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**A COMPARATIVE ANALYSIS OF THE SECURITY OF MINERAL TENURE UNDER
THE MINES AND MINERALS ACT (CHAPTER 21:05) AND THE MINES AND
MINERALS AMENDMENT BILL 2015 IN ZIMBABWE.**

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ABSTRACT

The mining Industry plays an important role in development. It provides raw materials for industrial development; it also provides huge resource rents which can be useful in funding infrastructure projects and budget deficits. Mining is also a labour-intensive vocation and may therefore, help in alleviating poverty through job creation. If managed well, mining resource rents may lead to sustainable development of economies.

In Zimbabwe, mining is a major contributor to foreign currency earnings and contributes significantly to the Gross Domestic Product (GDP). The industry contributes 50% of the country's foreign currency receipts and its contribution to GDP averages about 11%. To illustrate the importance of the industry to the economy, all post-independence economic blue prints have been anchored on resource rents to stimulate growth.

Despite possessing an attractive geology, the country has not experienced any significant investment in the sector. No exploratory work has been undertaken in the past ten years. The country has failed to attract meaningful investment capital in exploration as a result of a general lack of investor friendly laws. The indigenization requirements for a free carried 51% local content participation has been cited as a major disincentive for investment in the sector over the years. However, other factors which have contributed to lack of investment include, a general absence of laws protecting private property rights. The government's appetite for private property rights was demonstrated in the manner in which legislation was hurried in order to expropriate private property rights during the land reform program. The consolidation of mining concessions in Chiadzwa in 2016 also heightened fears of the security of mineral tenure in the country.

The security of mineral tenure is an important consideration in the mining investment decision making. Studies have demonstrated that countries which have incorporated International Best Practice in the regulation of mineral resources by ensuring the security of mineral tenure have been able to attract significant investment.

The prevalence of subjective discretion in the allocation and loss of mineral rights in Zimbabwe undermines the security of mineral tenure. Regulation of mining in the country is characterised by subjective administrative discretion. Unregulated administrative discretion breeds corruption and as a result affects the stability of mineral rights. In order to develop mines, huge capital investment is required. Mining right holders may be required by to securitise rights funders in order to raise funding for projects. Prohibition against securitization of mineral rights in Zimbabwe undermines the security of mineral tenure.

LIST OF ACRONYMS.

The Bill- Mines and Minerals Amendment Bill 2018 HB 2015.

BSAC-British South Africa Company.

EPL-Exclusive Prospecting Licence

EPO- Exclusive Prospecting Order.

MMA – Mines and Minerals Act (Chapter 21:05).

Min.-Minister

MMCZ- Minerals Marketing Corporation of Zimbabwe.

ZMDC- Zimbabwe Mining Development Corporation.

KEYWORDS

Security of Tenure.

Registrability.

Transferability.

Securitization.

Prospecting

Right to mine

Loss of Rights.

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CHAPTER ONE – INTRODUCTION

1.1. Background

Zimbabwe is a resource-rich country, minerals found in the country include, Platinum Group of Metals (PGMs), Iron, Nickel and Coal.¹ Other minerals found in the country include industrial diamonds, asbestos, cobalt, graphite, lithium and palladium.² It is estimated that the country has the second largest Platinum reserves in the world after South Africa. Its high-grade Chromium reserves are estimated at approximately 10 billion tonnes and are believed to be the largest reserves in the world.³

The importance of the mining sector to the country cannot be over-emphasised. From 1999 to 1998 the mining sector's contribution to the Gross Domestic Product (GDP) averaged 4%.⁴ Its contribution grew significantly to average 11% between 2009 and 2011.⁵ In 2011, the mining sector contributed USD\$2.3 billion to national exports constituting 50% of the country's exports and foreign currency receipts. The industry directly employs 45 000 people, upstream and downstream linkages with the rest of the economy doubles the number of those employed and reliant on the sector.⁶

Despite its mineral endowment and attractive geology, investors have generally stayed clear of the country's mining sector. A general poor ease of doing business environment, lack of respect for property rights and policy inconsistency have been cited as the general push factors for investment in the sector.⁷ The Fraser Institute Survey ranked the country amongst the worst on the Policy Perception Index with a score of 29.54 and ranked 89 out of 91 countries.⁸ In the same study, Botswana, a country considered as best practice in mining regulation was ranked 41 out of 91 countries with an average

¹ Zurcom International; 'Mining Assets in Southern Africa,' <http://exportvirginia.org/wp-content/uploads/2014/05/Southern-Africa-Mining.pdf>.

² *Ibid* note 1.

³ F. Mugumbate, 'Overview of Zimbabwe's Resource Potential-Tip of the iceberg', paper presented to the geological society of Zimbabwe.

