).
[369] Zimbabwe Independent, (Harare) 9 August 2002. Between the late 1980s and 1990s, Zimbabwe sent approximately 20 thousand soldiers to Mozambique to help the Liberation Front of Mozambique (FRELIMO) government fight the Mozambican National Resistance Movement (RENAMO) insurgency. See generally Padraig Carmody, op cit note 1 at 1 – 30. See also Judi Hudson 'South Africa's Economic Expansion into Africa: Neo-colonialism or Development?' in Adekeye Adebajo, Adebayo Adedeji & Chris Landsberg (eds) *South Africa in Africa: The Post-Apartheid Era* (2007) 128 at 130.

of Congo territory in the 1880s, mineral resource endowment has been an integral motivation for interests.[370] The control over domestic mineral resources has been an influential motivator for external influence in order to exploit the resources.[371] The motivations underpinning domestic conflict could be a consequence of economic interests; chief among them the need to have access to, and control of domestic mineral resources.[372] Naidoo points out that the externally planned and executed overthrow of Mobutu was undertaken primarily to ensure economic and political interests, as well as security of the DRC's neighbouring states such as Burundi, Rwanda, Uganda and Angola and to secure mineral resource interests of some western governments and their mining companies operating in the DRC.[373] The armed conflicts which began in May 1997 negatively affected domestic mineral production.[374] Foreign investors reduced their operations due to political uncertainty and this adversely affected domestic economic development.[375] The transitional government that was formed after the withdrawal of external evading troops in 2002 established a platform for economic recovery, investment negotiations and renegotiation with international financial institutions and donors, as well as implementing political and economic reforms.[376]

From the above, the DRC's mineral endowment continues to be the core for external interests and interference, on the one hand, and the resources are also the DRC's greatest natural asset, on the other hand. This brings in tension between domestic and foreign interests over control

[370] STAND 'Congo's natural resources and conflict minerals' available at http://www.standnow.org/learn/aoe/drc/issues (accessed 3 December 2104).
[371] Aaron Ezekiel 'The application of international criminal law to resource exploitation: Ituri, Democratic Republic of the Congo' (2007) 47 *Natural Resources Journal* 225.
[372] Michael L Ross 'How do natural resources influence civil war? Evidence from thirteen cases' (2004) 58 *International Organization* 35 at 50. See also Sagaren Naidoo, op cit note 80 at 4. See also David Moore 'The political economy of the DRC Conflict' in Sagaren Naidoo (ed) *The War Economy in the Democratic Republic of Congo* (2003) 16 at 16; Paul Orogun 'Blood diamonds and Africa's armed conflicts in the post-cold war era' (2004) 166 *World Affairs* 151.
[373] Ibid. The overthrow of the late Mobutu in 1997 was justified for two main reasons. Firstly, from the Great Lakes' perspective, Mobutu was regarded as the chief supporter of the opposition parties of his neighbouring governments. Chief among them was his support for the remnants of the former Rwandan Hutu government of the late Juvenal Habyarimana and its militants, the ex-FAR, and the Hutu extremists – the Interahamwe, most of whom are responsible for the 1994 genocide in the Republic of Rwanda. Furthermore, Mobutu's longstanding relations with the UNITA rebels in Angola and his support for the Allied Democratic Forces (ADF) justified the external intervention or involvement of Angola and Uganda respectively to overthrow him. Secondly, Mobutu's barricade of the democratic process that springs from the 1992 National Sovereign Conference resulted in the leadership of the non-armed opposition leading the fight for his removal.
[374] Sagaren Naidoo, op cit note 80 at 1 - 2. See Thomas Turner, op cit note 69 at 2 – 3. See also Padraig Carmody, op cit note 1 at 3; Dani W Nabudere, op cit note 363 at 60.
[375] Ibid, (Dani W Nabudere), at 47 – 64.
[376] See generally Thomas Turner, op cit note 69 at 147 – 161. See also Georges Nzongola-Ntalaja, op cit note 1 at 227 – 240; David Moore, op cit note 374 at 31. See also Gerard Prunier *From Genocide to Continental War: The Congolese Conflict and the Crisis of Contemporary Africa* (2009) at 316 – 327.

and access of the resources. Thus the ability by the DRC to assert sovereignty over the resources is dependent upon the central authority's ability to strengthen regulatory capacity.

Mineral resources conflicts in the eastern DRC could be considered to be motivated by the external desire for access to, and control of the resources. Ezekiel confirmed that the UN Report of the Panel of Experts documented the role of various rebel groups, proxy groups, armed forces, and some governments of neighbouring countries played a major role in the illegal exploitation of the DRC minerals.[377] The findings of the UN Panel of Experts confirm that the DRC's mineral resources and weak regulation is the major cause for conflicts. Thus, the DRC's assertion of sovereignty over domestic mineral resources is restricted and weakened from various competing external interests aimed at accessing and controlling the resources.[378] The inability to assert sovereignty could undermine the international law principles which support the DRC's sovereignty discussed in chapter 2.

With the aid of their home governments, most of the foreign troops illegally looted mineral resources from the DRC; depriving the Congolese people of their lawful rights to benefit from their natural endowment.[379] When mass plunder of mineral resources declined owing to various reasons, including the end of vicious circle of armed conflicts and the gradual depletion of the stocks, the DRC government lost minerals worth billions of US dollars.[380] Undeniably, looting of the DRC's mineral resources is a direct confrontation with the international law principles, which support the assertion of sovereignty over domestic mineral resources and an affront to the right of the Congolese to benefit from their mineral resources.

While it is the duty of the state to put regulatory and enforcement measures in order to control domestic mineral resources, the DRC's fragile efforts to effectively assert sovereignty has been hindered by various external interests and political instability.[381] Presumably, this shows the weakness of the central authority to effectively regulate domestic mineral resources. The absence of appropriate regulation and enforcement mechanisms is a challenge that restricts the assertion of sovereignty over mineral resources. It can be argued that the DRC's assertion of sovereignty, self-determination and integrity, as well as the right to

[377] Aaron Ezekiel, op cit note 373 at 226 – 227.
[378] See generally Adrian Day *Investing in Resources: How to Benefit from the Outsized Potential and Avoid the Risks* (2010) at 19 – 42.
[379] Richard M Auty & Raymond F Mikesell *Sustainable Development in Mineral Economies* (1988) at 32 – 33.
[380] The value is estimated at market price and in taxes; see Michael A Lundberg, op cit note 88 at 498.
[381] UNSC Report of the Panel of Experts of 2002, supra note 358.

development has been compromised due to conflicts associated with the control, exploitation and regulation of domestic mineral resources. Whether the disguised military intervention was necessary to help the Congolese people to restore their integrity and sovereignty over mineral resources is debatable.[382]

Of all post-cold war civil conflicts in Africa, the DRC conflict reflects the intricacies of the nexus between mineral resources and conflict, on the one hand, and negative and adverse effects of weak central authority on restricting or weakening sovereignty of the state over domestic mineral resources, on the other hand. It can be concluded that mineral resource endowment and weak central authority, and regulation have the potential to lead to natural resource conflicts. The extent of the correlation is potentially more pronounced in the DRC context where the central authority's ability to defend its sovereignty from internal conflicts seems to be unremediably weak. Moreover, the camouflaged interference has the potential to weaken regulation and control of, as well as sovereignty of the DRC over domestic mineral resources. In this regard, internal conflict influences illegal access to, and control of domestic mineral resources as well as illicit trade. This in turn adversely restricts or weakens the potential of the DRC to derive much economic benefits.[383]

Post-independence resource conflicts presently affecting political stability and economic development in the DRC could be a denial of the rights of, and disempowering the Congolese people and their sovereignty over mineral endowment. Political instability and interference in

[382] UN News Service 'UN envoy tells Security Council of improving security, remaining threats' *UN News*, 11 June 2011. See also Roger Meece, the Secretary-General's Special representative and Head of the United Nations Organization Stabilization Mission in the DRC (MONUSCO), briefing to the UN Security Council 6925th Meeting on 23 February 2013, available at http://www.un.org/News/Press/docs/2013/sc10921.doc.htm (accessed 4 June 2014); What's in Blue 'Adoption of a resolution on the Democratic Republic of the Congo' 2013, available at http://www.whatsinblue.org/2013/03/adoption-of-a-resolution-on-democratic-republic-of-congo.php (accessed 8 September 2014); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, ICJ Reports* 2005 at 168; hereafter the *Armed Activities Case.* See further Andrew Mollel 'International adjudication and resolution of armed conflicts in the Africa's Great Lakes: A focus on the DRC conflict' (2009) 1 *Journal of Law and Conflict Resolution* 10; Congo News Agency 'DR Congo has returned to peace, Kabila tells UN General Assembly' on 23 September 2011, available at http://www.congoplanet.com/news/1889/dr-congo-has-returned-to-peace-kabila-tells-un-general-assembly.jsp (accessed 7 November 2011).

[383] The Enough Project Team (with the Grassroots Reconciliation Group) 'A comprehensive approach to Congo's conflict minerals – strategy paper' 2009, available at http://www.enoughproject.org/publications/comprehensive-approach-conflict-minerals-strategy-paper (accessed 21 January 2012). See generally Brandon Prosansky 'Mining gold in a conflict zone: The context, ramifications and lessons for AngloGold Ashanti's activities in the Democratic Republic of the Congo' (2007) 5 *Northwestern University journal of International Human Rights* 1 at 1 – 6; Paivil Lujala, Nils Peter Gleditsch & Elizabeth Gilmore 'A diamond curse? Civil war and lootable resource' (2005) 49 *The Journal of Conflict Resolution* 538; Mirian Kene Kachikwu 'Diamonds & civil conflicts in Africa – the conflict in central and west Africa' (2004) 22 *Journal of Energy & Natural Resources Law* 171; Michael L Ross, op cit note 374 at 35.

the internal affairs of the DRC can be traced back to the scramble for Africa in 1884 to 1885,[384] colonization and under-development. Regardless of this, the DRC is a sovereign state; the role of international law in protecting politically weak states that cannot defend themselves is imperatively a need to uphold the principle of non-interference in domestic affairs of another state, permanent sovereignty over natural resources (PSNR) and self-determination.[385]

### 5.5.4 IMF and World Bank Conditionalities

The relationship between the DRC and international financial institutions such as the IMF and the World Bank under the late Mobutu and Laurent Kabila regimes from the 1990s until 2003 was not cordial due to a myriad of political and economic factors.[386] The civil war affected the economy, which suffered hyperinflation and other economic ills during the same period. Although the DRC's national budget is partly dependent on financial assistance from international institutions and foreign aid, the Kabila government laid a three legged foundation; first, the restoration of the relationship with international financial institutions and donors; second, steps to rejuvenate economic recovery continues and third, the first democratic elections since the DRC's ushering in of political independence from Belgium in 1960. When Joseph Kabila regime assumed office in 2001, and thereafter, the new DRC government that was installed was technocratic, much like the present government.[387]

The appointment of Mbuyamu Matungulu, a renowned and longtime IMF economist, as the DRC's Minister of Finance was presumably instrumental in the restoration of the formal relationship between the DRC, on the one hand, and the World Bank and IMF, on the other. Perhaps using the experience acquired while working for the IMF and the influence of the international financial institutions, Matungulu assisted the DRC to liberalize the labour

[384] Padraig Carmody *The New Scramble for Africa* (2011) at 177. See also Georges Nzongola-Ntalaja *The Congo: From Leopold to Kabila: A People's History* (2002) at 235 – 236; Gerard Prunier *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (2009) at xxix; Stefaan Marysse 'The new role of some key peripheral countries after the fall of the Berlin wall: The case of Democratic Republic of Congo' 2001 at 1 & 21, discussion paper, Institute of Development Policy and Management, University of Antwerp, Belgium, available at http://econpapers.repec.org/paper/iobdpaper/2002001.htm (accessed 9 March 2012).

[385] Thomas Packenham *The Scramble for Africa* (1991) at 1.

[386] See generally Pierre Englebert 'Life support or assisted suicide? Dilemmas of US policy toward the Democratic Republic of Congo' in Nancy Birdsall, Milan Vaishnav & Robert L Ayres (eds) *Short Goal of the US Policy and Poorly Performing States* (2006) 53.

[387] World Investment News 'Democratic Republic of Congo: Paving the reconstruction' published in Forbes Global Magazine, 1 April 2002, available at http://www.winne.com/congo/cr00.html (accessed 8 September 2014). See generally Institute of Security Studies 'Situation report' 2012, available at http://www.issafrica.org/uploads/SitRep2012-21Jun.pdf (accessed 8 September 2014).

market, mining and forestry industries. Following these reforms, the DRC started receiving technical and financial assistance from the World Bank and IMF.[388] Although it is not expressly stated, inference may be drawn that economic reforms undertaken by the DRC were conditionalities proposed by either the IMF or the World Bank, or both in order to receive assistance from the two international financial institutions.

The reforms referred above were not the only conditionalities, aid and debt relief from the two financial institutions was conditional upon the recipient countries drawing and spelling out 'Poverty Reduction Strategy Papers'.[389] The DRC was no exception to this influence; it drew up its own PRSPs. The issue central to this is the manner in which the conditionalities affected the DRC's assertion of sovereignty over mineral resources. Paradoxically, it appears these reforms did not affect the DRC's sovereignty because theoretically, the state still enjoys the right to control, alienate, vindicate, encumber and expropriate domestic mineral resources. However, in practice the liberalization of the economy under the influence of the IMF and World Bank means the nature of the entity with the right to mine is being changed, thus eroding the object of the DRC's assertion of sovereignty over mineral resources by redefining the role of the state from the custodian and manager and confining it to the regulator. This can be seen in one of the most recent economic reforms in the DRC, which consist in transforming the main mining parastatal, Gecamines, into a private company, with some state participation, a process that is still under way.

## 5.6 Conclusion

This chapter deliberated on the importance of domestic mineral resources to the DRC economy, the provisions in two major mining laws that support, as well as themes that restrict the assertion of sovereignty over mineral resources and the manner in which this is done. While the DRC is endowed with an array of mineral resources, their economic contribution to the national GDP is affected by various internal and external factors, which include illegal mining, mineral resource associated conflict, the absence of firm property rights, corruption, weak enforcement of the relevant laws and policing. The cumulative negative impact of these factors has been exacerbated by weak central authority.

[388] See generally Geraldine Baudienville 'Public financial management reforms in fragile states: The case of the Democratic Republic of the Congo' 2012, available at http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7853.pdf (23 October 2013)
[389] Poverty Reduction Strategy Papers, hereafter PRSP.

Regardless of the various steps undertaken in the regulation of domestic mineral resources, including giving meaning to the assertion of sovereignty as shown in the chapter, the enforcement of mining laws is fraught with loopholes, and corruption in the sector continues unabated. Some of the citizens including politicians have amassed riches while the majority of indigenous Congolese are pinned to the walls of poverty. The unequal distribution of economic benefits derived from the exploitation of domestic mineral resources undermines the assertion of sovereignty and economic development. Lack of transparency and accountability in the processes of regulation of mineral resources has caused bottlenecks and challenges to sovereignty. As a result, the DRC is losing revenues derived from the resources, and the loss is aggravated by weak policing and tax collection system, as well as enforcement of the relevant laws owing to institutional failure.

The Mining Code and the Mining Regulations are modern mining laws that provide an adequate legal basis for transparency and accountability, and assertion of sovereignty over domestic minerals, as well as economic development through the exploitation of the resources. However, the DRC has to an extent not been able to exercise its mandate and sovereignty in order to derive maximum benefits from exploitation of the resources due to weak regulation as a result of political fragility and instability as well as poor implementation and enforcement of the relevant mineral resource laws.

Taking into account the DRC's mandate and assertion of sovereignty over mineral resources and the threats discussed in this chapter, alongside with those discussed in chapter 4, the next chapter provides a comparative analysis of the operationalization of international law principles governing Zimbabwe and the DRC as regards sovereignty over their mineral resources for self-determination.

# CHAPTER 6

# A COMPARATIVE ANALYSIS OF THE OPERATIONALIZATION OF INTERNATIONAL LAW PRINCIPLES SUPPORTING SOVEREIGNTY OVER MINERAL RESOURCES

## 6.1 Introduction

Chapters 2 and 3 provided a conceptual frame for this thesis in terms of international law principles governing state sovereignty over mineral resources and threats to the outworking of that sovereignty. In chapters 4 and 5, I discussed the manner in which Zimbabwe and the DRC operationalize international law principles that were discussed in chapter 2; that is, how sovereignty over mineral resources manifests in domestic mining laws, and how the mandate derived from the principle of permanent sovereignty over natural resources (PSNR) is restricted by threats identified in chapter 3. The manner in which Zimbabwe and the DRC assert sovereignty over mineral resources occurs in various ways, through property rights, conditions of assess to the resources, beneficiation and trade, enforcement of mining laws and policing, as well as creating obligations toward indigenous communities. Both countries also assert sovereignty through the manner in which they respond to the constraints imposed by principles of international investment and trade.

Despite being richly endowed with various mineral resources and as well asserting their sovereignty in the manner outlined and discussed in chapters 4 and 5, both Zimbabwe and the DRC are economically weak and poor. The inverse relationship invokes the resource curse: The paradoxical relationship between mineral endowment and underdevelopment dovetail with the complexity of resource governance in a context of state fragility. In this chapter, I therefore return to the problem and questions posed in chapter 1: How Zimbabwe and the DRC used the strategic area of domestic law and policy to operationalize aspects of international law principles relating to sovereignty over natural resources, taking into account threats to such sovereignty?