⁴ P. Jourdan, G. Chigumira, I. Kwesu & E. Chipumho; 'Mining Sector Policy Study,' Zimbabwe Economic Policy Analysis.

⁵ *Ibid* note 4.

⁶ M. Dhliwayo; 'The Mines and Minerals Amendment Bill, Its promises and pitfalls', Zela, 2016.

⁷ Zimbabwe is ranked 84 out of 104 on the ease of doing business index. However, at the time of writing the government had embarked on a World Bank assisted program of reforms to enhance the ease of doing business.

⁸ The Fraser Institute's Annual Survey of Mining Companies 2017.

score of 63.14. The Policy Perception index is a comprehensive assessment of a country's attractiveness for mining investment made from responses of major mining companies.

The studies above are a clear testimony that geological factors alone are insufficient in attracting investment in the mining sector. Other factors which affect profitability and security of mineral tenure such as the regulatory environment and economic conditions in a mining destination are equally as important. In a world of competition for mining investment capital, it is important that the regulatory machinery in place reduces the risks faced by mining investors.' ⁹Investment decisions really are 'as much idiosyncratic as [they are] scientific.'¹⁰ The legal framework in a mining jurisdiction is an important consideration in the mining investment decision making. In this respect, a clear, simple and non- discretionary legal and regulatory framework is an important factor in attracting risk capital to a mining sector.¹¹ The conditions under which mineral rights are granted, maintained, requirements for work programs, conditions under which the rights may be transferred or securitised as a means of raising finance, time granted for development of mining assets, time limits for administrative decision making, machinery for challenging administrative decisions and the nature of mineral rights are important determinants of the security of mineral tenure. Mining involves a commitment of capital over a long period of time before profits can be realised. Unless an investor is assured of a long term title to his mining rights sufficient enough to repay loans and generate a return on investment(ROI), there may be very little motivation in front loading capital investment to develop a mining asset.¹² It is important therefore, that the regulatory framework assures continuity of tenure by minimising discretionary powers in the transition from exploration to a mining right and the key elements affecting the stability of rights once the mining right has been granted.¹³

In Zimbabwe the Mines and Minerals Act (Chapter 21:05) ('the MMA') is the principal legislation regulating mining activities. It is generally accepted that the MMA is out-dated, characterised by unregulated ministerial discretion, is worded in prolix and as a result, hopelessly fails to provide for the stability of mineral rights necessary to attract risk capital in the sector. An amendment to the MMA is currently before the Parliament. The objectives of the Mines and Minerals Amendment Bill 2018 ('the Bill') are to improve competitiveness of the mining sector, achieve the security of mineral tenure

⁹ V. Vivoda; 'Determinants of Foreign direct investment in Asia: A comparison between China and India', Resources Policy Journal 36 (2010) 49-59.

¹⁰ H.V. Niekerk; 'Mineral Tenure Security, registration and enforcement of rights: Debunking the property law paradigm', 2018 SALJ 159 at 164.

¹¹ N.H. Burma, k Kaiser, T. Min Le; 'Rents to Riches? The Political Economy of Natural Resource Led Development', The World Bank, D.C p 104.

¹² J. Otto; 'The Changing Regulatory Framework for Mining Ventures', 14 J. Energy & Nat. Resources L. 25 (1996) vol. 14, No.3.p257.

¹³ *Ibid*, note 12.

and optimise mineral production.¹⁴ The Bill aims to achieve its objects by the setting up of a computerised mineral rights cadastre system, designate mineral rights as ‘real rights’ and simplify the granting of mineral rights. In view of the importance of the industry to the country’s economy, a comparative study of the conditions affecting the security of mineral tenure under the MMA and the improvements suggested in the Bill is therefore, merited.

1.2. Aims and Objectives

This study aims to evaluate the security of mineral tenure in Zimbabwe. A comparative study of the conditions under which mineral rights are granted, maintained, lost, or may be encumbered, transferred, time limits for development of mineral assets, administrative discretion and the stability of mineral rights under the MMA and the Bill is used as the lens within which conclusions on the security of mineral tenure in the country are made.

1.3. Research Questions

1.3.1. Primary question

The Study will seek to answer one primary question, viz to what extent does the mining policy and regulation of mining in Zimbabwe protect the security of mineral tenure?

1.3.2. Secondary questions

1.3.2.1 What is the significance of the mining industry in the economy of Zimbabwe?

1.3.2.2 What is the security of mineral tenure and how is it secured in a mining regulatory framework?

1.3.2.3 What is the theoretical basis of mining regulation in Zimbabwe?

1.3.2.4 What provisions govern the acquisition, maintenance and loss of mineral rights in Zimbabwe?

¹⁴ Report on the Mines and Minerals Amendment Bill by the Portfolio Committee on Mines and Energy, 8th March 2018 presented by Hon. P. Mliswa.