The chapter discusses how the DRC and Zimbabwe's operationalized aspects of the international law principles governing state sovereignty over mineral resources discussed in chapter 2. This chapter adopts a relative comparative analysis in order to show how both states' mineral laws (as discussed in chapters 4 and 5) operationalize salient aspects of PSNR,

self-determination, non-interference, as well as principles facilitating investment and trade. The extent to which both states managed or failed to manage threats discussed in chapter 3, as well as the challenges is worth of consideration. Appendix A provides useful information for the purposes of a comparative analysis of some issues discussed in this chapter.

## 6.2 Permanent Sovereignty Over Natural Resources (PSNR)

Chapter 2 established that the principle of PSNR vests host states with the mandate and right to control and regulate, as well as exploit domestic mineral resources and derive economic benefits for national development. Also, the PSNR principle vests the state with permanent custodianship over domestic mineral resources, as well as the right to enact and implements laws determining conditions of access; regulate the acquisition and cancellation of mining licences; decide who should be allowed to invest in the mining sector and use the revenue generated from exploitation of minerals for development purposes.

In both the DRC and Zimbabwe, the PSNR principle is primarily operationalized through the following features of the domestic legal regime: The property regime applicable to mining; conditions of access to mineral resources; policy implementation enforcement and policing; beneficiation and trade; the indigenization policy; dispute resolution; royalties and mining tax rates; beneficiation and trade, and specification of legal obligations toward indigenous communities.

### 6.2.1 Custodianship over Domestic Mineral Resources

Based on the analysis provided for in chapters 4 and 5, Zimbabwe and the DRC have not been reticent in claiming custodianship over mineral resources in their national laws. In Zimbabwe, on the one hand, the state President is exclusively and absolutely vested with permanent custodianship over domestic mineral resources on behalf of Zimbabweans. The state President has been conferred with dominium over all the mineral resources located within the country and has the right to alienate property rights in the resources for the benefit of the citizens. There are no private ownership rights and control of the resources; they are the property of the state. In his or her representative capacity and in consultation with the cabinet, the state President can grant rights to exploit a mineral resource subject to the conditions discussed in section 4.4.2 of chapter 4.

In the DRC, on the other hand, the Constitution and the Mining Code provide that the state is the owner and custodian of all domestic mineral resources. Custodianship is vested in the state on behalf of, and for the benefit of, the Congolese people. As the case with Zimbabwe, the DRC has no private ownership of the resources but they are the property of the state. As such, the state has exclusive and inalienable ownership rights to all domestic minerals. Through the department of the state responsible for mines and mineral development, the state grants access to the resources by way of mining rights as discussed in section 5.4.2 of chapter 5.

As an expression of custodianship both Zimbabwe and the DRC restrict ownership in mineral resources by granting limited exploitation rights to investors. Two issues arise in connection with this position. The first is whether it makes any difference to vest mineral resource ownership in the state President (as in Zimbabwe) or in the state (as in the DRC)? The second, is how the decision to limit rights to exploitation rights squares with the *realpolitik* of investment and, particularly, investors' desire for security of tenure?

In response to the first issue, one could argue that it should not make a difference whether custodianship rights vest in the state or the state President. Both Zimbabwe and the DRC recognize the supremacy of ownership and custody of mineral resources. Vesting custody of mineral resources in the state and the state President does not entitle private claims over the resources, providing instead the responsibility to act in good faith, transparency and accountability as well as trust for the benefit of citizens.[1] As suggested in chapter 4, however, vesting custodianship in the state President is subject to debate, particularly where there are no checks or balancing mechanisms to ensure transparency and accountability. It could lead to personalizing ownership and custody of the resources contrary to the good intentions of PSNR, thus making the state less able to manage the threat of corruption. The orchestrated and intricate links in dodgy mining joint venture agreements are used to loot minerals. Other mechanisms that are used to loot the resources include under-invoice production, thereby making it hard to investigate and arrest those involved. Arguably, those involved in such illicit, self-serving and pernicious deals are mostly politically connected and they enjoy political protection. Further, one can argue that opaque mining agreements and company

[1] OSISA 'Existing legal and institutional frameworks' 2013, available at http://www.osisa.org/book/export/html/5137 (accessed 3 August 2014). The requirement for transparency and accountability is one of the major objectives of the Africa Mining Vision (AMV) as highlighted in preceding in chapters.

structures are used to hide the beneficiaries of illicit dealings as well as provide cover for the police and military. The illegitimate beneficiaries of Zimbabwe's mining concessions, for instance the Marange diamonds, are often obscured. Undeniably, the operationalization of PSNR and the mandate to exploit the resources for development breaks down due these self-serving and pernicious deals. In the circumstances, how may corruption be linked to the vesting in the state President with the powers to control domestic mineral resources? In the absence of strong checks and balances, vesting of custodianship in the state President could be manipulated and used as a vehicle for corruption in the mineral value chain. While, on the one hand, vesting of ownership and custody over mineral resources in the state President could be influential and useful tool to curb corruption. On the other hand, this all depends on the moral integrity of the state President, the credibility of the regulatory authority, as well as transparency and accountability in the mineral value chain.

Regarding the second issue, as a result of limiting investor rights to exploitation rights, both Zimbabwe and the DRC provide some form of security of tenure. Zimbabwe's Mines Act requires holders of mining or exploration licences to register with the Ministry of Mines.[2] In the DRC, holders of mining or exploration licences have to register with the Mining Registry. In both countries, the requirement to register mining licences converts the rights imbedded in the licences to secured property rights, thus providing security of tenure. Despite these efforts, however, weak central authority (in the DRC) and property rights, and the rule of law in both jurisdictions are a concern. One can argue that doing business in both states is risky because of the lack of firm property rights, as reflected in low World Bank ratings (as discussed in chapters 4 and 5). Arguably, low ranking in the protection of property rights and "ease of doing business" adversely affects foreign mining investment in both countries. Thus contributing to breakdown of the operationalization of PSNR, precisely because both countries require foreign investment in order to successfully exploit their resources. It can therefore be argued that the operationalization of PSNR is inherently underpinned by host states' ability to attract mining investment and provide firm property rights.

In a nutshell, the principle of PSNR provides Zimbabwe and the DRC with the mandate, rights and authority to enact laws or provisions in domestic laws regarding property rights embedded in mining licences. Apart from the differences in vesting custody and ownership of

[2] See generally section 4.4.1 of chapter 4, above. See also section 15 of the Mines Act (of Zimbabwe).

mineral resources between Zimbabwe and the DRC, both countries are quite similar in how they define property in mineral rights and limit "ownership" to exploration and exploitation rights. This can be a strong assertion of sovereignty over the resources for self-determination. However, low investor ratings suggest lack of various fundamental factors including failure to establish firm and sufficient security of tenure for exploration and exploitation rights.

### 6.2.2 Determining Conditions of Access

In addition to asserting custodianship over mineral resources, both Zimbabwe and the DRC have articulated fairly elaborate conditions of access to their mineral resources in domestic laws. In both states, regulation and control of rights to access to mineral resources is exclusively the responsibility of the state through the departments in charge of mines and mining development. However, there are important differences in their strategies of allocation.

In Zimbabwe, the conditions of access to mineral resources are set out in the Mines Act, which provides the Minister of Mines and Mining Development with authority, in consultation with the state President and cabinet, to grant or refuse a mining investor rights of access to a domestic resource. As discussed in chapter 4, the Mines Act provides for six different types of mining licences which confer rights upon prospective mining investors. Each category of mining rights has varying conditions of access.[3] Generally, in order to be granted rights of access to a mineral resource foreign mining investors must meet the requirements of the indigenization law relating to mining joint ventures and the 51 percent indigenous share ownership.[4]

Unlike Zimbabwe, the DRC government grants rights to access a domestic mineral resource on a "first come, first served basis".[5] The "first come, first served" requirement is provided for in the Mining Code, which makes it an obligation for the government to consider or reject applications in that order. This is a departure from the Zimbabwean approach. The Mines Act is silent on the issue, thus affording the state President and the Minister of Mines the discretion to decide which potential investor to grant the rights regardless of the date of submission of the application.

[3] See discussion in section 4.4.2 of chapter 4 above.
[4] See discussions in sections 4.3.1.6 and 4.4.2 of chapter 4 above.
[5] See discussion in section 5.4.2 of chapter 5 above.

Unlike Zimbabwe's Mines Act, the DRC's Mining Code specifically provides that the Congolese have rights to engage in regulated artisanal mining activities on condition that each is a holder of an artisanal miner's card, and is otherwise eligible to carry out artisanal mining.[6] Artisanal mining is not formalized and regularized in Zimbabwe, and those engaging in the activity cannot obtain technical, financial and administrative assistance from the state, and also cannot freely use formal channels to trade their minerals.[7] Due to this, artisanal miners are not capable of operating freely and have to use intermediaries to sell their produce. In that process, they are exploited and even arrested. In both countries, unregulated mining activities are illegal and therefore an offence to win a mineral from the earth without a valid licence. Further, both the Zimbabwe's indigenization law and the DRC rules to reserve regulated artisanal mining for the Congolese stretch the boundaries of PSNR principle in respect of access to domestic minerals.

As discussed in chapter 5, the DRC expressly prohibits government and civil servants, magistrates, employees of public entities which are authorized to undertake mining activities, armed forces, security agents and polices officers from carrying out mining activities. However, the Mining Code[8] simultaneously allows such categories or persons to participate in the capital of any mining companies operating in the country. The provision is self-contradicting: The objective to exclude the categories of people and then allow them to participate in the capital of mining companies is incompatible with the reasons to exclude them in the first place. The contradiction defeats the purpose of the provision and creates room for corruption. Unlike the DRC, however, Zimbabwe's Mines Act does not expressly provide for categories of persons excluded from undertaking mining activities. The silence in the principal law is a cause of concern where conflict of interest arises.

Regardless of being empowered by the PSNR principle to exercise sovereignty and the mandate to exploit domestic minerals for self-determination, both Zimbabwe and the DRC require capital that comes with foreign investment. Accordingly, both countries require

[6] See generally Articles 17 & 27 of the Mining Code.
[7] Norman Mukwakwami 'Formalizing Zimbabwe's artisanal mining sector' 2013 at http://projekt263.wordpress.com/2013/09/24/formalising-zimbabwes-artisanal-mining-sector (accessed 3 August 2014); Oladiran Bello & Megan Bybee 'Revamping artisanal gold mining in Zimbabwe to catalyze poverty Reduction' 2014 at http://www.saiia.org.za/policy-briefings/revamping-artisanal-gold-mining-in-zimbabwe-to-catalyse-poverty-reduction (accessed 3 August 2014).
[8] Article 27 of the Mining Code.

partnerships with private investors in order to realize substantial investment. In this regard, however, there is tension where the application or the exercise of PSNR is limited. The DRC Mining Code[9] and Zimbabwe's indigenization law[10] provide for mining investor partnerships with the state in order to exploit the resources. Unlike Zimbabwe's Mines Act, the Mining Code provides for joint-mining venture with investors where the state deems it necessary. The provision for mining partnerships can be an acknowledgement that both states cannot successfully exploit their mineral resources without foreign investment.

While Zimbabwe's Mines Act is an outdated principal law, the DRC Mining Code is a more recent principal law that provides for partnerships and better operationalization of PSNR. The Code clearly states who can be an investor and who is excluded. Regarding artisanal mining, the Code provides for who qualifies to obtain an artisanal miner's card and who should be disqualified. Zimbabwe's Mines Act is explicitly silent over the same issues. Regardless of these strengths and shortfalls in the Mining Code and the Mines Act, respectively, however, one can therefore argue that the DRC and Zimbabwe do not provide for unrestricted access across all categories of mining, yet both states also recognize the need for partnerships.

### 6.2.3 Power to Choose Who Should Invest

The power to decide and choose which mining investor should be granted mining or exploration licence(s) is the prerogative of the state in both Zimbabwe and the DRC. This power is derived from the international law concept of sovereignty discussed in chapter 2 and is at the same time a manifestation of sovereignty. That said, my focus is on the use of such power to enhance indigenization policies to benefit the indigenous people in Zimbabwe and the DRC.

The operationalization of PSNR though indigenization is a noble strategy in order to execute the mandate to exploit domestic mineral resources for national development. Fundamentally, the DRC and Zimbabwe flex their sovereignty muscles: The power to choose mining investors as well as to compel such investors to uphold indigenization policies is an act of asserting sovereignty. However, the operationalization of PSNR breaks down in that politics and not equitable distribution drives the benefits arising from the implementation of

[9] Para 3 of Article 8 of the Mining Code.
[10] The indigenization law of Zimbabwe requires a 51 percent indigenous partnership.

indigenization policies. Have local communities benefited from the indigenization policy? Arguably, the response is in the negative; indigenization has illegally enriched a few, mainly politicians and their close relatives. It is evident that the objectives of indigenization in both countries have been debased; the implementation and enforcement of the policy has not been concomitant or in accordance with the wishes of the people. Accordingly, one can argue that the operationalization of PSNR breaks down because powers to choose who to invest can be abused for self-serving interests.

### 6.2.4 Inalienable Right to Control and Regulate Resources

The DRC and Zimbabwe have inalienable rights to control and regulate their mineral resources. This is an aspect of PSNR that is operationalized by rules relating to access and allocation of mineral resources discussed above, as well as rules on implementation and enforcement, together with beneficiation and trade. Accordingly, effective and appropriate implementation and enforcement of mining laws as well as policing is the core vanguard against threats to sovereignty over mineral resources discussed in chapter 3.

Zimbabwe Mines Act and subsidiary laws, and the DRC Mining Code have provisions on implementation and enforcement. In both states, contravention of provisions in mining laws occurs either by way of commission or omission. For example, the Mines Act criminalizes failure to comply with any provision of the Act; this includes failure to keep an up-to-date register of mineral transactions[11] and disposal of minerals from a location without payment of royalties. The DRC's Mining Code criminalizes certain conduct that includes dealing in or possession of minerals without a licence. As discussed in chapters 4 and 5, mining offences were enacted as a way to flex sovereignty muscle in order to control the resources, as well as to execute the state's mandate to exploit the resources for self-determination.

With regard to implementation and enforcement, Zimbabwe's indigenization law is a case in point, which exhibits poor and the absence of clear, consistent, and legitimate enforcement structures and mechanisms. The authority in the Ministry of Youth and Economic Empowerment is responsible for facilitating appropriate implementation and enforcement of this law. However, as discussed above and in some instances, the state has rather used

[11] See discussions of the Gold Trade Act & Copper Control Act in sections 4.3.1.4 & 4.3.1.5 of chapter 4, respectively.

intimidation in the form of threats of seizure of business interests of foreign mining investors in order to compel them to agree to the 51 percent indigenization share ownership. Arguably, the indigenization law is largely perceived by many foreign mining investors as an obstacle to foreign investment purportedly for lack of simplicity. Against this background, '[f]oreign investors often point to the government's policy of forcing foreign-owned firms to sell a majority of shares to locals as an impediment to investment'.[12] This is one example of how the operationalization of PSNR breaks down, as the state flexes its sovereignty muscles and at the same time breaches the rule of law.

Although the DRC and Zimbabwe have institutions responsible for regulation and enforcement of mineral laws and policing, the role of the state and its mining institutions as well as regulatory structures are better defined in the DRC's Mining Code than in Zimbabwe's Mines Act. The DRC's regulatory system rests on cooperative governance and hands-on approach in order to ensure the objectives of the Mining Code are realized. Also, the statutory fines and imprisonment terms for contravention of provision(s) of the Mining Code are higher and more prohibitive compared to Zimbabwe' mining laws.[13] However, due to a weak central authority, the implementation and enforcement as well as policing of the DRC mining laws fundamentally breakdown and so is the operationalization of PSNR and mandate to exploit the resources for self-determination. Regardless of the DRC's mining laws being good on paper, one can argue that weak implementation and enforcement have adversely contributed to the prevalence of illegal mining, corruption and resource conflicts. The negative effects on the operationalization of PSNR over the DRC's mineral resources do not mean Zimbabwe has not been affected from the same threats. As discussed in chapter 4, Zimbabwe mining laws have weaknesses that also cause breakdown of the operationalization of PSNR due to, inter alia, failure to define the mandate of each office bearer. Neither the DRC nor Zimbabwe spells out with certainty specific powers of mining law enforcement agents. Also, there is no detail regarding the number of mining inspectors and officials deployed to each mining region and the field distance each has to monitor.