1.3.2.5 How does the regulation of the acquisition, maintenance and loss of mineral rights affect the security of mineral tenure under the MMA and the Bill?

1.3.4.6. What changes can be made to the framework in order to strengthen security of mineral tenure?

1.4. Methodology and Limitations

1.4.1. Methodology

A Comparative legal study is employed to answer the research questions set out above. A technical legal study of the concept of the security of mineral tenure is made to set the context for a comparative study of the provisions of the MMA and the Bill which undermine or enhance the security of mineral tenure. A historical analysis of the development of regulation is employed to explain the theoretical foundation of mining regulation in the country.

1.4.2. Research parameters

There is no universal definition of the concept of security of mineral tenure and this study does not purport to be a comprehensive study of the concept. A limited discussion of the broad and narrow conception of the concept of security of mineral tenure is undertaken in this work. The broad conception of the concept of the security of mineral tenure is preferred in this study.

1.4.3. Limitations affecting the research

The final limitation of this work relates to the proposed amendments contained in the Bill. The Bill is currently before the Parliament of Zimbabwe, any changes made after the 31st August 2018 is not considered in this work.

1.5. Relevance of the research

Zimbabwe is currently reforming its mining code in order to strengthen the security of mineral tenure, optimise production and attract investment to the sector. The reform of the code is an on-going process and this study therefore, seeks to contribute to the reform agenda.

1.6. Chapter overview

Chapter one introduces the contextual background and the contribution of the mining sector to the general economy of Zimbabwe. The chapter also sets out the aims and objectives of the study as well as the methodology adopted to achieve the set aims and objectives. Chapter two defines the key concepts shaping this study and the importance of the concept of security of mineral tenure in the mining investment decision making. Chapter three discusses the theoretical basis of regulation of mining in Zimbabwe by undertaking a historical study of the evolution of regulation of mining from Rhodesia to Zimbabwe. Chapter Four sets out the regulatory framework for the acquisition of mining rights, the maintenance and loss of rights under the MMA and the changes proposed under the Bill to the regulatory framework. Chapter five undertakes a comparative analysis of the security of mineral tenure under the MMA and the Bill and identifies security of tenure issues arising from regulation and Chapter 6 is the conclusion and recommendations.

CHAPTER TWO – UNPACKING KEY CONCEPTS.

2.1. The Concept of Security of Mineral Tenure

There is no consensus on the meaning of the concept of Security of Mineral Tenure.¹⁵ However, two standard views stand out whenever the concept is discussed. These are conveniently described as the 'broad' and the 'narrow' conception of the concept of the security of mineral tenure.¹⁶ Each of the two conceptions focuses on the impediments in mining regulation which may affect the right of an investor to develop a mining asset, operate without interference or threat of interference and dispose of mineral production profitably.¹⁷

2.1.1. *The Narrow Conception of the Concept of Security of Mineral Tenure*

In most jurisdictions the development of a mine occurs in sequential phases conveniently described as the 'mining sequence' or 'mining phases.'¹⁸ In the inception of the mining phase, the mining investor obtains an exploration permit/licence.¹⁹ The exploration permit/ licence gives the mining investor the right to access land and carry out exploratory work for purposes of making a commercial decision on whether or not to proceed with mining. Once minerals have been discovered in commercial quantities and quality justifying development of an asset, the mining investor then applies for a mining right which entitles him to access the mining site, develop the asset, extract and dispose the resource profitably.²⁰

The transition from the exploration permit/licence to a mining right raises certain key tenure issues.²¹ Questions arise whether a mining investor who has committed risk capital in conducting exploratory

¹⁵ M.O Dale; 'Security of Mineral Tenure as a key issue Facing the International Mining Company: a South African Perspective,' J. Energy & Nat. Law 298 at page 299 the author states that, 'Security of tenure has been defined as referring 'to the length of time for which the mining company will have a particular mining right.'

¹⁶ M.K. Ayisi; 'Ghana's New Mining Law: Enhancing the Security of Mineral Tenure,' 27 J. Energy & Nat. Resources Law, 66 (2009) 75 para 5.

¹⁷ H. Van Niekerk; 'Towards a New Understanding of Security of Mineral Tenure; Demise of a Property law Paradigm,' LLD Thesis, University of Cape Town. The author refers to, 'the uncertainties affecting a profitable development of a mine as an issue of security of mineral tenure.'

¹⁸ Note 3 page 2. para.1.

¹⁹ In some jurisdiction a recognisance licence is granted.

²⁰ E. Bastida; 'A Review of the Concept of Security of Mineral Tenure: Issues and Challenges,' 19 J. Energy & Nat Law. 31 (2001), p. 35.