Apart from indigenization laws, a number of African countries have been turning their attention to the regulation of beneficiation and trade, as an expression of their permanent

[12] Reuters 'IMF sees Zimbabwe economy weakening further in 2015' *New Zimbabwe,* 9 March 2015.
[13] Compare from sections 4.4.3 of chapter 4 and 5.4.3 of chapter 5. See also Zimbabwe's Mines Act and DRC Mining Code for more detail.

sovereignty over mineral resources.[14] In both the DRC and Zimbabwe, trade of beneficiated mineral and mineral products emerged as a strategic policy. However, Zimbabwe's outdated Mines Act does not explicitly provide for beneficiation and value addition. Apart from a few incomplete beneficiation provisions in the Diamond Policy,[15] there is no consolidated beneficiation law or policy that can be regarded as a "beneficiation law of Zimbabwe". Although the Diamond Policy provides for mandatory beneficiation for diamonds, it has its weaknesses. The Policy does not spell out the standard for issuance of permits to those involved in diamond cutting and polishing sector. The Diamond Policy lacks clear administrative structures and procedures in the regulation of diamond beneficiation thereby creating loopholes for corruption and illicit dealings. Regardless of the irregularities, however, the government of Zimbabwe requires platinum mining companies to beneficiate their minerals before export or risk face heavy financial penalties.[16]

With regard to the DRC, the Mining Code provides for prospecting, exploration and exploitation of mineral resources, regulation of mineral processing, transportation and trade of minerals substances. The last three are not provided for in Zimbabwe's Mines Act. Further, the DRC Mining Code provides the Minister of Mines with unfettered jurisdiction and powers to decide whether to grant applications for export of unbeneficiated minerals.[17] The Minister exercises authority over the nature of mineral resource exports on behalf of the DRC government, this includes to derive maximum economic benefits for insisting for export of beneficiated minerals unless it is reasonably necessary to export raw mineral resources. However, there is no single and consolidated policy on beneficiation but the provisions are embedded in various policy documents. Failure to have a single consolidated policy negatively affects the operationalization of PSNR. Unlike the DRC, the government of Zimbabwe levies 15 percent export tariff on unbeneficiated platinum as well as related minerals. There are also fines that may be imposed where mining companies illegally export unbeneficiated minerals.

[14] See generally Lucas Moalusi, Isaac Munyuki & Fasken Martineau 'Mineral beneficiation in Africa: The elephant in the room' 2014, available at http://www.polity.org.za/article/mineral-beneficiation-in-africa-the-elephant-in-the-room-2014-07-28 (accessed 4 March 2015); Janine Erasmus 'Beneficiation an opportunity for BRICS' 2013, available at http://www.southafrica.info/global/brics/mining-270313.htm#.VeiyPvBGR2A (accessed 14 December 2014).
[15] See discussion in section 4.3.1.3 of chapter 4 above.
[16] Lucas Moalusi *et al*, op cit note 14.
[17] Refer to the discussion in section 5.4.4 of chapter 5 above.

Unlike the articulation of state custodianship over mineral resources and rights of access to mineral resources, it can be argued that Zimbabwe and the DRC are not fully operationalizing PSNR because the rules regarding beneficiation are uneven, sketchy and incomplete. Weak enforcement of "uneven, sketchy and incomplete" laws makes evading beneficiation requirements easy, through loopholes in the regulatory system. The loopholes are widened due to lack of appropriate mechanisms for beneficiation, thus adversely affecting full operationalization of the principle of PSNR in both states.

### 6.2.5 Use of Mining Revenues for Development Purposes

Lastly, the expression of PSNR most typically manifests in the state levying various forms of taxes. This is primarily operationalized by rules dealing with royalties and taxes. As discussed in chapters 4 and 5 above, the mining tax regime for Zimbabwe and the DRC includes mining duties, royalty, fees and charges payable by mining investors on the concessions or contracts concluded with the host state. It therefore implies that mining investors are legally compelled to pay mining taxes as required by the domestic mining laws of both countries.

As discussed in section 4.4.5 of chapter 4, a mining investor in Zimbabwe pays a flat rate of 15 percent of the total profits to the state. The fiscal regime for mining provides 5 percent for withholding tax charged on dividends declared by mining companies listed on the Zimbabwe Stock Exchange (ZSE) but unlisted mining companies pay 10 percent. The variations imply that Zimbabwe provides exclusive privilege to mining companies that are doing business in the country while listed on the ZSE than those listed elsewhere. Thus, listing on the ZSE provides the mining companies with an opportunity to raise capital to fund new projects or undertake expansion or diversification.

Unlike Zimbabwe where the mining taxes are higher, the DRC rate of royalty for iron is 0.5 percent, 2 percent for non-ferrous metals and 2.5 percent for precious metals, as well as a preferential 30 percent for profit-based tax for exploitation of mineral resources.[18] Looking at the tax rates, one can argue that the percentages are lower in the DRC compared to Zimbabwe.[19] During the period spanning 2002 and 2012 the DRC guaranteed stable mining

[18] See section 5.4.5 of chapter 5 above.
[19] Generally compare from sections 4.4.5 of chapter 4 and 5.4.5 of chapter 5.

tax modifications. However, the stabilization clause restricted the DRC from freely altering the mining tax regime for 10 years. Arguably, this was a very explicit way in which the DRC restricted its own sovereignty.

With regard to the distribution of mining revenues, Zimbabwe does not have a royalty distribution plan save for the Trust Funds for the provinces and the National Sovereign Wealth Fund established in terms of the indigenization policy. However, there is no transparency and accountability, as well as traceability of the revenues in these funds. This is thus a major weakness contributing to breakdown of the operationalization of PSNR. Unlike Zimbabwe, the DRC has no trust funds but has a pro rata distribution plan of royalties to all levels of government in order to benefit all Congolese. The distribution plan is a noble idea; however, weak regulation and corruption in the minerals sector and the distribution chain contribute to breakdown of the operationalization of PSNR.

Notably, PSNR is the core principle underpinning the DRC and Zimbabwe's mandate and the right to benefit from exploitation of their mineral resources. The same principle also vests the state (DRC) and the state President (Zimbabwe) with permanent custodianship over domestic mineral resources. The principle provides the executive and the legislature with authority to make laws in order to determine conditions of access and regulation of mineral resources, acquisition and cancellation of mining licences, as well as security of tenure. Further, the same principle provides inherent powers to choose investors and exclude others. Furthermore, the principle provides inalienable rights of control of economic benefits derived from exploitation of domestic minerals, the allocation and use of the revenues for self-determination. Thus, PSNR is the fountainhead of state authority to control and regulate domestic mineral resources for self-determination.

### 6.3 The Principle of Self-determination and its Operationalization

As discussed in Chapter 2, the principle of self-determination manifests in the right to decide how the benefits of mineral resource exploitation will be used in accordance with the wishes of the people.

It was also concluded that the principle of self-determination is operationalized primarily through the indigenization policy, and through provision for public participation,

transparency and accountability, and planning for use of mineral resources. Corruption, and potentially illegal mining, threatens the beneficial operationalization of the principle of self-determination.

### 6.3.1 Provision for Public Participation in Mineral Resources

Public participation is an important tool central to, and interconnected with dissemination of information in order to make informed decisions while opening doors to public scrutiny, transparency and accountability. Public participation improves community rights to access to information.[20] This includes the possibility for availability of information to all the three levels, namely, national, regional and local levels. Further, public participation alongside the right to be informed of mining activities that can directly or indirectly affect communities is a way to bring awareness at levels of society. In this regard, views of a cosmopolitan community in a hierarchy of structures can be heard and contributing to policy formulation and decision-making.[21]

As discussed in chapter 4, the preamble to the Constitution of Zimbabwe recognizes the natural endowment of the country including mineral resources. Although the Mines Act vests the state President with the custodianship of mineral resources on behalf of, and for the benefit of Zimbabweans, however, there is no clear provision for public participation in the regulation of, and decision-making relating to these resources. There is no provision for a forum where public participation in mineral licensing can take place. In the absence of public participation, the executive acts in ways that do not reflect the views and collective decisions of the public. Arguably, the exclusion of public participation does not support the idea that the peoples of Zimbabwe are at the centre of mineral resources and their regulation, as well as that exploitation of the resources should benefit them. However, the absence of public participation in mineral licensing goes along with non-disclosure of information, thereby leading to lack of public scrutiny, transparency and accountability. Thus, the exclusion of public participation makes the legitimate owners of the resources (the people of Zimbabwe)

[20] See generally Michael Lockwooda, Julie Davidsona, Allan Curtisb, Elaine Stratforda & Rod Griffithb 'Governance principles for natural resource management' (2010) 23 *Society & Natural Resources Journal* 986; Anne Larsona & Jesse Ribot 'Democratic decentralisation through a natural resource lens: An introduction' (2004) 16 *The European Journal of Development Research* 1; Fred Nelson & Arun Agrawal 'Patronage or Participation? Community-based natural resource management reform in Sub-Saharan Africa' (2008) 39 *Development and Change* 557.

[21] Ibid. see also James L Creighton *The Public Participation Handbook: Making Better Decisions through Citizen Involvement* (2005).

mere viewers and listeners, yet they are supposed to be agents and champions of their own development. The absence of public participation is a fundamental anomaly that requires immediate attention to ensure exploitation of mineral resources is people-centred and locally responsive.

Similarly, the DRC Constitution provides all Congolese with the right to enjoy national wealth. This should include participation in the process to realize the wealth. The DRC government is under a constitutional obligation to distribute the wealth equitably and safeguard the right to development.[22] The Mining Code provides for public participation in mineral licensing or public tender regarding mining licensing. The Code has provisions around mining operators making themselves known to chiefs and local communities, thus creating room for public participation at a local level. Ideally, the provision for public participation is entrenched in the law; however, in practice little is done to ensure sound participation at local level. Communities at local level are not informed of their legitimate rights as they are the most affected by mining activities.

### 6.3.2 The Impact of Illegal Mining and Corruption on Self-determination

Both Zimbabwe and the DRC have been substantially affected by loss of mining revenues through corruption and illegal mining. In both countries, various players are involved in illegal mining of minerals and in orchestrated corruption in the mineral value chain. As discussed in chapters 4 and 5, both countries' dire economic situation has forced many families, particularly in rural areas, into illegal mining to eke out a living. Illegal mining has also been driven by high demand for precious minerals such as alluvial gold and diamonds on local and regional markets, notably Botswana and South Africa, and abroad.

One can argue that the DRC and Zimbabwe are losing substantial revenue through illegal mining and smuggling, and corruption owing to weak regulation. Both threats reduce the amount that would otherwise go to the fiscus, which means there is even less money available for law and enforcement – a vicious circle. Also, both threats undermine host states' efforts to assert control and regulate mineral resources for self-determination in that revenues that could have been available for development are lost through illicit flows. Therefore, illegal mining and corruption impact negatively on the operationalization of the principle of self-

[22] See generally Articles 58 & 59 of the Constitution of the DRC.

determination, and the mandate to exploit domestic mineral resources and use the proceeds for national development.

With regard to corruption in Zimbabwe and the DRC's mineral value chain, it can be argued that those in positions of authority take advantage of the state's weakness. The loopholes in the regulatory system, lack of strong checks and balancing mechanisms influence self-serving decisions, evade paying mining taxes and under declare production in order to advance private interests. As discussed in chapters 4 and 5, corruption contributes to a loss of investor confidence and makes the "ease of doing business" more complex owing to a myriad of unnecessary challenges.[23] In both countries, the elite use political connections to obtain mining contracts, for themselves or their associates, or to benefit from mining joint ventures. Further, corruption may lead to conclusion of illicit mining deals, thereby debasing the good intentions of self-determination in that such deals advance pernicious interests at the expense of national interests. Against this background, however, it can be argued that the silence by both governments on effective public scrutiny and participation, transparency and accountability, as well as the establishment of strong checks and balancing mechanisms could be a deliberate strategy to conceal illicit mining deals and misuse of mining revenues. One can further argue that the development of both countries' minerals is driven by pernicious and illicit private interests and these undermine national priorities that are people-oriented.

A comparative analysis of the extent of corruption in the mineral value chain and illegal mining in the DRC and Zimbabwe shows that both countries have not been able to flex their sovereignty muscles in order to curb these threats and illicit financial flows associated with them. Although the DRC has a recent mining law, the economic effects of illegal mining are more far-reaching than the situation in Zimbabwe. However, the prevalence of illegal mining in both states undeniably is connected to weak implementation and enforcement of mining laws. Paradoxically, the prevalence of illegal mining and corruption in the mineral value chain has the effect of lowering foreign mining investment enthusiasm for both states relative to other African countries.[24]

[23] See generally sections 4.5.2 & 5.5.2 of chapters 4 & 5, respectively.
[24] Oxford Policy Management 'The impact of mining in the Democratic Republic of Congo: Performance to date and future challenges' 2013 at 5, available at http://www.opml.co.uk/sites/default/files/DRC%20mining%20report%20-%20OPM%20-%20Final%20Eng.pdf (accessed 5 January 2015).

A discussed in chapters 4 and 5 above, illegal mining and corruption in the mineral value chain systematically disempower and undermine self-determination.[25] Both threats reduce the revenue base as some mining tax payers evade paying tax through loopholes in the mining tax collection system. Also, those involved in illegal mining do not pay tax as their activities are not regulated by the state. The cumulative effects of these factors inherently debase the outworking of self-determination and the mandate to exploit domestic mineral resources for national development. A comparative analysis suggests that the prevalence of corruption in the mineral value chain is more deeply-entrenched and orchestrated in Zimbabwe compared to the DRC, whereas in the DRC illegal mining appears to be a greater problem. However, both corruption and illegal mining are threats that negatively affect the operationalization of self-determination in both countries. Accordingly, both threats contribute to weakening and breakdown of the mandate of both states to derive maximum economic benefits from the exploitation of their minerals.

### 6.3.3 Transparency and Accountability for Self-determination

Transparency and accountability are important aspects for effective participation in the mineral value chain. If mineral resource exploitation is going to benefit the people, they need to have access to information so that they know what is going on and can make their wishes heard, as well as to determine whether mining companies and the government are playing by the rules. The DRC is a member of the Extractive Industries Transparency Initiative (EITI) while Zimbabwe is not. Therefore it can be argued that the DRC benefits from the EITI membership while Zimbabwe does not.

The principle of PSNR cannot be realized until the revenues derived from exploitation of minerals are used and managed in a transparent and accountable manner for self-determination. Unlike other transparency initiatives, revenue transparency and accountability, as well as traceability is fundamental in order to bridge the weaknesses and gaps in the administrative systems and to curb illicit flows in the mineral value chain.

The fact that Zimbabwe is not a member of any transparency initiative means the government should be putting in its own transparency and accountability mechanisms to monitor and trace mineral revenues, allowing also for public scrutiny of the process. However, Zimbabwe

[25] See sections 4.5.1 & 4.5.2 of chapter 4, as well as sections 5.5.1 & 5.5.2 of chapter 6 above.

does not have policies to facilitate transparency and accountability in the use and management of mining revenues. Only the office of the Comptroller and Auditor-General, whose appointment is at the discretion of the state President,[26] release statements on government spending but there is no rule compelling the government to be transparent and accountable. Further, neither the Mines Act nor any mining law provides for declaration of mineral resource payments and revenues realized from mineral exports. One can therefore argue that the absence of mandatory disclosure, transparency and accountability as well as traceability in the law create loopholes and weaknesses that contribute to breakdown in the operationalization of the principle of self-determination.

In addition to being a member of the EITI, the DRC is a member of the International Conference on the Great Lakes Region (ICGLR), and is therefore required to meet minimum reporting standards on transparency and accountability, as discussed in section 5.4.10 of chapter 5 above. The requirement for transparency allows for public scrutiny as a check mechanism that can compel the government to be accountable. However, due to weak central authority, regulatory institutions and structures, and the prevalence of corruption in the mineral value chain, the effectiveness of operationalizing self-determination initiatives, including revenue transparency and accountability is largely unsuccessful.

Like Zimbabwe, one can argue that the DRC's opaque decisions in awarding mining contracts promote a culture of secrecy, and a conduit for endemic corruption.[27] Due to weak mineral resource regulation, both the DRC and Zimbabwe are losing millions of US dollars in mining revenues each month through loopholes and uncollected mining taxes, as well as through corruption, smuggling and illegal mining.[28] The activities of mining companies are hidden in shadowy financial management systems with limited legislative oversight, as well as limited or biased auditing. The terms of product-sharing contracts, reporting on signature bonuses for conclusion of mining agreements and trading are hardly made public.[29] Through partnerships with foreign mining investors and product-sharing contracts, state mining

[26] See generally sections 309 – 313 of the Constitution of Zimbabwe, 2013.
[27] Global Witness 'Equity in extractives: Stewarding Africa's natural resources for All' Africa Progress Report 2013 at 55, available at http://www.globalwitness.org/sites/default/files/library/DRC-Africa%20Progress%20Panel%20report%20-%20Congo%20pages.pdf (accessed 20 July 2014).
[28] Ibid, at 55 – 56. See also Luis Jones 'Preventing the export of conflict diamonds in the Democratic Republic of the Congo' 2014 at 10 – 11; Patricia Feeney 'DR Congo: End illegal exploitation of natural resources' *Press Release*, February 21, 2006; Rights and Accountability in Development (RAID) 2006, available at http://www.raid-uk.org/news/lutundula_report.htm (accessed 27 July 2014).
[29] Global Witness, supra note 21 at 55.

companies occupy a pivotal role that could be used to expose opaque activities in mineral resource regulation.[30] However, the terms on which mining contracts are concluded are even not disclosed. Arguably, non-disclosure can be one of the ways to conceal opaque or illicit deals that are used to siphon revenues from exploitation of mineral resources. Further, the weaknesses in the regulatory systems create opportunities for various illicit practices that include the use of secret offshore companies to facilitate diversions of mining revenues into private bank accounts.[31] Accordingly, the dishonest practices in the mineral value chain contribute to revenue losses, thus inherently depriving Zimbabwe and the DRC of revenues that should have been channeled towards national development programmes.

### 6.3.4 Strategic Planning on the Use of Mineral Resources for Development

The right to development places a responsibility on the DRC and Zimbabwe to formulate policies, strategies and plans for national benefit. Zimbabwe's Agenda for Sustainable Socio-economic Transformation (ZIM-Asset)[32] and the DRC's poverty reduction and growth strategy papers (PRGSP)[33] are blue prints and strategic policies and plans for national development. At the core of both Zim-Asset and, PRGSP and the review of mining contracts (in the DRC) is strategic exploitation of mineral resources and use of the revenues in line with development plans.

Zimbabwe adopted Zim-Asset as a strategy that takes into account exploitation of domestic mineral resources, their beneficiation and value addition as an integral aspect of the development agenda. Further strategy affirms the need to re-evaluate the mineral resource endowment in order to determine how best the country can exploit them for self-determination and development. The policy embraces the mandate to exploit domestic mineral resources as well as the operationalization of PSNR through self-determination and non-interference in the regulation, exploitation, beneficiation and trade of the resources. However, Zim-Asset faces critical challenges due to lack of capital and foreign direct investment to kick-start its implementation and enforcement; thus negatively affecting both the operationalization of PSNR and self-determination.

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[30] Ibid.
[31] See generally Gerry Jackson 'Mujuru family involved in dirty gold and diamond dealings' *SW Radio Africa*, 11 August 2014; United Nations Economic Commission for Africa 'Africa review report on mining: Executive summary' http://www.uneca.org/sites/default/files/publications/aficanreviewreport-on-miningsummary.pdf (accessed 17 August 2014).
[32] See section 4.4.11 of chapter 4 above.
[33] See section 5.4.11 of chapter 5 above.

With regard to the DRC, strategic planning has included review of all mining contracts that were concluded between 1996 and 1998. Some of the contracts were prejudicial and renegotiating them was strategic in order to bridge the weaknesses as well as to ensure the DRC government did not lose revenues unnecessarily. The PRGSP was a strategy intended to formulate development policies and plans in order to reduce poverty, *inter alia*, through exploitation of mineral resources and to use the revenues in line with development strategies. Also, it is a strategy that the DRC is both a player through mining joint ventures and a beneficiary of mining taxes paid by mining companies. However, the effectiveness of the development strategies, implementation and enforcement, as well as operationalization of the right to development is riddled by various threats.[34] Episodic and recurrent or resurgence of resource conflicts (armed conflicts), political tensions and instability owing to weak central authority, as well as lack of coordinated efforts to curb conflicts, illegal mining and corruption in the mineral value chain have contributed to the failure of the PRGSP.

Sound strategic planning for development could enhance the operationalization of PSNR and self-determination. Taking into account the requirement of transparency and accountability, both countries ought to apply or use and manage the revenues derived from exploitation of domestic mineral resources in line with their strategies and development vision. Although there have been strategic planning and policies, however, implementation and enforcement fails due to weak regulation and threats to self-determination discussed in chapter 3.

### 6.4 The Principle of Non-interference

As discussed in Chapter 2 above, non-interference reinforces PSNR and self-determination by ensuring other subjects of international law are restrained from interfering in the domestic affairs of host states insofar as the control and regulation of mineral resources is concerned. The International Court of Justice (ICJ) held that interference by a state or group of states is illegitimate when it uses methods of coercion regarding choices that the host state has to make,[35] which must remain the discretion of the state through self-determination. Non-interference can therefore said to be operationalized where states are not coerced in making

[34] See discussion in chapter 3 & section 5.6 of chapter 5 above.
[35] *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*), Judgment of 27 June 1986 at 106 para 205; hereafter the *Nicaragua Case*.

their executive, legislative or judicial decisions, as well as enforcement and policing their decisions and laws.

As discussed in chapter 4,[36] Zimbabwe was compelled to adopt and implement ESAP. The implementation of the programme required internal reforms including reducing the size of government ministries and public service, and amending some of the domestic laws in order to create a legislative environment for the new programme. However, ESAP had wide adverse effects including retrenchment. Accordingly, there was a disempowerment of the civil service. Also, the reforms restricted the government of Zimbabwe from enacting laws contrary to what was recommended by the IMF. The restrictions affected major sectors of the economy including the minerals sector and policing of mining laws.

The DRC's weak central authority, state fragility, poverty, underdevelopment and weak economy provide room for interference by the IMF and World Bank. As a heavily indebted country, the DRC requires debt relief mechanisms, in addition to relying on funding from the two institutions to finance its national budget and projects. The fact that the DRC is poor and classified under the "Heavily Indebted Poor Countries (HIPC)" initiative means the country has to meet certain criteria in order to qualify for debt relief. Among the criteria, the Poverty Reduction Strategy Papers (PRSP) discussed in chapter 5 was adopted at the behest of the IMF and World Bank. It therefore means sovereignty of the DRC has been interfered with in various ways, including through policy formulation.[37] As such, the World Bank and IMF's discretion for debt relief come with conditions that interfere with sovereignty. The conditionality policy comports with the principle of non-interference, which supposedly guarantees the DRC's right to be the agent of its own development.[38]

Taking into account the conditionality policies, one can argue that ESAP and adjustment programmes interfere with the regulation of the DRC and Zimbabwe's mineral resources, by distorting internal state processes and well as implementation and enforcement capacity. The adjustments programmes also restrict formulation of domestic policies in the same areas. The conditionality policy interferes with the DRC and Zimbabwe internal processes to function

[36] See section 4.5.4 of chapter 4 above.
[37] See generally Noel G Villaroman 'The loss of sovereignty: How international debt relief mechanisms undermine economic self-determination' (2009) 2 *Journal of Politics and Law* 3.
[38] Ibid.

independently as would have been without them. Both states cannot flex their sovereignty muscles against the IMF and World Bank conditionality policy due to fear of losing funding.

Apart from the conditionality policy, non-interference is threatened by resource conflicts. Resource conflicts distract the state from diligent regulation of mining activities, implementation and enforcement of mining laws. The conflicts that are experienced in the DRC are a threat to investment security and property rights embedded in mining licences, peace and security of persons and the state, as well as restricting the state's capacity to formulate policy and their implementation. Further, the conflicts restrict and interfere with the uniform application of mining laws and regulation. Thus, the conflicts interfere with the outworking of, and operationalization of sovereignty over mineral resources and self-determination.

The operationalization of non-interference requires that the DRC and Zimbabwe should not be coerced in their mineral resource decisions. The conditionality policy interferes with both states in formulating domestic law and policy, implementation and enforcement in a manner that amounts to coercion.[39] Regardless of the variations of the conditions, there was interference with sovereignty of both states to determine their own destiny. Regardless of being endowed with various mineral resources, both countries are poor and have turned into "beggar states", thus denoting resource curse.

## 6.5 Principles Facilitating Investment and Trade and their Operationalization

As discussed in chapters 2, 4 and 5 above, the operationalization of principles relevant to investment and trade are potentially an expression of a state's sovereignty, but also potentially undermine that sovereignty.[40] The principles facilitating investment and trade are integrally related to the mandate to benefit from exploitation of domestic minerals. However, these principles also create tensions with what could be considered an unfettered operationalization of PSNR, self-determination and non-interference. The following section discusses how key principles associated with investment and trade focus areas have been operationalized in a mining context in the DRC and Zimbabwe; namely, compensation for expropriation, foreign exchange and repatriation of profits, and the principles of most favoured nation and national treatment.

[39] Refer to the discussion in sections 4.5.4 of chapter 4 and 5.5.4 of chapter 5 above.
[40] See discussion in section 2.2 of chapter 2 above.

### 6.5.1 Compensation for Expropriation

As discussed in sections of the preceding chapters,[41] the predominating principles associated with compensation for expropriation are:

(a) A country may not expropriate alien property, whether directly or indirectly, except on the ground of the public interest, and the expropriation has to be non-discriminatory and against fair compensation,[42]

(b) Determination of fair compensation should be based on the fair market value of the expropriated property prevailing at the time of expropriation,[43]

(c) In the absence of an agreement by the parties, and where business interests are expropriated, the amount of compensation has to be determined according to the "going concern-value", and where a non-profit enterprise is expropriated, the amount of compensation has to be determined in terms of the monetary value of the original investment while taking into account appropriate adjustments,[44]

(d) The payment of compensation shall include interests in free convertible currency based on the market value of the existing exchange rates that is accepted by the affected foreign investor, and must be made prompt and without undue delays.[45]

States generally operationalize these principles through expropriation laws that are not necessarily mining specific.

The Constitution of Zimbabwe provides for protection of property rights and in the event of expropriation, fair compensation must be paid. Accordingly, Zimbabwe has operationalized compensation for expropriation in its supreme law. Apart from the Constitution, the Mines Act of Zimbabwe provides compensation for expropriation of mines or mining locations. However, there is an exception when the government cannot pay – when the expropriated mining location is not functional or is under-utilized. It can be argued that Zimbabwe exercises its sovereignty and self-determination by enacting provisions in its principal mining

[41] See section 2.4.4 of chapter 2; section 4.4.7 of chapter 4 & section 5.4.7 of chapter 5. For detailed discussion of international law principles on compensation for expropriation; see for example, Andrew Newcombe & Lluis Paradell *Law and Practice of investment Treaties: Standards of Treatment* (2009) at 321 – 398; Jeswald W Salacuse *The Law of Investment Treaties 2nd ed* (2015) at 228 – 280 & 313 – 374; R Dolzer *'Indirect expropriations: New developments?'* (2003) 11 *New York University Environmental Law Journal* 64; A F M Maniruzzaman 'Expropriation of alien property and the principle of non-discrimination in international law of foreign investment: An overview' (1998) 8 *Journal of Transnational Law & Policy* 57.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.

law justifying certain mining expropriations without compensation. However, non-payment of compensation on the basis that the mining location is underutilized or non-functional is subject to debate. One can argue that compensation should not be paid in respect of such mines because the minerals belong to the state, but compensation has to be paid with regard to the development that took place at the mining location. This could be reasonable, fair and just in order to balance the interests of the state and those of the investor.

Like Zimbabwe, the DRC Constitution and some of its domestic laws highlighted in chapter 5 provide that expropriation should be based on public utility. The DRC provides compensation for expropriation and that the compensation must be fair and just in terms of conditions established by law. The fact that DRC, like Zimbabwe, formulated policies to spell out the contours for expropriation confirms that public interest fundamentally underpins this legal requirement. As discussed in chapters 2, 4 and 5 above, expropriation can be a threat to both states where the governments fail to pay appropriate compensation,[46] for example, where unworked or underworked mines are expropriated in terms of the Mines Act as discussed in chapter 4. Regardless of these issues, the operationalization of compensation for expropriation in both countries is an exercise of sovereignty. However, failure to pay just and fair compensation within a reasonable time could be an indication of lack of capital, political will, or both.

Although the operationalization of compensation for expropriation is an assertion of sovereignty, however, it is almost always controversial.[47] Arbitrary expropriation can be a barrier to investment and the requirement for compensation can restrict expropriation because it lessens the revenues available for development. This is an overarching issue that requires the DRC and Zimbabwe to strategize before engaging in the process. The section on the rules on expropriation, on the one hand, empowers both states to exercise PSNR, and on the other hand, limits the powers because unplanned expropriation can cause self-inflicted economic and development policy failure.

[46] Zimbabwe's controversial expropriation of commercial farms without compensation is a case in point. Although Zimbabwe government promised to pay for the development on the farms, nothing has been done to date.

[47] The proposed nationalization of diamond mining that Zimbabwe will soon bring all diamond mining operations in the country under one firm in which the state will have a 50 percent shareholding: See News Day Business 'Zim nationalizes diamond mining' *News Day*, 13 March 2015.

### 6.5.2 Foreign Exchange and Repatriation of Profits

Repatriation of profits and payment of current transactions, and exchange controls are intrinsically some of the major factors that foreign mining investors consider before investing in host states. As discussed in chapters 2, 4 and 5 above,[48] the Articles of Agreement of the IMF (IMF Rules) are applicable to Zimbabwe and the DRC because both are member states of the IMF. As discussed in 5,[49] the DRC's Mining Code provides for repatriation of profits and payment of current transactions, as well as exchange controls; however, the provisions in the law have to comply with the IMF Rules. Unlike the DRC mining Code, Zimbabwe's Mines Act does not provide for repatriation of profits, payment of current transactions or exchange control for the benefit of a mining investor.

The operationalization of the IMF Rules is manifests through enacting provisions in domestic laws and policies relating to exchange controls, as well as repatriation of profits and payment of current transactions.[50] In Zimbabwe and the DRC, the Reserve Bank of Zimbabwe (RBZ) and the Central Bank, respectively, are responsible for the formulation of monetary policies in line with IMF Rules on exchange controls, repatriation of profits as well as payment of current transactions. The two domestic financial institutions can exercise discretion as discussed in chapters 4 and 5; however, the percentage of profits that a mining investor may repatriate cannot be below the minimum prescribed by IMF Rules. As discussed in chapters 4 and 5 above (in relation to the conditionality policy), it can be argued that the IMF is powerful enough to dictate or prescribe policies to the DRC and Zimbabwe. Accordingly, one can argue that the IMF Rules are superior over Zimbabwe and the DRC's financial laws.

The supremacy of IMF Rules accordingly restricts the sovereignty of Zimbabwe and the DRC in that both countries cannot restrict repatriation of profits in a manner that is in conflict with the rules, in a situation where the primary beneficiaries of the rules are mining investors. Regardless of a need to balance conflicting interests, one can argue that the IMF Rules are not benefiting citizens of Zimbabwe or the DRC regarding repatriating profits. The repatriation of profits restricts the quantity of revenues available for reinvestment and development, and this is one way in which the effectiveness of PSNR breaks down. The operationalization of Article XIV of the IMF Rules in domestic law restricts sovereignty and

[48] See generally sections 2.4.3 of chapter 2 & 4.4.8 of chapter 4, as well as 5.4.8 of chapter 5 above.
[49] See sections 4.4.8 of chapter 4 and 5.4.8 of chapter 5 above.
[50] Refer to the discussions in section 5.4.8 of chapter 5 above.

the mandate to derive benefits from exploitation of mineral resources in that it dictates to both states what percentage of the profits foreign mining investors may repatriate regardless of the absolute unwillingness to grant access to financial movement out of the country. As such, repatriation of profits and payment of current transactions, as well as exchange controls restrict the ability of both states to control movement of mining investors' capital in and out of the country. Accordingly, these are key and strategic areas in which the sovereignty muscle of the DRC and Zimbabwe is not being adequately flexed.

### 6.5.3 Equitable Treatment of Mining Foreign Investors

Non-discriminatory treatment of mining investors is fundamental in order to make the playing field even and create an environment conducive for investment. The national treatment and the most favoured nation (MFN) principles discussed in chapters 2,[51] 4[52] and 5[53] restrict the sovereignty of the DRC and Zimbabwe in granting advantages to a certain investor(s) over another or others.

It can be argued that Zimbabwe's "look east policy" in investment and trade expresses a preference for a particular group of investors. Equitable treatment compels uniform application of laws and their enforcement, for example, the indigenization policy has to be applied uniformly regardless of the nationality of the investor(s). Non-discriminatory treatment compels the government of Zimbabwe to guarantee foreign mining investors fair and equitable treatment through legislative, judicial and administrative decisions, the case in point is the indigenization law. In this regard, however, Zimbabwe cannot pass laws giving investment and trade advantages to certain mining investors in the mineral value chain.

Like Zimbabwe, the DRC is compelled to provide equitable, fair and non-discriminatory treatment to mining investors doing business in the country. When the DRC reviewed and renegotiated mining contracts as discussed in chapter 5,[54] the Lutundula Commission which

[51] See sections 2.4.1 & 2.4.2 of chapter 4 above.
[52] See section 4.4.9 of chapter 4 above.
[53] See section 5.4.9 of chapter 5 above.
[54] See generally Marian Webb 'Fair renegotiation of DRC mining contracts vital to restore confidence' 2008 at http://www.miningweekly.com/article/fair-renegotiation-of-drc-mining-contracts-vital-to-restore-confidence-2008-03-26 (accessed 24 December 2014). See also Report by Southern Africa Resource Watch 'Mining Contracts Renegotiation in the Democratic Republic of Congo: Freeport Freeport-McMoRan and First Quantum Minerals Exposed' 2009 http://www.conflictminerals.org/pdf/freeport_first_quantum_sarw_report.pdf (accessed 7 August 2014); Mining Review 'Concern over re-negotiation of DRC mining contracts' 2008 at

represented the DRC in the reviewing process considered all mining contracts that were concluded during two periods of war, 1996-1997 and 1998. The basis of the review was to renegotiate contracts that were considered prejudicial to the DRC. The review and renegotiation of prejudicial contracts is a quite unusual exercise of state sovereignty that has never been undertaken or considered by Zimbabwe.

Foreign mining investors have the privilege extended to them by foreign investment law to choose an arbitration forum and host states to protect their business interests. Local mining investors do not have such preferences, and have to exhaust all available domestic remedies before they can approach external forums to resolve their disputes. In this regard, it is absurd to claim that there is equitable treatment. From the discussion in chapters 4 and 5,[55] one can argue that fair and equitable treatment of foreign and domestic mining investors' claims cannot succeed where some investors prefers to resolve disputes in international fora instead of the local structures or courts. The fact governments of both the DRC and Zimbabwe were dragged by some mining investors to different international arbitration forums is indicative that equitable treatment of foreign mining and the locals mining investors is only operative on paper. Thus, the flexing of sovereignty muscle is weak.