²¹ *Ibid* note 6.

work must be granted an automatic mineral right once a commercial discovery has been made? This guarantee of a mining right after successful exploratory work has been termed as the 'narrow' conception of the concept of security of mineral tenure.²² The entitlement to a mining right after successful exploratory work has classically been defined as 'a reasonable entitlement for extraction rights after a successful completion of the exploration phase.'²³ The commercial justification for guaranteeing extraction rights after successful exploratory work is apparent from the nature of mining. Exploratory work involves significant investment which is associated with the risk that the exploratory work may not result in grades and quantities justifying mining.²⁴ Because of the uncertainty of mining geology and the volatility of commodity prices, exploratory work constitutes a huge calculated gamble by the mining investor. Given these risks associated with exploratory work, it is generally thought that unless an investor is guaranteed of obtaining a mining right, there may be little justification for committing capital to undertake exploratory work.²⁵

The Peruvian and Bolivian mining codes achieve security of mineral tenure in this narrow sense by combining the exploration and exploitation rights into a single concession.²⁶ A single permit for exploration and mining is granted without any recourse to administrative bureaucracies after a commercial discovery. In most countries however, the law will require proof of an environmental and social Impact Assessment or technical and financial competence before a mining right can be granted. There is no automatic right from exploration to mining right. Often, exploration permit/licences and mining right are interposed by administrative discretion.

2.1.2. Limitations of the Narrow Conception of the Security of Mineral Tenure

The development and operation of a mine occurs over several years constituted into different mining phases. Various risks are encountered during the construction phase, production and reclamation phases. A restive community may for example, withdraw its social licence to operate from the mining investor through persistent picketing and protests. In this sense, the withdrawal of the social licence to operate by the community will undermine the ability of the investor to develop the asset or continue with the project. In this sense, the withdrawal of the social license to operate may be

²² T. Walde; 'Investment Policies and Investment Promotion in the Mineral Industry,' (1991), 6 ICSID Foreign Investment Law Journal, 1 (Spring) at 102 as quoted in, E. Bastida, 'A Review of the Concept of Security of Mineral Tenure: Issues and challenges,' 19 J. Energy & Nat. Law 31 (2010) p35.

²³ *Ibid* note 20, p32.

²⁴ D. Singer and R. Kouda; 'Examining Risk in Mineral Exploration,' Natural Resources Research, (1999) vol. 2 Issue 2, p 111-122.

²⁵ *Ibid* note 6 p 32.

²⁶ *Ibid* note 20 p.40.

understood as a security of tenure issue.²⁷ Further, in jurisdictions in which the development of a mine follows a sequential order, more licences/permits apart from the mining right may be necessary in order to continue operations. Any time delays or rejection of an investor's application for such licences may affect the security of and continuity of mineral tenure.²⁸ Other risks faced by investors way after the transition from the exploratory permit/licence include, the threat of nationalisation or expropriation without compensation, local content requirements such free carried local ownership which may impair the investment, requirements to market and sale minerals in a regulated market controlled by the host government. The existence of risks affecting the security of mineral tenure after the transition from exploration to a mining right clearly demonstrates the limitations of the narrow conception of the security of mineral tenure.

Risks in a mining venture are not restricted to the transition from an exploration permit to a mining right. Preferred is a conception of security of mineral tenure which takes into account all uncertainties which may interfere with the profitable development of a mine.²⁹ Put differently, the security of mineral tenure must be conceptualised within the life of a mine from the granting of exploratory permit, through the granting of a mineral right, development of a mine and reclamation.

The narrow conception may also be criticised for its insistence on an automatic right from exploratory permit to a mining right. In making such an insistence, the narrow conception prefers the interests of the mining investor to those of the host nation and the host community. Granted, history has demonstrated that the efficient development of mineral resources is best achieved by the private sector in free market economies.³⁰ In most developing countries such investors are powerful international mining companies whose capacity in negotiating terms with host governments is unmatched. Invariably, the call for an automatic right to mine after a successful discovery rings louder with such investors. However, mining is a footprint industry; the development of a mine has the potential to affect host nations in both positive and negative ways.³¹ As a result, host nations may very well have legitimate concerns for insisting on an Environmental and Social Impact Assessment (EIA) or Environmental Management Plans (EMP) to ensure that the envisaged effects of the development of a mine are adequately addressed during the life of a mine.

²⁷ A 'Social License to Operate' is the authority granted by host communities to a mining operation beyond the 'black letter' regulatory requirements, see generally, K. Moffat and A. Zhang, 'The paths to social licence to operate: An integrative approach model explaining community acceptance of mining,' *Resources Policy*, vol. 39, March 2014, p 61-70.