## 6.6 The Right to Development and its Operationalization

As discussed in chapter 2,[56] the right to development places a responsibility (at least moral) on Zimbabwe and the DRC to formulate development plans and policies. Since both countries are endowed with mineral resources, strategic planning and development policies underpin effective and appropriate regulation and how to exploit the resources for self-determination.

## 6.7 Overarching Issue: Has the DRC and Zimbabwe Managed Threats to PSNR?

In this section, the overarching question is: What does the exercise of sovereignty mean in the mining context? How do the international law principles discussed in chapter 2 contribute to executing the mandate to exploit domestic mineral resources for self-determination,

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http://www.miningreview.com/concern-over-re-negotiation-of-drc-mining-contracts (accessed 26 December 2014).

[55] See sections 4.4.9 and 5.4.9 of chapters 4 and 5, respectively.

[56] See section 2.3.4.3 of chapter 2 above.

economic growth and development? Do they help states to navigate the threats to PSNR discussed in chapter 3?

In the context of the thesis, successfully navigating the *realpolitik* of mineral resource investment, and reducing threats to beneficial mineral exploitation, is the key to translating the resource endowments into economic development, as well as to escape the resource curse paradox. Transforming mineral resource regulation by promoting checks mechanisms and, strong regulatory institutions and structures can translate the good side of operationalization of PSNR and maximize revenues available for national development.

By taking advantage of the protection offered by principles referred to in chapter 2, as well as international law generally, the DRC and Zimbabwe can navigate the threats and restrictions to sovereignty by strategic planning. However, weak and insufficient institutional reforms, outdated and/or inconsistent and incomplete policies, as well as poor regulation breed an environment for corruption and other illicit practices discussed in chapters 4 and 5. The synergies of malpractices facilitate illicit diversion of benefits derived from mineral resources into private hands. One may even suggests that the inability to effectively regulate domestic minerals in both states is a deliberate strategy in order to orchestrate clandestine agendas to loot the resources.

Since the ushering in of political independence was achieved after a protracted war motivated not only by the denial of basic rights for the black majority in Zimbabwe and the DRC,[57] but also extreme inequality in the distribution of resources, the same conditions are still prevailing. Surprisingly, Zimbabwe advocates for radical transformation but the strategy is only benefiting the elite. This raises questions about the ideal operationalization of PSNR.

Apart from the issues identified above: "What does the exercise of sovereignty mean in the mining context?" This is a critical and crucial, as well as controversial aspect, which is central to the thesis. In addition to sovereignty being very multifaceted and complex in the precise meaning, scope and content as discussed in chapter 2, sovereignty can be exercised by

[57] See generally sections 4.2.1.1 and 5.2.1.1 of chapters 4 and 5 respectively. See also Economic Commission for Africa 'Minerals and Africa's development: The international study group report on Africa's mineral regimes' 2011at 136, available at http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf (accessed 17 August 2014).

the peoples directly or indirectly through their elected and trusted representatives.[58] The DRC and Zimbabwe governments exercise sovereignty through the trust vested in them by their citizens. It is probably unrealistic to assume that governments always represent the will and the wishes of their citizens. Accordingly, in the process to exercise sovereignty the legitimate expectations of the citizens and national priorities should always be central.[59] This is the foundation upon which the good intentions of sovereignty should be based in order to fulfil the economic objectives of PSNR. It is therefore a reminder to Zimbabwe and the DRC to take into account informed decisions, including making, executing and applying laws impartially, imposing and collecting taxes, entering into bilateral investment treaties (BIT), as well as concluding mining contracts with investors for the benefit of the citizens. Although is it difficult to distinguish between the legitimate exercise of sovereignty and political influence, however, there is always the need for transparency and accountability, as well as public participation. This is against the backdrop that those in government or representing their governments can purport to exercise sovereignty yet they use it as a shield to protect and further their own private interests. In order to avoid abuse, the "good intentions of sovereignty" require various factors such as political will, and the establishment of strong regulatory and implementing institutions, as well as checks and balancing mechanisms. However, the application of these factors ought to be done in a consistent, unambiguous, transparent and accountable manner. This creates a more complex relationship between host states and mining investors. The intricacy and the interdependent nature of the relationship require diligent checks on the manner in which the DRC and Zimbabwe governments exercise PSNR for self-determination and to escape the resource curse problem. However, balancing this delicate relationship is very tricky, if not controversial, since international investment law aims to protect the interests of foreign mining investors in both countries.[60] Therefore it can be argued that the principle of PSNR involves a complex relationship

[58] See generally Stephen D Krasner 'Sovereignty: An institutional perspective' in James A Caporaso (ed) *The Elusive States: International & Comparative Perspectives* (1989) 89. See also Michael Ross Fowler & Julie Marie Bunck *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1995) at 32.

[59] M J Connolly, Stephen C Hick & Martina N Alibrandi *Black's Law Dictionary 6th ed* (1990) at 695. See also S K Date-Bah 'Rights of indigenous people in relation to natural resources development: An African's perspective' (1998) 16 *Journal of Energy & Natural Resources Law* 389; Alain de Benoist 'What is sovereignty?' 1999 (translated by Julia Kostova from '*Qu'est-ce Que la Souveraineté?'* in *Elements*, No. 96 (1999) 24 – 35 at http://www.alaindebenoist.com/pdf/what_is_sovereignty.pdf (accessed 3 August 2014).

[60] See generally Nicalaas Schrijver 'Self-determination of peoples and sovereignty over natural wealth and resources' in OHCHR (ed) *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development (*2013) 95 at 101. Also, see generally Hurst Hannum *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, revised edition* (1990).

between the regulator and the regulated. This is made even more complex by principles of international investment and trade discussed in the preceding chapters.

How sovereignty is exercised in the mining context was discussed under various themes in sections 4.4 and 5.4 of chapters 4 and 5, respectively. However, Zimbabwe's Mines Act is an outdated and prescriptive law, and was intended to address the mining challenges of the 1960s. It is therefore reminiscent of the dark age of colonialism. The regulation of the mining sector and challenges of the colonial era are certainly not the same as those encountered in the contemporary era. The changes in modern mining laws and shifts in ideology, also mean the Mines Act has several loopholes that never existed in the 1960s. Accordingly, planning and addressing the threats to the outworking of PSNR using such an outdated principal mining law is disastrous to the mining sector and Zimbabwe's prospects to use the sector as a springboard for economic growth and development. For example, the Mines Act does not provide for modern mining taxation, and has loopholes that promote tax evasion. There is no formalization of the role of mining police, safeguarding indigenous communities and environmental impact assessments, as well as social risks arising from mining operations. Further, the Act does not provide for avoidance of conflict of interests as in the DRC Mining Code, and clarity on the responsibility for fair compensation to indigenous communities. Such flaws are the major internal limitations that weaken the framework for regulation of mineral resources in Zimbabwe, thus contributing to loss of mining revenues through various weaknesses in the regulatory system.

Unlike Zimbabwe's Mines Act, the DRC's Mining Code is a recent expression of the manner in which sovereignty over mineral resources is exercised. The Code is a modern law that provides a framework to regulate mining activities including prospecting, exploration, exploitation, processing and refinery, transportation and export of domestic mineral substances. Further it is a statutory requirement that the state distribute proceeds from mineral resources equitably to all levels of government and structures in order to benefit the public.[61]

Comparative analysis shows that politics of patronage fundamentally debases the good intentions of PSNR. As indicated in chapter 4, Zimbabwe has been unable to attract much

[61] See generally Global Witness 'Global Witness's recommendations for the Democratic Republic of Congo's new Mining Code' 2012, available at http://www.globalwitness.org/sites/default/files/library/DRC-GW%20Mining%20code%20brief%20Oct%2010,%2012%20ENG.pdf (accessed 18 July 2014).

foreign mining investors due to unfavourable and inconsistent policies. Arguably, investors have taken a wait-and-see attitude before investing as they fear the current policy on economic empowerment, and the scope offers no evidentiary proof to suggest that it is different from the much criticized land reform.[62]

With weak regulation, come loopholes that mining companies exploit in order to under-declare production, underpay or not to pay some of the taxes as discussed in chapters 4 and 5. Another threat to PSNR is that both Zimbabwe and the DRC are constrained to demand a share of ownership in mining companies because of the protection of property rights of foreign mining investors. Both states are constrained to declare export quotas or impose beneficiation requirements because of the limitations imposed by the principles of international investment and trade law discussed in chapter 2 above. The high costs associated with opaque concessions and secrecy, as well as withholding information allows one to question the legitimacy of the process and how best the PSNR can be operationalized for self-determination.

When one recalls the economic and political functions of international law, one more often encounters gaps and weaknesses. Although international law has its weaknesses as shown in the thesis, the absence of the actualization of transparency and accountability in Zimbabwe and the DRC makes it superficial to blame international law for the ills caused by the threats to PSNR. The inability to appropriately regulate the minerals sector and its value chain, the politics of patronage and ignorance are the triple evils of greed that have debased the good intentions of operationalization of PSNR in both countries. Clearly, both states have thwarted measures aimed at promoting transparency and accountability, and at the same time they practice lip-service regarding corruption when the initiatives interfere with their pernicious interests.

After obtaining political independence, Zimbabwe and the DRC did not change much of their mining laws and regulatory systems and structures. Both countries' first independence governments inherited colonial mining laws whose major objectives were to protect the

[62] Webdev Author 'EU cautions investors over empowerment rules' *The Financial Gazette*, 18 February 2010; Business Live 'Zimbabwe, risky investment destination: Australia' *Daily News*, 7 May 2014; Reagan Mashavave 'Zimbabwe business grab scares investors' *AFP News*, 2 May 2012; The Editor 'Editorial comment: Policy review will unlock Zim-Asset potential' *The Herald*, 26 May 2014; Daniel Compagnon *A Predictable Tragedy: Robert Mugabe and the Collapse of Zimbabwe* (2011) at 220.

economic interest of colonial governments. However, it took the DRC about 40 years to enact a principal mining law while Zimbabwe since 1980, has not enacted a new principal mining law. Efforts in Zimbabwe to enact new principal mines law culminated in the Mines Bill of 2007 but shelved in unclear circumstances. Although the mining laws have been amended several times to reflect modern mining concerns, there are major weaknesses that promote weak regulation, as well as plunder of the resources while harbouring criminal activities. The core for resource plunder is negatively influenced by bad governance, as well as institutional failure to regulate and weak enforcement of mining legislation in both countries, thereby showing lack of enthusiasm to promote mineral-based linkages.

While Zimbabwe and the DRC are richly endowed with an array of mineral resources, so are the problems relating to the regulation of the resources. Of the problems, one cannot rule out lack of transparency and accountability in the entire mineral value chain, as well as a record of poor negotiation of mining concessions resulting in skewed contracts. Such contracts and their execution fail to unlock maximum potential value from exploiting mineral resources in both countries. Also, lack of clearly defined beneficiation policies, lack of access to information to enable appropriate public participation and making of informed decisions exacerbate the problem. Further, poor management of mining revenues and non-recognition of the fundamental role of critical stallholders such as communities and violation of community rights have contributed to debasing PSNR. Although the DRC Mining Code recognizes the role of artisanal mining, however, regardless of its contribution to gold output Zimbabwe's Mines Act does not legalize the activity.[63] It can be argued that the incomplete mining framework, including weak central authority, weak or biased implementation and enforcement of the laws lies at the core of the problems affecting the DRC and Zimbabwe mining sectors.

The focus ought to be on strengthening and empowering, as well as promoting the regulatory system and the institutions responsible for regulating the mineral sector in order to ensure Zimbabwe and the DRC navigate threats to PSNR. One can argue that the regulatory institutions have to be used as transformative instruments and curb corruption in the minerals

[63] For example, reference can be made to the economic contribution of artisanal mining to gold production. However, regardless of its valuable contribution, the activity is illegal in Zimbabwe.

sector.[64] However, failure to take into account these factors can lead to systematic disempowerment of the operationalization of PSNR due to conflict of interests and also corruption in the mineral value chain.

One can argue that the operationalization of PSNR manifests through the indigenization policy in Zimbabwe in order to consolidate economic empowerment unlike the DRC that does not have a specific legislation dedicated to economic indigenization, apart from a few provisions in the Mining Code referred to in chapter 5 above. However, the implementation and enforcement of the indigenization provisions in the DRC were not controversial compared to Zimbabwe' situation where foreign investors threatened to close their mining activities in protest. Arguably, Zimbabwe's radical implementation and enforcement of "one size-fit-all approach" has failed completely leading to a volte-face in the approach in 2013. The soft-landing can be attributed to fears to lose foreign mining investors and breach of BITs that Zimbabwe concluded with other contracting states being adversely applied against the country. Although indigenization policy is a landmark strategy in operationalizing PSNR, however, poor planning and execution exposes the incompetence and confusion inherent in a policy that is not supported by coherent knowledge and capital, as well as lack of strategies that are designed to achieve economic growth and development.

Although Zimbabwe and the DRC principal mining laws have provisions for mining companies to pay royalties and taxes, the mining laws of both states leave it to the discretion of the each government on how to use the revenues. The use of the revenues is chiefly the responsibility of central authority but there is no transparent and accountability in the manner the revenues are used and managed. In the absence of evidence to the contrary, and while considering the general state of affairs in both states, one can argue that the revenues are not all use for national benefit but diverted for self-serving interests.

[64] See generally Thandika Mkandawire 'How the new poverty agenda neglected social and employment policies in Africa' (2010) 11 *Journal of Human Development and Capabilities* 37; Thandika Mkandawire 'Running while others walk: Knowledge and the challenge of Africa's development' 2010 at 8, at http://eprints.lse.ac.uk/55395/1/Mkandawire_Running_while_others_walk_LSE_African_Initiative_2010.pdf (accessed 18 August 2014).

## 6.8 The Challenges for Zimbabwe and the DRC Governments

Zimbabwe and the DRC governments are confronted by threats that were identified and introduced in chapter 1, discussed in chapter 3, and contextualized in chapters 4 and 5. The extent to which the threats affect "good intentions" or debase the exercise of sovereignty over mineral resources can be severe as evidenced by the lack of notable economic growth and development in both states. As such, the threats are awakening and highlighting the need to reform regulatory system and institutions and supporting structures. However, with the current nature of Zimbabwe and the DRC's weak regulatory capacity, corruption, illegal mining, lack of transparency and accountability, as well as resource conflicts; it is difficult, if not impossible, to navigate and overcome the threats and challenges easily. Both countries lack strong political will and the capacity to effectively take advantage of the protection offered by international law principles discussed in chapter 2, as well as to navigate threats to the outworking of sovereignty.

One of the challenges is failure to reconcile major imperatives; namely, property rights in mining licences, transparency, traceability and accountability, impartiality in the exploitation mineral resources and fair and non-discriminatory treatment in the distribution of benefits. This failure constitutes a barrier to economic growth and development. Regardless of enacting the Mining Code for the DRC and the amendments to the Mines Act for Zimbabwe, an effective and transparent regulatory system is fundamentally lacking in both states.[65] The inability to navigate the threats to the outworking of sovereignty over mineral resources in both states gives rise to skepticism toward the regulatory institutions. Arguably, the trend is that '[…] in correcting a narrow policy agenda, the new focus pushes a good point too far when it focuses attention only on the proximate cause […].'[66] Inasmuch as both countries require foreign investment, most potential investors have taken a "wait and see attitude" due to the uncertainty caused by political fragility and uncertainty, weak regulation, lack of firm protection of property rights and conflicts.

Zimbabwe and the DRC's corrupt tendencies in the regulation of domestic minerals can be a microcosm of Africa's challenges in translating the mineral endowment into economic

[65] Ahmad Abubakar *Africa and the Challenge of Development: Acquiescence and Dependency Versus Freedom and Development* (1989) at 48. See also Lori Fisler Damrosch 'Politics across borders: Non-intervention and non-forcible influence over domestic affairs' (1989) 83 *The American Journal of International Law* 1 at 2 – 3.
[66] Thandika Mkandawire, op cit note 64 at 37.

development. Weak economic status and dire need for mining investment put both countries in an awkward position; they cannot afford to flex their sovereignty muscles and dictate terms and conditions when negotiating mining investment agreements with investors. The inability is a challenge that weakens the operationalization of PSNR and the potential to obtain favourable terms at the conclusion of mining investment negotiations. It then becomes absolutely difficult for both states to freely dispose of their mineral resources without elements of prejudice. Thus, the principle of mutual benefit cannot apply contrary to the International Covenant on Civil and Political Rights of 1966, which reiterate that '[i]n no case may a people be deprived of its own means of subsistence'.[67] As controversial as it may be, one can argue that both countries are taken advantage of, due to their inability, as well as the insatiable predatory practice of the political elite and their associates.

With reference to mining contracts in Zimbabwe and the DRC, one can argue that illicit agreements are a replica of some mining investment deals that are prejudicial in nature.[68] The fact that there are no tangible developments yet both countries are endowed with the resources can be a pointer of failure to operationalize international law principles governing state sovereignty over mineral resources discussed in chapter 2 above. In a nutshell, the threats and challenges facing the operationalization of PSNR in Zimbabwe and the DRC are exacerbated by weak economies, poor regulation of mining sectors, lack of political will of the leadership, corruption and abuse of the resources for self-serving interests.

## 6.9 Conclusion

The overarching issue is the manner in which PSNR is operationalized in the regulation and exploitation of mineral resources in Zimbabwe and the DRC. The chapter has discussed the good and bad sides of sovereignty over mineral resources. There is an antagonistic relationship between the two sides; the principles that support sovereignty over mineral resources and their exploitation, and the threats to that sovereignty. The challenges show the nature of the dilemma the DRC and Zimbabwe face in exercising sovereignty over mineral resources. Threats to state sovereignty over mineral resources in both countries have contributed to uncertainty in administering and interpreting mineral regulations, which has

[67] Article 1(2) of the International Covenant on Civil and Political Rights, 1966, was adopted and opened for signature, ratification and accession by the UNGA Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49 of the Covenant.

[68] See generally Blessed Mhlanga 'Zimbabwe officials nearly scuttled Essar deal' *The Standard in Business*, 18 May 2014. See also Tinashe Makichi 'Zimbabwe: Essar to venture into coal mining' *The Herald*, 21 May 2014; Nare Msupatsila 'Essar deal must be revisited says Mpofu' *Bulawayo24 News*, 19 June 2012.

significantly weakened the good side of sovereignty. Also, the threats have contributed to derailing the realization of economic growth and development through exploitation of domestic mineral resources in both countries.

The overarching issue has been overshadowed by the nature of the relationship between sovereignty and threats to the outworking of that sovereignty, as well as how PSNR is operationalized in order to contribute to economic development in Zimbabwe and the DRC. On assumption of the "good intentions" of the operationalization of PSNR, both states can translate mining fortunes into development; however, the threats associated with PSNR spoil this realization. The threats spring from deep structural factors such as weak central authority and regulatory institutions and their structures, lack of effective enforcement capacity, as well as lack of political will of the leadership. Transparency and accountability are central twin issues, and both are notably lacking in the regulation of mineral resources in both states.

Lack of transparency and accountability in executive decisions, as well as in the use and management of revenues derived from exploitation must receive attention in Zimbabwe and the DRC. Mere provision in legislation is not sufficient in the absence of practical actions in practice. Although the international law principles discussed in chapter 2 supports the mandate are fundamental, operationalizing them is by far full of inherent ambiguity in the absence of effective and strong implementing structures. The operationalization of the principles breaks down due to threats to the mandate to exploit mineral resources for self-determination, as well as mismanagement of the revenues. It can be argued that when an elected government fails to perform, the regime and its leadership are responsible for such failure. As such, the citizens can demonstrate against the regime in order to express their displeasure, which if not addressed, should naturally translate into a civil protest.

The problems facing the DRC and Zimbabwe are not necessarily of the same form and scope, but differ in their degree of impact. Regardless of varying nature of the problems, both countries surfer from the resource curse paradox. Imperatively, there is a need to promote strong state regulation and control of mineral resources, improve operationalization of the principles through effective assertion and exercise of sovereignty, and the mandate to exploit the resources for self-determination. The capacity to operationalize PSNR, and the ability to navigate threats and consolidate the mandate to exploit mineral resources, are important strategies to escape the resource curse. Apart from navigating the threats to the outworking of

sovereignty over mineral resources, political stability is the vanguard in order to realize economic and growth development through exploitation of the resources.

# CHAPTER 7

# RECOMMENDATIONS AND CONCLUSION

## 7.1 Introduction

The resource curse paradox was considered through the lens of international law principles governing state sovereignty over mineral resources. The principle of permanent sovereignty over natural resources (PSNR) was identified as the core principle governing state sovereignty over mineral resources. This principle assigns rights of control and regulation over mineral resources to host states and the mandate to exploit the resources for national benefit. However, PSNR is not a standalone principle; it is fundamentally supported by two key principles of international law, namely, self-determination and non-interference, alongside the right to development. These three principles predominantly provide states with protection against interference, as well as the mandate to exploit domestic mineral resources for self-determination.

The right of states, including the DRC and Zimbabwe, to assert sovereignty over domestic mineral resources were shaped and crystalized over time, putting host states at the center of the politics of domestic control over the resources. This was done by defining conditions of access and regulating exploitation of the resources. Being former colonies, Zimbabwe and the DRC shaped the regulation of their mineral resources and operationalization of PSNR, self-determination and non-interference against the backdrop of colonial subjugation. Thus, the ability of both states to assert sovereignty over mineral resources can dovetail sound strategies and economic pathways aimed to rise above their colonial histories.

However, the effectiveness of operationalizing international law principles discussed in this thesis is dependent upon virtuous political will of host states and administration, as well as the ability of governments of states to control, implement and enforce mineral laws, establish appropriate institutional structures and appoint competent personnel who are able to shun corruption. These factors are crucial for Zimbabwe and the DRC in order to realize the mandate to exploit mineral resources for national benefit.

## 7.2 The Central Argument of the Thesis

The thesis focused on the resource curse through the lens of international law principles supporting state sovereignty over mineral resources and how the principles protect the mandate that is conferred on the DRC and Zimbabwe to exploit mineral resources for economic development. Chapter 1 introduced the study and the research problem. Chapter 2 discussed cardinal principles of international law governing Zimbabwe and the DRC's sovereignty over domestic mineral resources. The principles fall into two key broad categories, namely, those that give both countries the mandate to control domestic minerals and those that facilitate access to investment and trade. Three cardinal principles that support sovereignty over mineral resources, namely, permanent sovereignty over natural resources (PSNR), self-determination and non-interference, alongside the right to development, are the major legal pillars underpinning the mandate to exploit domestic mineral resources for economic development. However, in asserting sovereignty over mineral resources, two kinds of difficulties can arise, namely, to secure investment and markets, which more often come with conditions that have a problematic and unclear relationship with the mandate. In addition to the problematic and unclear relationship with the mandate, four threats were identified that interfere with the mandate. Chapter 3 discussed four threats to the outworking of sovereignty over mineral resources and the manner in which they restrict sovereignty and the operationalization of PSNR. These are corruption, illegal mining, resource conflicts and conditionality policy of the IMF and the World Bank. On the one hand, Zimbabwe and the DRC are caught between the need to protect their sovereignty and the mandate to exploit their mineral resources, and on the other hand, to navigate threats to sovereignty over mineral resources.

Chapters 4 and 5 discussed the manner in which Zimbabwe and the DRC assert sovereignty over domestic mineral resources, the operationalization of the principles governing state sovereignty over mineral resources, and the mandate to exploit the resources for self-determination. The operationalization of PSNR in mining laws of both states manifests through key themes discussed in chapters 4, 5 and 6, which include property and ownership rights imbedded in mining licences and tenure systems, conditions of access to mineral resources, policing and enforcement of mining laws, beneficiation and trade, royalties and mining taxes, legal obligations of mining investors towards indigenous communities, compensation for expropriation, exchange controls and repatriation of profits, equitable

treatment of mining investors, revenue transparency and strategic planning and how these can be used to translate the endowment into national economic growth and development. The discussion of these themes shows the strength and weaknesses in how Zimbabwe and the DRC flex or fail to flex their sovereignty muscle in operationalizing PSNR for self-determination.

Regardless of the weaknesses that were noted, however, the thesis established that the DRC mining laws provide a better legal environment for foreign investment and "ease of doing business" compared to Zimbabwe's mining laws. Regardless of the variations, however, implementation and enforcement of mining laws in both countries is largely poor, a challenge that is characterized by weak regulatory institutions, incoherent implementing structures and strategies, as well as lack of skilled human resources. Also, the regulatory systems of both countries are fraught with loopholes and weaknesses, and corruption. This contributes to breakdown of the operationalization of PSNR, as well as systematically undermines prospects to translate mineral endowment into economic growth and development.

Although international law provides a framework to control and assert sovereignty over mineral resources, the bottom line is that the *realpolitik* of mineral resources requires investment and trade for the DRC and Zimbabwe to benefit from their resources. Even in this context, IMF and World Bank conditionalities hinder rather than help these countries. How to navigate the threats such as the IMF and the World Bank conditionalities came to the fore. The thesis shows that due to financial constraints and weak economic status of the DRC and Zimbabwe, both require IMF and the World Bank conditional aid. Also, owing to technology gaps in the mineral value chain, it is often impossible for both countries to navigate the conditionality policies that interfere with the assertion of sovereignty, policy formulation and the operationalization of PSNR. In turn, state failure to navigate the threats systematically weakens and contributes to breakdown of the effective operationalization of PSNR. These adverse effects are also exacerbated by fragile political situations in both states owing to conflicts and endemic corruption among others.

Chapter 6 provided a comparative analysis, and discussed the extent to which Zimbabwe and the DRC endeavour to navigate threats to the outworking of sovereignty over mineral resources. It was established that there is little room to manoeuvre against the backdrop of state fragility and absence of strong regulatory institutions and mechanisms. The chapter

established that in the assertion of sovereignty over domestic mineral resources, the elected leaders employ pernicious techniques in order to amass private economic benefits from exploitation of the resources. Self-serving interests are ways that do not build the long-term economic development in both states. The illicit practices are a threat to the mandate to exploit minerals and affect the legitimate intentions to operationalize PSNR and exploit mineral resources for self-determination and, economic growth and development. Also, the chapter noted that the excesses are not kept in check. Threats to sovereignty over mineral resources thrive because of weak monitoring institutions and policing; these factors contribute to the ineffectiveness of mining laws. Also, poor and inconsistent policies and decisions, weak implementation and enforcement of the mining laws, as well as incompetence and illicit revenue flows contribute to failure to derive maximum benefits from exploitation of domestic mineral resources in both countries.

Regardless of the overarching issues and weaknesses surrounding the assertion of sovereignty over natural resources, however, international law recognizes the DRC and Zimbabwe's mandate to control domestic mineral resources for national economic benefit. Ideally, the international law principles referred to in the thesis reinforce the control of domestic mineral resources and their exploitation for national benefit. Therefore, the DRC and Zimbabwe have the privilege to control and regulate, as well as exploit mineral resources and the right to dispose them free from interference. However, navigating the challenges that come with investment and trade policies remains of paramount importance in the mineral value chain.

By enacting domestic mining laws, the DRC and Zimbabwe legislatures and executives have the power to influence the implementation of the laws and decision–making processes, including creating an environment conducive for mining investment. Thus, the nastiest detractors of genuine control and regulation of mineral resources and their exploitation are the central governments and the relevant regulatory authorities. Also, poorly negotiated mining contracts inherently contribute to poor performance of the mining sectors, thus undermining the legitimate intentions of PSNR and the right to development in both countries.

The thesis established that DRC's weak central authority and capacity deficit translate to lack of meaningful control and regulation of domestic minerals. Also, weak implementation and enforcement of mining laws and policing contribute to the inability to navigate the threats to

PSNR. There are varying inconsistencies between the mining regimes and the operationalization of PSNR in both countries. These include weak regulation, lack of strategic planning and skills in order to navigate the challenges and conflicts, as well as the challenges ton sovereignty that come with international investment and trade principles. Also, failure to navigate corruption, illegal mining and resource conflicts and conditionality policies of the IMF and the World Bank renders the effectiveness of the international law principles governing state sovereignty over mineral resources weak. This does not mean the hypocrisy associated with international law, discussed in various subsections of section 2.4 of chapter 2, will be eliminated completely, but minimized.

The major issue raised in the thesis was how sovereignty over mineral resources and the mandate to exploit them can be asserted in order to guarantee the spoils of the resources contributes to development. The *realpolitik* of resource exploitation at domestic level is missing as well as the international law protection of weak states endowed with mineral resources. The principles of international investment and trade law protect foreign mining investors, by providing rights while the DRC and Zimbabwe as host states have responsibilities. For example, compelling both states to guarantee foreign mining investors same and fair treatment through legislative, judicial and administrative decision-making adversely affects the operationalization of PSNR. Thus, both countries cannot pass laws giving investment and trade advantages to certain investors in the mineral value chain. Although foreign investment is the primary vanguard to exploit mineral resources in both states, however, investment and trade principles interfere with, and weaken and restrict sovereignty over the resources. As discussed in the thesis, the negative effects of these principles are most notable in weak and fragile economies such as the DRC and Zimbabwe.

It was concluded that although international law provides for, and supports sovereignty over mineral resources, it also restricts sovereignty by allowing interference. Intrinsically, international law has an inborn ambiguity and contradictory impact on sovereignty; on the one hand, it gives protection of Zimbabwe and the DRC's mineral resources and, on the other hand, it takes away the protection. It is also necessary to state that both states are politically and economically weak; in practice, they do not benefit much from international law in the context of the mandate to exploit their minerals without interference.

The threats that were identified and discussed in chapter 3 and contextualized in chapters 4 and 5 weaken the implementation and effectiveness of aspects of international law principles discussed in chapter 2, which support state sovereignty over mineral resources. Also, the threats to PSNR significantly hinder and interfere with the DRC and Zimbabwe's sovereignty over mineral resources. This interference contributes to a breakdown of the operationalization of PSNR as well as the economic contribution of mineral resources to host states as contemplated in the AMV.

In a nutshell, the DRC and Zimbabwe case studies illustrate the multi-faceted ways in which developing states use (and fail to use) their domestic laws in a manner that allows them to benefit from the international law mandate in support of self-determination and development through control and exploitation of domestic mineral resources. Due to the weaknesses politically and economically, as well as failure to navigate threats to PSNR, both countries do not have prospects of escaping the resource curse unless there is strategic planning, political will to regulate and exploit domestic mineral for self-determination and development.

## 7.3 Recommendations

Since there is competition for foreign investment in minerals sector, mining laws and tax regimes should ideally be competitive in order to attract investments and provide appropriate strategies for development. In my view, however, African countries should not participate in a "race to the bottom" but should help each other to implement reasonable level of tax that is commensurate with each mineral. Improving or reforming mining laws and regulatory systems or processes has the potential to significantly increase foreign investment, and simultaneously become a tool to market the domestic mining sector globally. The paradox of the resource curse in the DRC and Zimbabwe lies in historical structural and strategic deficiencies, the inability to navigate the threats discussed in the thesis and how to use the benefits from mineral resources for self-determination in order to spur economic growth and development. Accordingly, there is a need to pursue an investment strategy backed up by strategic legislative reforms.

In order to improve transparency and accountability, as well as marketing the mineral endowment to international investors, there is a need to implement a comprehensive and effectively computerized mining cadaster. The need to protect property rights in the mineral

value chain is fundamental. In order to do so, there is need to establish an effective system, namely, (i) for the registration of mining titles and (ii) for granting and monitoring mining licences. How such a system would protect property rights and improve transparency and accountability is underpinned by political will, strong regulatory institutions as well as checks and balancing mechanisms in order to promote transparency and accountability in the minerals sector. The system can also improve the sector's reliability and processing of mining applications, permits and titles, leading to a better mineral licensing regime. Availability of mining information internationally would provide clarity on mining title systems and assist prospective mining investors to make informed decisions without difficulties.

There is the need to introduce sound regulatory regimes, strong regulatory institutions and structures, as well as to capacitate them through strategic planning, provision of operational capital and, skilled and sufficient human resources. This is inherently necessary in order to ensure effective implementation, enforcement of mining laws and monitoring compliance. Also, this is necessary in order to enhance to mandate of Zimbabwe and the DRC to exploit their mineral resources and derive economic benefits for self-determination and development.

Apart from indigenization provisions in the DRC's Mining Code and Zimbabwe's indigenization law, appropriate distribution of benefits from exploitation of mineral resources should occur at all spheres of both government and reach deserving sectors such as to capacitate the Ministry of Mines which is the backbone of the economy, and other departments such as health, education and defence and security. However, prior to the distribution, there is need to determine the purpose for which the funds are to be allocated.

On the aspect of empowerment, there is the need to design monitoring mechanisms and introduce partnerships with communities and civil society focusing on mobilizing effective monitoring and enforcement of the mining laws. This will spur public involvement and participation in decision making processes. I recommend that the DRC and Zimbabwe undertake and adhere to non-corrupt standard of practice at all the three levels of mineral resource governance, namely, national, provincial and local levels, alongside transparency and accountability in the mineral value chain, and to publish all relevant and material information on revenue movements and expenditure.

The measures undertaken by the DRC and Zimbabwe governments and policy choices ought to be thoroughly examined before being implemented and enforced in order to ensure a people-based mineral resource regulation. This is against the backdrop that mineral endowment ought to serve as a platform for development with a view that they benefit the host states. The thesis offers the DRC and Zimbabwe an opportunity to learn how best to navigate the threats in order to escape the resource curse paradox. The experience of both states is a microcosm of the challenges facing many African states endowed with mineral resources. The challenges fundamentally give rise to the need to create a robust regulatory framework for the mining sector in Africa and the ability to strategically implement mining laws, by putting people at the center of the transformation in a transparent and accountable manner. This could be done by adopting identical regulatory standards across African states endowed with mineral resources.

The final sections of the thesis set out recommendations specific to the DRC and Zimbabwe governments. This is inherently necessary for clarity and in order for each section to focus on each country.