²⁸ J. Otto; 'Security of Mineral Tenure: Time Limits' in E. Bastida and J. Warden Fernandez; 'International and Comparative Mineral Law and Policy: Trends and Prospects', (The Hague: Kluwer International 2005).

²⁹ *Ibid* note 16.

³⁰ *Ibid* note 12, p.301.

³¹ *Ibid* note 26, p.26.

Host nations have an interest in the optimal development of mineral resources and may very well insist on conditions which ensure optimal development before a mining right can be granted such as technical, financial capacity and work programmes. The fact that such conditions are imposed should not be viewed as detracting from the security of mineral tenure. Failure to take such local concerns into account in granting mineral rights may in itself become an issue of security of mineral tenure. Radical groups may seize the opportunity as a rallying call for renegotiation or cancellation of mining rights on the basis that the government negotiated a bad deal for the community. The key is always to maintain a balance between the interests of an investor who has committed risk capital in exploratory work and the legitimate concerns of the host nation. One way of achieving this delicate balance is to give the mining investor priority where there are competing applicants for the granting of a mineral right over the same location.³²

In light of the criticism above, the narrow conception must therefore be understood as the first phase of an otherwise broad conception of the security of mineral.

2.1.3. The broad conception of the concept of security of mineral tenure

Omalu and Zamora argue that, 'the second phase of mineral tenure security involves the certainty of rights obtained and conditions under which the rights obtained in the exploration and mining stages may be revoked or lost, transferred to an eligible third party or mortgaged in order to raise funds or other legitimate purposes.'³³ This also deals with the element of discretion in the granting of mineral rights.³⁴ This broad conception of the security of mineral tenure focuses on the impediments to profitable development of a mine from the grant of an exploratory permit to mine development and closure. The World Bank in its policy guidelines for Latin America insists on a broad conception of the security of mineral tenure and has 'stated that a regime of secured tenure ensures a mineral right once granted, cannot be suspended or revoked except on specified grounds which are clearly set out by law, and provides reasonable assurances guaranteeing the continuity of operations over the life of the project.'³⁵ Conditions which affect the security of mineral tenure in this broad conception may be stated as follows;

³² *Ibid* note 19, p36.

³³ M.K Omalu and A. Zamora; 'Key issues in Mining Policy: A Brief Comparative Survey on the Reform of Mining Law', (1999) 17 J. Energy & Nat. Resource Law 38.

³⁴ The World Bank; 'Granting of Mineral Rights: A Good Practice Note:' World Bank Project-Extractive Industries Source Book Programme, for the University of Dundee, 2010, p.10.

³⁵ *Ibid* note 19, p.37.

- a) Conditions under which mining rights may be revoked or lost- it is important that the rules of the game must be defined upfront. Requirements for Work Programmes must clearly be defined in the mining code.³⁶
- b) Right to transfer Mining rights or permits- In order to develop mines profitably, the mining investor must be given latitude to transfer rights. Invariably, exploratory work is carried out by mining juniors with little capacity to develop a mining asset optimally. In such cases, the mining junior should be at liberty to alienate its rights to a mining major to allow for commercial development of an asset subject to reasonable requirements for notification to authorities.³⁷
- c) Right to securitise mining rights- In order to develop a mine, the mining investor will need to raise capital. The mining investor must therefore, be given latitude to securitise rights for such purposes. Reasonable requirements for regulatory approval for such securitisation or alienation must not be couched in such a way as to make the exercise of the right nugatory. Mineral tenure security requires certainty of the conditions under which mineral rights and titles may be mortgaged.³⁸
- d) Length of Time for which rights are granted- long lead times are required between the granting of a mineral right and realisation of profit. The regulatory regime must therefore, allow sufficient time for the development of an asset to allow the investor to repay loans and achieve a reasonable return on investment (ROI).³⁹
- e) Administrative discretion; 'unregulated discretion coupled with contradictory rules and procedures breeds' corruption.⁴⁰ Excessive regulation and cumbersome procedures coupled with unregulated discretionary powers constitute a considerable obstacle to private financing of mining enterprises.⁴¹ The regulatory framework must aim at reducing bureaucratic discretion to ensure security of mineral tenure.
- f) Time frames for administrative actions- the regulatory framework must set out timelines for making administrative decisions and the consequences of failure to act within such time frames.⁴²

³⁶ *Ibid* note 19, p.36.

³⁷ *Ibid* note 35.

³⁸ C. Andrews; 'Mining Investment Promotion: a view from the Private sector,' (1991), 15 Natural Resource Forum, 50-58.

³⁹ *Ibid* note 15.

⁴⁰ *Ibid* note 19, p. 37.

⁴¹ The World Bank, 'Strategy for African Mining,' World Bank Technical Paper No.181, Africa Department Series (Mining Unit, The World Bank, Industry and Energy Division, Washington DC) (1992).