### 7.3.1 To the DRC Government

There is an inherent need to put in place mechanisms to curb corruption in the mining sector. There is the need to improve implementation and enforcement of mining laws, and policing, as well as transparency and accountability. Further, there is the need to strengthen the political will by promoting democracy in the regulation of mineral resources and by fully engaging in conducting oversight mining activities to assist regulatory agencies to implement and enforce mining laws. Furthermore, there is the need to alleviate human resource capacity constraints that impede oversight and accountability. These would constitute significant steps towards control and transforming mineral endowment into economic growth and development. As discussed in chapter 5 regarding to threats to the DRC' sovereignty over mineral resources and in order to overcome the resource curse, there is also the need to embrace a significant and sustained, as well as long-term investment in the minerals sector, strengthening central authority and security concerns. Regarding mining taxation and trade of the minerals, the DRC needs a consolidated single system responsible for the oversight of mining taxation and trade in mineral resources, and a coherent single entity for

accountability. Also, there is need to avoid duplication of responsibility and to curb loopholes in revenue collection system by improving efficiency.

In order to address the mineral resource associated conflicts, there is the need to move away from the reactive ways that are *ad hoc* and sometimes not proportionate to the threat, by adopting proactive measures that are commensurate to the scale of the threats. Also, there is the need to strategize broadly in order to obtain the political will in the country and of neighbouring states. Further, there is the need for robust diplomatic dialogues and solutions to the resource conflict in order to rejuvenate the DRC's mineral resource regulatory system and institutions seized with the obligation to control the resources. Furthermore, there is the need to undertake capacity building of the regulatory institutions as an aspect supporting resource regulation. This is imperative because the country fundamentally lacks the coherent and diplomatic momentum needed to revise the status *quo*. Transparency and accountability should be considered in every facet of the mineral value chain, as well as transnational co-operation in the Great Lakes region in order to curb smuggling of minerals and illegal trade.

### 7.3.2 To the Zimbabwean Government

The Mines Act allows investors to get claims for free and it is skewed in favour of foreign investors for whom it provides too much protection at the expense of the state. There is the need to repeal the outdated Mines Act and replace it with a new principal mining law that brings domestic mining and regulation into line with international standards, and to assert the exercise of sovereignty unambiguously. There is the need to vest custody and ownership of all mineral resources in the state (not the state President) in order to improve transparency and accountability, and to empower institutions to implement checks and balancing tools, as well as to improve compliance. The proposed new mining law should promote security of tenure by avoiding provisions that threaten the tenure system, yet are aligned with the indigenization law. The proposed mines law should contain elaborate provisions to curb corruption and loopholes in tax collection as well as illicit financial flows. Further, there is need to repeal the Gold Act, Copper Act and Precious Stones Trade Act - these are outdated and do not reflex modern trends including transparency and accountability in the regulation of specific minerals.

There is need for political will to strengthen and spearhead sound policies, as well as transparency and accountability in the mineral value chain. These three imperatives have to be compulsory and help to curb corruption in the minerals sector. Against the backdrop of well-documented history and catalogue of corruption in the mineral value chain, illegal mining and smuggling of the resources, theft and incompetence; the government of Zimbabwe should put in place appropriate mechanisms to deal with these ills, and embrace transparency and accountability in every facet of the mineral value chain including setting national priority areas. The regulator should be held accountable in order to ensure that the mandate derived from PSNR is executed as a supreme state responsibility with a view to control and exploit domestic minerals for national economic development. Further, there is need to enact mandatory provisions in for imprisonment terms in mining laws for threats such as corruption in the mineral value chain and illegal mining, and smuggling of the resources. This could be a way to bring transparency and accountability in the minerals sector. There is also the need to capacitate the Anti-Corruption Commission in order to assist the policy to curb corruption in the mineral value chain.

With regard to the indigenization law, there is the need to clarify the legal position in order to ensure consistency in the application of the law. There is the need to balance indigenization with attracting foreign investment in the minerals sector, simultaneously creating room for economic growth and development. There needs to be a clear implementation as the current implementation of the indigenization law is incomplete, inconsistent, and arbitrarily enforced. Since navigating threats and interference has been a challenge, there is the need to take inherent steps and measures regardless how trivial this could be, to close the gaps and weaknesses in the mineral resource regulatory framework, by establishing mines police and courts (within the current national police and courts) to specialize in investigating and dealing in mineral resource crimes only.

### 7.3.3 To Africa Generally

Mineral endowment has positive and negative consequences for host states and governments, as well as local communities. The competing interests and outcomes also suggest the fundamental importance of a shared mining vision with a view to creating mining policy that

protects stakeholders in the mining value chain and the interests of the citizens.[1] Regardless of Africa's mineral endowment, the entire continent has for far too long been characterized by poverty and underdevelopment, and labelled a continent of losers.[2] Illicit regulatory practices and self-serving interests make local communities and host states and indeed the entire continent far from economically secure. This is exacerbated by high levels of poverty across the African continent. Poverty in turn contributes to Africa's continued weak voice in the negotiation of mining contracts, a position which fails to support or promote the AMV.[3]

The various legal systems in Africa, so can the challenges associated the legal terrains across the continent regarding control and regulation of mineral resources and investment. Regardless of the fact that foreign mining investors have the leverage to invest where they want, they turned to invest in those countries they think their investment will be protected. Apart from the recommendations adopted by African heads of states and governments contemplated in AMV, I propose that Africa should also have a mining investment code that can be used as a template across the continent. While this recommendation could in itself be seen as a form of "interference", it would be ideal for creating a uniform legal framework for foreign investors intending to invest in Africa's minerals sector in addition to helping African states stand together in order to ensure that their mineral resources are exploited at a rate most beneficial to them. It is also imperative that African states put in place a concerted effort in order to support the implementation of the "proposed investment code". To this end, I suggest adopting of efficient and speedy reforms in mineral resource administration, and the institutional structures with a view to effectively regulate the sector and curb the prevalence of prejudicial mining contracts. It is fundamental that economically weak states such as the DRC and Zimbabwe address the democratic deficit in the regulation of their mineral resources, as well as improve transparency and accountability.

I suggest the establishment of an independent office, "a kind of ombudsman function", to oversee the implementation of the "mining investment code for Africa" as well as the AMV in order to protect host states against concluding prejudicial mining agreements with foreign mining investors. The proposed independent office and the code could as well be tools to reinforce the objectives of the AMV which African states have to consider in the regulation

[1] United Nations Economic Commission for Africa 'Minerals and Africa's development: An overview of the report of the international study Group on Africa's mineral regimes' 2011 at xiii.
[2] Ibid.
[3] See the shared mining vision contemplated in Africa Mining Vision, 2009 at v, 13 – 29.

of their mineral resources. In line with the AMV, the regulatory framework for the "Africa minerals sector" and its value chain should be developed in a collaborative way, and to include civil society, the private sector and governments of host states. In light of the threats and interferences discussed in chapters 3, 4, 5 and 6 of the thesis,[4] and the need to navigate them, it is important to have mutual interventions and working together by the regulators and the regulated in order to find a common ground that benefits both parties. Where there is mutual agreements and working together, there is most likely to be good partnerships and such a situation can ameliorate loopholes in the regulatory systems as well as curb corruption in the minerals sector. However, the proposal requires political will and strategic engagement prior to its adoption.

The double standards that exist in the regulation of minerals in many African states have failed the mandate and operationalization of PSNR in many states. To this end, there is the need to establish a development forum system where all mining agreements, apart from the watchful eye of an independent supervisory body, are open to public scrutiny. While taking into account the principles of international investment and trade, international law can be seen as a form of organized hypocrisy.[5] It epitomizes suspicion and general fear that the international law principles governing state sovereignty over mineral resources do not essentially assist politically weak and poor African countries but defend the interests of foreign investors, by protecting their mining rights.[6] The hypocrisy fundamentally makes international law unresponsive and irresponsible to provide protection to vulnerable states and unhelpful to provide solution to their challenges. This often opens floodgates for prejudice and breakdown of, and undermines the objectives of PSNR, thus promoting the resource curse. Accordingly, the question is for how long should this hypocrisy of international law continue disadvantaging African states over mineral resources?

Worthy of further consideration is whether Africa as a continent can create mechanisms to navigate the hypocrisy of international law, by compelling each state to adopt uniform rules and standards to regulate mineral resources, and to establish strong institutions and mechanisms in order to navigate threats to the mandate and operationalization of PSNR. How to navigate the threats requires a paradigm shift from the culture of drafting mining laws and

[4] See sections 3.2 – 3.7 of chapter 3; section 4.5 of chapter 4; section 5.5 of chapter 5 and section 6.3.2 of chapter 6.
[5] See elements of the hypocrisy discussed in sections 2.4.1 – 2.4.4 of chapter 2 above.
[6] Ibid.

policies without hands-on strategies in order operationalize the international law principles discussed in this thesis, namely, non-interference, self-determination and PSNR along with the right to development with a view to derive tangible national economic benefits. Also, there is the need for African states to realize that without strong political will to operationalize PSNR and curb the threats discussed in the thesis, economic growth and development through exploitation of domestic mineral resources could be far from secure. Therefore the realization of the objectives of the AMV hinges on strong commitment by African governments to develop strong regulatory institutions and enforcement agents, and transparency and accountability in the mineral value chain.

## 7.4 Conclusion

The thesis provides a conceptual framework to view the resource curse paradox through the lens of international law. The resource curse is a pragmatic challenge that many African states endowed with mineral resources experience as they endeavour to operationalize PSNR, and the mandate to exploit the resources for self-determination and development. Although it is important to realize that international law principles play a role by assigning states with rights regarding permanent ownership and custodianship over domestic mineral resources, there are rights and duties that come with the assignments, as well as threats to PSNR. In this regard the operationalization of PSNR in domestic mining laws becomes imperative. The case of the DRC and Zimbabwe is a microcosm of the resource curse that many African states are going through. The findings and the recommendations are pointers that one can take into consideration.

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# APPENDICES

## Appendix A

### 6.2 Summary: How International Law Principles Governing State Sovereignty over Mineral Resources are Operationalized in Zimbabwe and the DRC

| Principle | Operationalizing International Law Principles Governing State Sovereignty over Mineral Resources Through Domestic Law | |
|---|---|---|
| | **Zimbabwe** | **The DRC** |
| **Permanent sovereignty over natural resources (PSNR)** | **Property & ownership rights**:<br><br>-State President is exclusively and absolutely vested with permanent custodianship over domestic mineral resources on behalf of the people of Zimbabwe.<br>-State President has dominium over all domestic mineral resources on behalf of the people of Zimbabwe.<br>-the state President has the right to alienate property rights associated with mining permits, exploration as well as to demand payment for such rights in the form of fees and taxes.<br>-no private ownership of mineral resources, they are property of the state.<br>-State President grants rights of access and use of the resources through issuing of mining licences. ---the rights may be limited depending on the nature and conditions under pinning the issuing of the permit.<br>-when they are granted to an investor, rights to mineral resources cannot be transferred to another.<br>-Ministry of Mines is responsible to oversee the granting and registration of mining licences.<br>-property rights in mineral resources include rights to exploit, explore and a system of tenure but not ownership of the resources.<br>-the PSNR principle empowers the Zimbabwe legislature and the executive to enact laws regarding property rights in mineral resources and how this comes to be.<br>-Mines Act provides the manner to acquire property rights and cancellation. | **Property & ownership rights**:<br><br>-the DRC Constitution and the Mining Code provides that the state is the owner and custody of all mineral resources in the country.<br>-state ownership of the resources is provided and guaranteed as well as protected by the constitution.<br>-vests custodianship in the State.<br>-no individual ownership of mineral resources – property of the state.<br>-the state grants limited access and use of the resources to investors by way of mining licences that is registered by the mining cadastre. In this way, right to access the resources is confirmed.<br>-state has exclusive and inalienable ownership rights to all Mineral resources found in the DRC.<br>-the Mining Code provides the manner in which states ownership of mineral resources is exercised and protected by domestic law.<br>-holders of exploration, mining, processing, transportation or trade permits do not have personal rights to the resources they are dealing in but rights to exploit the resources as defined in their permits.<br>-the DRC is internationally ranked low by the World Bank regarding protection of investors due to weak property rights.<br>-the Mining Code provides how one can acquire property rights in mineral resources and cancellation thereof.<br>-from the above, the principle of PSNR provide the DRC executive and the legislature authority to make provisions in domestic mining laws regarding rights to mineral resources but without ownership of the resources. |

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| | **Access to mineral resources:**<br><br>-the right to grant access to mineral resources in Zimbabwe and to exploit them the State President with the help of the Minister of Mines and the Cabinet (central arm of Government in decision-making) decide which investor to grant rights of access.<br>-the Mines Act provides the acquisition and maintenance as well as mining rights, and six categories of mining licences (see chapter 4 section 4.4.2), and each category has its requirements and conditions.<br>-there is the need to comply with the requirement of indigenization law in terms of share ownership of the rights. Generally, joint mining ventures with indigenous partners are fundamental as required by the indigenization law (see chapter 4 section 4.3.1.6) in order for foreign investor to have access to domestic mineral resources.<br>-however, the Mines Act does not provide and is silent on the categories of persons who are capable to access mineral resources in Zimbabwe, conditions and eligibility for acquisition of and registration of the rights.<br>-there is no transparency in the process to decide on granting mining rights or rights of access.<br>-the Mines Act does not provide the eligibility and categories of persons who can access the resources.<br>-Mines Act is silent and does not provides categories of persons to be excluded from engaging in mining activities by virtue of being bearers of certain offices.<br>-investors to meet certain financial requirements and to pay rehabilitation fees (the amounts are not provided). | **Access to mineral resources:**<br><br>-the DRC government grants rights to access to its domestic mineral resources on a "first come, first serve basis". (see chapter 5 section 5.5.2).<br>-Mining Code provides the conditions of access to domestic minerals and the Mining Regulations spell out the process in order to get rights of access to the resources.<br>-foreign investors can only have rights of access to non-artisanal mining activities upon being granted rights of access to the resources.<br>-indigenous Congolese are allows to engage in regulated artisanal mining activities on condition that a miner is a holder of artisanal miner's card. The Mining Code also provides the eligibility of Congolese who can have artisanal miner's card.<br>-unregulated artisanal mining activities are prohibited because it is illegal mining.<br>- Mining Code provides the categories of persons capable to have rights to mineral resources, and who is disqualified.<br>-since the DRC is not capacitated to exploit its minerals, it requires joint partnerships with foreign investors, (Article 8 para 3 of the Mining Code).<br>-access to DRC minerals is based on joint agreements with the government to exploit the resources.<br>-the Mining Regulations (Article 17) provides the eligibility of who qualifies to access the resources.<br>-provides categories of persons excluded to engage in mining activities by virtue of their offices ((article 27 of the Mining Code).<br>-investors are required to meet certain financial requirements and to deposit rehabilitation fees (the amounts are not provided). |
| | **Mineral resources policing and enforcement of mining laws:**<br><br>-the core vanguard against corruption, illegal mining and smuggling as well as to ensure compliance with domestic and mining laws. | **Mineral resources policing and enforcement of mining laws**:<br><br>-mining law enforcement and policing is the primary objective of the department responsible for minerals in the DRC.<br>-Mining Code and Mining Regulations are |

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| | -the Mines Acts and the subsidiary mining laws provide conducts that contravenes intention of the legislature, e.g. failure to keep an up-to-date register of all transactions of gold and precious stones, dealing in any mineral without a licence.<br>-the Mines Act criminalizes disposal of minerals from any location until outstanding royalties are paid, or arrangement to pay has been made.<br>-mandatory sentences for contravention of certain mining laws, e.g. illegal dealing in gold and copper in terms of the Gold Act and Copper Control Act, respectively.<br>-Ministry of Mines is responsible to enforce and police mineral resources regulation and its agents, e.g. mining commissioners empowers, mining inspectors, Mineral Unit and Border Control Officers, national police investigate and arrest offenders.<br>-when convicted of mineral or mining related offences, courts can impose fine, custodial sentences or both.<br>-however, fines and custodial terms are very low and short respectively compared to those provided in the DRC mining laws. Regardless of the variation, illegal mining activities are less than what the DRC is experiencing.<br>- how the indigenization laws is policed – no clear and consistent implementation and enforcement, therefore this law is incomplete. | the two key mining laws.<br>-the state through its agents/institutions responsible for mines and mineral development has prime roles to regulate the resources (in terms of the Mining Code and Mining Regulations), and to implement, enforce and monitor compliance.<br>-criminalises dealing in any mineral without a valid licence.<br>-the DRC criminalizes dealing in or possession of a mineral resource without a valid permit.<br>-the role of the state and its mining institutions and regulation structures are clearly defined compared to Zimbabwe.<br>-cooperative governance and hands-on approach on all the mining institutions and structures to ensure the objectives provided in the Mining Code and Mining regulations are realized.<br>-however, fines and custodial sentences are higher compared to those provided for in the Zimbabwe mining laws. Regardless of this, illegal mining activities in the DRC are common when compared to Zimbabwe.<br>-weak central authority and corruption and resource conflicts are the challenges facing appropriate and effective implementation, enforcement and policing.<br>-hard to meet all the basic requires in policing and enforcement of domestic mining laws where the state is the sole regulator, on the one hand, and as a partner in joint mining ventures, on the other hand. |
| | **Beneficiation and trade:**<br><br>-exporting beneficiated and value addition is a strategic policy for Zimbabwe.<br>-the Mines Act does not provide for beneficiation, outdated principal mining law.<br>-no single and consolidated policy on beneficiation but the government has to compel mining investors to beneficiate their mineral produce before export.<br>-higher fines or risk losing mining licence to export unbeneficiated minerals.eg 15 percent levy on export of unbeneficiated platinum and there are plans to completely ban raw platinum group mineral exports. | **Beneficiation and trade:**<br><br>-Minister of Mines unfettered jurisdiction and powers to decide whether allow application for export of unbeneficiated mineral resources.<br>-two key reasons provided which justify seeking permission to export unbeneficiated minerals (Article 85(a) & (b) of the Mining Code).<br>-there is no single and consolidated policy on beneficiation but embedded in many policy documents.<br>-weak enforcement and monitoring make it easy to evade beneficiation requirement and illegally export unbeneficiated mineral resources. |

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| | -Diamond Policy provides for mandatory beneficiation and value addition of diamonds.<br>-the Diamond Policy has a weakness, does not spell out the provision and clarity on the standard for issuance of permits to those in the diamond cutting and polishing sections.<br>-lack of clear administrative procedures in the regulation of domestic beneficiation creates uncertainties and gaps, which harbour room for corruption and illicit dealings.<br>-Zimbabwe asserting sovereignty by slowly closing the net on exports of unbeneficiated minerals. | |
| | **Royalties and taxes:**<br><br>-mining investors compelled to pay royalties and other taxes.<br>-flat rate of 15 percent of the total profits is paid<br>-fiscal regime for mining provides 5 percent for withholding tax charged on dividends declared by companies listed on the Zimbabwe Stock Exchange (ZSE), then unlisted companies pay the rate of 10 percent, and additional 5 percent withholding tax is charged on interests paid to mining investors.<br>-Zimbabwe does not have royalty distribution plan for the benefit of all levels of the community save the Trust Funds for the provinces, as well as the national Sovereign Wealth Fund established in terms of the indigenization law.<br>-no transparency and accountability as well as traceability of the revenues in the Trust Funds and Sovereign Wealth Fund. | **Royalties and taxes:**<br><br>-mining investors to pay mining taxes and royalties to the state.<br>-like Zimbabwe, DRC mining tax regime include mining duties, royalties and fees, charges and taxes payable by mining investors on the concessions.<br>-from 2002 to 2012, the Mining Code provided a guarantee on stable mining taxes as per legislative modifications. The stabilization clauses restricted the DRC to freely alter mining tax regime.<br>-rate of mining royalty for iron is 0.5 percent; 2 percent for non-ferrous metals, and 2.5 percent for precious metals. Profit-based tax for exploitation of mineral resources is levied at a preferential rate of 30 percent.<br>-distribution of royalty proceeds to the entire DRC society is provided by the Mining Code and the Mining Regulations.<br>-the Mining Code (Article 242) provides a formula, that the royalty must be proportionally distributed to all levels of the government for the benefit of all Congolese people. |
| | **Legal obligations towards indigenous communities:**<br><br>-mining contracts to include basic EIAs, resettlement plans, community development plans in the form of corporate social responsibility (CSR), as well as employment of local people and revenue sharing percentage. | **Legal obligations towards indigenous communities:**<br><br>-mining is inherently unsustainable to the environment and the adjacent communities.<br>-to pay compensation to affected communities.<br>-environmental health and safety – requirement to undertake environmental |

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| | -transparency of mining agreements is critical for public benefits and also scrutiny.<br>-constitution provides protection of the environment and the right to a clean environment, which is free of pollution and degrading activities such as mining that is inherently unsustainable.<br>-mining companies to pay rehabilitation costs.<br>-Mines Act provides for compensation of private land owners, eg compensation is only for the development on the land (property) and not compensation for the land, land compensation of paid to rural district councils (RDC). | plans (EPs), environmental impact assessment (EIAs), and public consultations. (the major issue is the level of public consultation in the DRC against the backdrop of a government desperate for foreign mining investment??).<br>-residual effects of some of the chemicals used in processing stages of production. Requires strict compliance, monitoring and to protect the indigenous communities and the environment.<br>-mining investors are legally obliged to honour and fulfil their obligations towards the communities adjacent to the mining locations – corporate social responsibility (CSR). |
| **Self-determination** | -Zimbabwe has an inherent right to formulate laws to support the regulation of its mineral resources.<br>-indigenization policy and laws<br>-the right to decide how benefits from mineral resources are used in accordance with the wishes of the people.<br>-requirement of transparency and accountability in regulation of minerals, as well as use of the revenues and planning.<br>-mineral resources are the anchor of the Zim-Asset strategic development policy. | -the DRC has the prerogative to formulate own laws to support its sovereignty over mineral resources and their regulation and exploitation in accordance with the wishes of the Congolese.<br>-laws or provision in mining laws that favour indigenization (eg regulated artisanal mining is reserved for local peoples in terms of the Mining Code).<br>-revenue transparency and accountability as well as traceability.<br>-planning for use of mineral resources for self-determination. |
| **Non-interference** | -mineral resource policing<br>-dispute settlement<br>-policy formulation, implementation and enforcement as well as policing.<br>-reign forces PSNR and self-determination principles<br>-non-interferences in domestic decision and law making processes. | -mineral resource policing<br>-dispute settlement<br>-policy formulation, implementation and enforcement as well as policing.<br>-reign forces the DRC's self-determination and PSNR principles.<br>-non-interferences in domestic decision and law making processes. |
| **Principles Relevant to Investment and Trade** | | |
| **Compensation for expropriation** | -Zimbabwe can exercise sovereignty by expropriating alien business interests in domestic mining.<br>-the Constitution of Zimbabwe provides for protection of property, and compensation for expropriation alongside the Mines Act.<br>-Zimbabwe can expropriate mines or mining location that is not worked or operational or that is underutilized – no compensation shall be paid, eg for loss of | -the DRC can assert sovereignty by expropriating domestic mining interests of investors.<br>-Constitution of the DRC provides security of and protection of property rights.<br>-compensation for expropriation has to be fair and just in terms of conditions established by law.<br>-arbitrary expropriation is prohibited.<br>-holders of surface rights have no claims of mineral resources found on or under the |

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| | prospective revenue.<br>-compensation is only for development made on the mining site and not for the minerals because they belong to the Zimbabweans.<br>-expropriation can be on the basis of failure to meet the indigenization law.<br>-compensation should be fair and<br>-weaknesses – constitution does not expressly define what property is in the context of mineral resources, and so does the Mines Act.<br>-expropriation is also a threat to sovereignty as highlighted in chapters 2 and 4. | surface area over which they have rights of control.<br>-such holders are entitled for compensation for expropriation of their surface rights.<br>-expropriation requires policy formulation, the policy was provided for in domestic law.<br>-expropriation could be a barrier to investment as well as compensation can restrict development since the process uses revenues available for development |
| **Repatriation of profits and exchange controls** | -requires policy formulation and the Reserve Bank of Zimbabwe (RBZ) implement, enforce and monitors compliance in terms of the IMF requirements.<br>-RBZ has discretion to decision on repatriation of profits depending on availability of foreign currency.<br>-Restriction on sovereignty -Zimbabwe cannot restrict repatriation by investors, and this restricts quantity of revenue available for reinvestment and development.<br>-Zimbabwe Exchange Control Act (ZECA) is inferior to IMF Rules which regulate repatriation of profits and payment of current transactions.<br>-restricts the Zimbabwe's ability to control movement of investors' capital into and out of the country. | -requires drafting of the enabling policy – DRC has the exchange control regulations (ECR) and the Central Bank if responsible for implementation, enforcement and monitoring compliance.<br>-Central Bank decides the conditions that must be fulfilled in order to repatriate profits and payment of current transactions.<br>-Central Bank is entitles to a fee for every transaction relating to repatriation of profits or payment of current transactions.<br>-DRC's exchange control regulation or regime (ECR) is inferior to IMF Rules on repatriation of profits and payment of current transactions.<br>-repatriation of profits restricts the quantity of revenues available for development.<br>-restricts the DRC's ability to control movement of investors' capital into and out of the country. |
| **Equitable treatment of mining investors (national treatment & MFN principles)** | -Zimbabwe's "Look–East Policy" preference over investors from the west.<br>-uniform application and enforcement of indigenization law.<br>-the non-discrimination treatment compels Zimbabwe government to guarantee foreign mining investors same and fair treatment through legislative, judicial and administrative decision making.<br>-Zimbabwe government cannot pass laws giving investment and trade advantages to certain investors in the mineral value chain. | -review and renegotiation of all mining contracts concluded during wars times.<br>-some mining contracts were negotiated on uneven platform, and were prejudicial to the DRC.<br>-Lutundula Commission had the prerogative to review the agreements on behalf of the DRC and make recommendations on which agreements were prejudicial to the state.<br>-the DRC is compelled to provide same and fair non-discriminatory treatment to all foreign mining investors.<br>-cannot pass laws giving investment and trade advantages to certain investors in the mineral value chain. |

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| **Revenue transparency & accountability** | -Not a member of the EITI and therefore does not need to meet certain minimum reporting conditions.<br>-no room for public scrutiny and checks mechanisms.<br>-minister of Finance and Mines only accountable to the Cabinet – (ruling party supreme law making body which is outside parliament), bias cannot be ruled out as well as corruption.<br>-Zimbabwe does not have a policy on mandatory transparency and accountability- a reason one can assume the elites take advantage to loot the available mineral resources and revenues.<br>-mines Act does not provide for declaration of mineral resource payment and revenues realized from mineral exports.<br>-Publish What You Pay Zimbabwe (PWYP-Zimbabwe) a civil society pressure group to compel government to be transparent and accountable | -Member of the EITI which require meeting certain minimum reporting conditions.<br>-member of the International Conference on the Great Lakes Region (ICGLR) required to improve transparency and traceability in the domestic mineral resources.<br>-requirement to use revenues transparency, and in an accountable manner<br>-allow for public scrutiny as a method of checks mechanism.<br>-Revenue Transparency group acts as watchdog to ensure transparency and accountability in use and management of revenues. |
| **The Right to Development** | | |
| | **Zimbabwe** | **The DRC** |
| **Strategic planning on how to use mineral resources for development** | -Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset) is a major development strategy policy adopted in October 2013, and beneficiation and value addition if a key component of the policy.<br>-strategic agenda to develop through exploitation of mineral resources (among the broad objectives of Zim-Asset) for self-determination, to include mineral beneficiation and value addition.<br>-provides for the need to re-evaluate domestic mineral resources in order to determine logical pattern to develop through exploitation of mineral resources.<br>-requirement for short development plans which lead to the realization of Zim-Asset in the long run.<br>-Zim-Asset embraces the mandate and resource sovereignty, self-determination as well as non-interference in control of Zimbabwe's mineral resources, their | -review and renegotiation of mining contracts concluded during war times (1996-97 & 1998) was a strategic plan to ensure state does not lose revenues through prejudicial mining agreements and irreparable harm.<br>-poverty reduction and growth strategy papers (PRGSP) was a method to formulate development policies, which include development plans.<br>-however, development plans and their implementation are riddled by threats such as episodic and recurrent or resurgences, political tensions and instability, as well as lack of coordinated efforts to curb corruption in the mineral value chain.<br>-lack of revenues due to corruption and lack of firm commitment and weak central authority and institutionalized mistrust among members who are trusted with the obligation to enforce the laws for self-determination.<br>-weak central authority and fragility in all |

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| | exploitation, and trade.<br>-Zim-Asset reign forces the right to derive benefits from domestic mineral resources.<br>-there is the need for Zimbabwe to use the revenue derived from exploitation of domestic resources in line with Zim-Asset (development vision of Zimbabwe).<br>-Zim-Asset faces critical challenges due to lack of capital due to lack of investment. | levels of government, systematically weaken strategic development planning, as well as exploitation of mineral resources for self-determination.<br>- DRC government should get significant amount of revenue from mining as it is both a player through joint mining ventures, eg Gecamines, and a beneficiary of taxes paid by mining companies. |
| **<u>Threats to the Outworking of Sovereignty Over Mineral Resources</u>** | | |
| **Threat** | **Effect on Zimbabwe** | **Effect on the DRC** |
| **Conditionality policies of IMF & World Bank** | -Economic Structural Adjustment Programme (ESAP) negatively affected Zimbabwe influencing retrenchment of civil service employees, reducing the size of state bodies and Ministries (especially affecting policing) – the executive and the legislature were compelled to adopt policies and political reforms that adversely affected state's capacity to regulate.<br>-basic services were cut to reduce public spending.<br>-systematically disempowered regulation of mineral resources due to retrenchment<br>-structural adjustments weakened implementation and enforcement capacity<br>- self-determination was interfered with as well as the right to non-interference in domestic affairs of Zimbabwe<br>- ESAP restricted Zimbabwe to formulate policies of its own; it interfered with state processes to function independently as would have been without it. | -national budget partly relies on IMF & World Bank (and other donor) funding – IMF and World Bank demanded restoration of the relationship with DRC by restoring rule of law, investment conditions and democratic elections<br>- argued that the IMF & World Bank conditions restricted the DRC government to formulate own policies.<br>-The conditionality policy (IMF & World Bank demands) interferes with the DRC internal processes to function independently as would have been without them.<br>-DRC government was compelled to liberate the economy under the influence of the IMF and the World Bank, thus changing and affecting the nature of the entity and the right mine mineral resources.<br>-the DRC government was compelled to adopt political and certain policy reforms.<br>-the debt relief extended to the DRC was conditionally upon the recipient drawing up sound and convincing poverty reduction strategy papers (PRSP). |
| **Illegal Mining** | -common in many parts of Zimbabwe due to lack of employment, poverty and economic decline.<br>-indication of weak regulation and failure by state to eradicate illegal mining activities.<br>-restricts revenue that can be available | -illegal mining most common in the DRC due to weak regulation, poverty and economic decline.<br>-about two-thirds of DRC industrial minerals that include diamond production are realised through unregulated artisanal diggers. This confirms illegal or unregulated |

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| | for development because illegal miners do not pay tax.<br>-illegal mining put citizens against the authorities as they resist eviction- thus leading to conflicts.<br>-illegal mining undermines state sovereignty because the activities are not sanctioned by law. | mining activities are very common and rampant.<br>-reduces revenue that would have been available to the states because illegal activities are not taxed.<br>-illegal mining activities undermine state sovereignty because the activities are not sanctioned by the states.<br>-illegal mining and transfer of revenues through loopholes in the regulatory system.<br>-some mining corporations as well as individuals are linked to confiscations, forced monopoly and price fixing thereby prejudicing the state of legitimate revenues.<br>-small mining companies promoting illegal mining as these companies buy minerals from illegal miners thereby buy at very low prices since the miners have no legitimate claims for better prices. |
| **Corruption** | -politicians use their political muscles to derive illegal benefits from mineral resources.<br>-acts of corruption are against the need for transparency and accountability.<br>-access to information is denied as a way to conceal illegal mining deals.<br>-illicit deals conflicts with sovereignty of Zimbabwe over mineral resources and the mandate to establish and maintain legitimate transparent and accountable regulatory institutions.<br>-corruption contributes to loss of investor confidence and lack of economic growth and development.<br>-deliberate denying public scrutiny for fear to expose illicit deals which are prejudicial to the state.<br>-deliberate avoiding tender procedures in order to illegally benefit from illegal deals, eg, awarding mining contracts.<br>-cartels used to loot domestic mineral resources through weak and unaccountable regulatory system.<br>-reduces and restricts revenue base through adverse or negative effects on taxable income and loopholes in tax collection system. | -corruption in the DRC mining sector has negative effects in that it conflicts with sovereignty and the mandate to establish and maintain transparency, accountability regulatory institutions.<br>-use and management of revenues and traceability is compromised.<br>-contributes to slow economic growth and development.<br>-creates classes and centralize power illegally.<br>-politicians use their political muscles to derive illegal benefits from mineral resources.<br>-leads to biased and/or weak implementation and enforcement of mining laws and justice delivery in mineral resources cases.<br>-systematically disempower credibility of investment environment.<br>-cartels used to loot domestic mineral resources while taking advantage of weak regulatory structures.<br>-restricts revenue base through negative effects on taxable income and loopholes in tax collection system.<br>-weak central authority and regulation, resource conflicts are multifaceted and threats and catalyst for corruption, and the cumulative effects of these factors restrict sovereignty and the mandate of the DRC to derive benefits from mineral resources for self-determination. |

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| **Conflicts** | -Marange diamond conflict is the most notable resource conflict (apart from the land issue).<br>-the conflict between ordinary poor villagers and the state shows weak regulation and enforcement of the law reportedly that the state resorted to use of force against unarmed ordinary illegal miners.<br>-Government of Zimbabwe was challenged to foster stable regulation of the resources, among others.<br>-investor confidence is weak due to recurrence of threats of expropriation. | -internal conflicts between the DRC government on the one hand, and armed militia groups and illegal miners, on the other hand, threated self-determination of the DRC.<br>-domestic affairs of the government and in relation to regulation of mineral resources are adversely affected, by the militia who challenge control and access to the resources.<br>-conflicts disrupt mining activities thereby reducing production and intimately the revenues that could have been available for development.<br>-the conflicts restrict government policy formulation and contrary to what other groups may anticipate.<br>-conflicts have undermined prospects of development in the DRC, by threatening investment security and security of the state and persons.<br>-conflicts restrict and weaken uniform application of the laws and regulation in areas affected by the conflicts.<br>-conflicts challenges sovereignty of the DRC to foster stable environment to sustain economic growth and development and the mandate to use mineral resources for self-determination.<br>-Rwanda, Uganda, Zimbabwe among others are implicated in the DRC conflict, ideally the interferences in the DRC domestic affairs regarding its minerals undermines the principles of non-interference and self-determination, as well as the right of the DRC to develop from its resources. |