⁴² *Ibid* note 27.

- g) Recourse against administrative decision- It is considered good practice for the regulatory framework to make provision for recourse against administrative decisions in courts or some other tribunal.⁴³

In recent times, scholars have added the right of an investor to retain a mining right even if he is unable to develop the mine due to unfavourable market conditions, or lack of funding to the conception of security of mineral tenure.⁴⁴ In the case of an on-going operation, the investor must be allowed to interrupt production awaiting favourable marketing conditions to return. In some jurisdictions this is achieved through the application by the investor for a retention right or permit.⁴⁵

The broad conception of the concept of security of mineral tenure encompasses not only the continuity of tenure from the exploratory permit to a mining right, but the certainty and stability of mineral rights throughout the life of a mine. The broad conception of the security of mineral tenure is preferred in this work.

2.2. Ways of protecting the security of mineral tenure

Host governments may employ various ways in protecting the security of mineral tenure. One of such ways is the privatization of ownership of mineral resources. According to Dale, 'a privatised mineral rights system...permits private ownership of mineral rights, which offers greater security and continuity of mineral tenure to investors' than the state oriented system.⁴⁶ In a private law system, the ownership of land and the mineral resources beneath the land can be subject of ownership by two different persons.⁴⁷ The land owner who owns the mineral rights may alienate his rights to a third party to develop the mineral resource whilst he retains ownership of the land. In this system, the transition from an exploratory permit to a mining right occurs within the private law sphere by the exercise of the option in a prospecting contract granted by the private mineral right holder, thus securing for the investor the mineral right itself or a lease conferring the right to mine.⁴⁸ This process

⁴³ *Ibid* note 33.

⁴⁴ W. Onorator and P. Fox; 'The role of the World Bank and other Multilateral and Private Sector Finance Institutions in Resource Development in Developing Countries,' 41 Rock Mountain Mineral Law Foundation, Chap 7, p1-38.

⁴⁵ Retention permits are issued in both Zambia and Botswana, allowing an investor to interrupt production subject to review by authorities.

⁴⁶ *Ibid* note 15 p.301.

⁴⁷ *Ibid* note 46.

⁴⁸ *Ibid* note 15 p.303.

occurs without any state participation and therefore, the tenure issues raised earlier relating to exercise of bureaucratic decision making do not arise.⁴⁹

The World Bank in its Strategy for African Mining has emphasised certain key issues to protect the security of mineral tenure in mining codes. They state that the mining code must;

- 'Clearly specify the ownership of mineral resources (for national or provincial) and vest a single authority with the power to grant exploration and mining rights.
- Contain explicit criteria for the allocation of mining rights from exploration to mining rights, and allow exploration and mining rights to be transferrable and saleable.
- Prescribe procedures for the settlement of disputes either in the courts or by arbitration.⁵⁰

In so far as licenses and permits are concerned, security of mineral tenure can be achieved through the obligatory grant and renewal of licences and permits.⁵¹ The law must provide that the owner of an exploratory permit is a competent applicant for a mining right.⁵² The grounds for termination of mineral rights must be clearly set out in the law. A further issue for strengthening the security of mineral tenure relates to regulatory time delays. Significant time delays are encountered in applying for necessary permits and licences. International best practice requires that the regulatory framework must state time limits within which administrative decisions must be taken and consequences for failure to act.⁵³

A further issue in strengthening the security of mineral tenure relates to the nature and content of a mineral right. 'The legal character of mineral rights or titles, while seldom clear, is important in various contexts, particularly in determining the security which they provide to the holder of the title against subsequent government interference.'⁵⁴ While much of the attention in conversations on security of mineral tenure is aimed at limiting government interference, investors and holders of mineral rights 'are also concerned with security as a matter of property law'.⁵⁵ According to Dale, 'where a mineral right is treated as real property, it constitutes more than a mere licence, it grants rights analogous to servitudes and easements which are freely transferable.'⁵⁶ Further, most modern constitutions offer

⁴⁹ *Ibid* note 15.

⁵⁰ The World Bank; 'Strategy for African Mining', Mining Unit and Energy Division, Washington DC, World Bank Technical Paper number 181, 1992.

⁵¹ *Ibid*, note 45, p.300.

⁵² *Ibid*, note 20.

⁵³ *Ibid*, note. 27.

⁵⁴ M.K Ayisi; 'The Legal Character of mineral rights under the new mining law in Kenya', J. Energy & Nat. Resources L. 35:1 25-45 at p.26

⁵⁵ *Ibid*, note 53 at p.27.

⁵⁶ *Ibid*, note 15 p 302.

protection against compulsory acquisition of property. Designation of mineral rights as 'property' will entail protection of mineral rights on the constitutional plane.⁵⁷ This strengthens the security of tenure. The nature and content of mineral rights also determines the security interests which can be placed over the mineral right. Lenders will be interested in knowing whether they have a right to delivery of the mineral right or permit upon a security interest being placed over it or whether they can foreclose on the right in the event of default by the borrower.⁵⁸ Designation of mineral rights as real rights in property allows the placing of various security interests on the right which may not otherwise be available where such rights are merely statutory entitlements.

State participation in mining activities may affect the profitability of a mining venture and therefore become a security of mineral tenure issue. In most developing countries, the state requires a free carried interest in foreign owned mining companies.⁵⁹ This conflates the government's supervisory and regulatory role with operational powers. 'The modern approach emphasises the complete separation of the operational sphere of industry, and the supervisory and regulatory sphere of the government.'⁶⁰ When a government owns equity in a mining venture, the effective rate of return is less and the project may not be sufficiently appealing.⁶¹

In less mature jurisdictions with little mining history, Model Mining Agreements (MA) can be employed as a means of achieving certainty in the granting of mineral rights. The mining agreement is viewed as a 'risk reducing mechanism and as a vehicle for providing security in relation to duration, extension, conversion, retention, suspension and termination.'⁶² The mining agreement must not however, duplicate the mineral rights in the mining code but may provide clarifications or assurances regarding specific issues such as the transition from exploration to a mining right, marketing and export rights etc.⁶³

2.3. The significance of security of mineral tenure to mining.

Unlike other types of investments, mining is geographically specific, once a decision to mine has been made and the infrastructure for the development of a mining asset has been constructed, negotiating

⁵⁷ *Ibid* note 56.

⁵⁸ *Ibid* note 54, p28.

⁵⁹ For example under the Indigenization and Economic Empowerment policy in Zimbabwe 51% free carried interest is reserved for locals. The policy now applies in the diamond and platinum sectors only.

⁶⁰ *Ibid* note 33.p18.

⁶¹ *Ibid* note 60.

⁶² *Ibid* note 15, p.300.

⁶³ *Ibid* note 15, p.300.

power shifts from the investor to the host government. For this reason, the mining investor views the security and continuity of tenure as an important consideration in the mining investment decision making.⁶⁴

In a recent survey, out of 60 possible factors, security of mineral tenure was ranked 2nd in the exploration stage and 1st in the mining phase in the order of importance to mining companies.⁶⁵

Table 1. Ranking of Transnational Mining Companies’ decision factors at the Exploration and Mining Stages.⁶⁶

Ranking.		
Exploration	Mining	
Stage	Stage	Decision Criteria
1	n/a	geological potential for target mineral
n/a	3	measure of profitability
2	1	security of mineral tenure
3	2	ability to repatriate profit
4	5	consistency of mineral policies.

In another Survey of transnational mining companies, over 50 percent of the respondents listed security of mineral tenure as ‘critical and non-negotiable’.⁶⁷ These surveys clearly demonstrate that geological factors alone may not be sufficient in attracting mining investment.⁶⁸ This view is supported by the World Bank in its Strategy for African Mining in which they ‘submit that security and continuity of tenure are essential to attract the necessary risk capital...’⁶⁹ Without assurances for the security

⁶⁴ The World Bank; ‘A mining strategy for Latin America and the Caribbean,’ World Bank Technical Paper No. 345, Washington: Industry and mining Division, Industry and Energy Department (1996) p14.

⁶⁵ J. Otto; ‘Foreword: The Changing Nature of Regulatory Framework for Mining Ventures,’ 14. Energy & Nat. Resource L. (1996) 251 at p.256.

⁶⁶ *Ibid* note 65, p256.

⁶⁷ *Ibid* note 15, p298.

⁶⁸ *Ibid* note 15, p.299.

⁶⁹ *Ibid* note 15, p.299.

and continuity of tenure, there may be little incentive for a mining investor to commit any investment into exploratory work.

2.4. Summative Remarks

The Concept of security of mineral tenure can be understood in two complimentary ways, i.e. a narrow conception in which the concept is understood as a reasonable entitlement to a mining right after a successful discovery of minerals. This narrow definition of the concept arises in state oriented systems in which the grant of mineral rights follows a sequence of mining phases. The broad conception of the doctrine focuses on the certainty and stability of rights throughout the life of mine. It places emphasis on the conditions under which rights are granted or may be lost, whether security interests may be registered against rights as a means of raising funds for mining development, whether rights may be transferred and whether an investor may interrupt production on account of unfavourable marketing conditions without losing his right.

Issues that affect the security and continuity of mineral tenure include unregulated administrative discretion, ambiguous regulatory provisions, lack of time limits for administrative action, state participation in mining ventures which is not accompanied by any capital contribution. In order to strengthen the security of mineral tenure, host governments must make clear regulations which limit administrative discretion and provide avenues for challenging administrative discretion. Recourse may also be heard to model mining agreements which can be employed as a vehicle for minimising the risks faced by mining investors.

Finally, the security of mineral tenure is an important consideration in the mining investment decision making. Studies have revealed that unless the law in any mining jurisdiction significantly reduces the risks faced by mining investors, even with an attractive geology it may-be very difficult to attract investment.

CHAPTER THREE – UNDERSTANDING MINING POLICY AND REGULATION IN ZIMBABWE.

3.1. Understanding regulation.

There is no universal definition of regulation. In this work, regulation shall be taken as the employment of legal regulations to attain certain socio-economic objectives.⁷⁰ Scholars however, make a distinction between social and economic regulation. Economic regulation consists of two variants *i.e.* structural regulation and conduct regulation.⁷¹ Structural regulation is employed in regulating market structure, examples would be technical and financial qualifications before a mining licence/permit is granted, local content or indigenization requirements etc.⁷² Conduct regulation is aimed at regulating behaviour in the market, such as the prohibition of selling of alcohol at mining sites. Social regulation on the other hand is aimed at regulating threats to the environment, distribution of rents to communities affected by mining enterprises, safety, health and labour.⁷³

The theory of economic regulation is based on two important insights.⁷⁴ The first insight is that regulation is made for the benefit of the public or some subclass of the public.⁷⁵ In this view, taxes which injure the general public such as the two percent tax on electronic transfers in Zimbabwe are costs of some larger social goal (raising public revenue for investment in social infrastructure).⁷⁶ The second view propounds that the ‘theory of cartels may help us locate demand and supply curves’.⁷⁷ ‘The theory of cartels teaches that the reluctance to co-operate in maintaining a monopoly price is most likely to be overcome if the number of sellers whose actions must be co-ordinated is small, which tends to reduce the cost of co-ordination and policing, and if the interests of the sellers are identical or nearly so which tends to reduce the costs of securing agreement. Likewise in regulatory sphere, the fewer the prospective beneficiaries of a regulation, the easier it will be for them to co-ordinate to obtain regulation.’⁷⁸

In summary regulation constitutes the enormous public power to intervene in industries and distribute rights and obligations for the benefit of the public or a subclass of the public. Some authorities argue that regulation is a reflection of the capture of government by interests which use the state’s coercive power to protect their interests in the guise of regulation.⁷⁹ Regulation is also aimed at achieving social goals such as environmental protection, labour, safety and health.

⁷⁰ J.D. Herton; ‘General Theories of Regulation’, Economic Institute/Utrecht University 1999, p. 224.

⁷¹ *Ibid* note 68.

⁷² *Ibid* note 68.

⁷³ *Ibid* note 68.

⁷⁴ R.A. Posner; ‘Theories of Economic Regulation’, Working Paper Number 41, Centre for Economic Analysis of Human Behaviour and Social Institutions, National Bureau of Economic Research, May 1974, p.15.

⁷⁵ G.J. Stigler; ‘Theory of Economic Regulation’, *The Bell Journal of Economics and Management Sciences*, vol. 2 No. 1 (Spring, 1971), pp3-21 at p.3

⁷⁶ The Government of Zimbabwe introduced a transfer tax of 2% on all electronic transfers above USD\$10.00 as a means of raising public revenues.

⁷⁷ *Ibid* note 68, p16.

⁷⁸ *Ibid* note 68, p19.

⁷⁹ *Ibid* note 68, p 14.

Potentially regulation may affect private interests. Costs are incurred in compliance, sanctions may be meted out for breach and these may affect not only profitability, but ultimately the security of investment itself. These issues are of importance in the broad conception of the security of mineral tenure and will be explored in the following paragraph.

3.1.1. Implications of regulation on the security of mineral tenure in the Extractive Industries.

The manner and extent of regulatory interference at any given time will have an effect on the common law protection of rights and security of mineral tenure.⁸⁰ In turn, 'the manner and intensity of regulation of a mining sector by the government informs the theoretical basis of mineral law'.⁸¹ Conveniently, two theoretical bases are prominent namely, the property based system in which the security of mineral tenure is enhanced by the private law aspects of mineral law and the public law system in which the administrative law aspects of mineral law will be essential in protecting mineral tenure. In public law based systems, the government plays a significant role in the acquisition, maintenance, transfer and loss of mineral rights. Invariably, in systems where government discretion is extant in the regulation of the mining sector, property rights are weaker and therefore, protection of mineral tenure can only be achieved by legislative provisions.⁸² On the other hand, in 'privately oriented systems for example, conversion from an exploration right to a mining right occurs purely in a private context'.⁸³ In such systems, no governmental consent is necessary in securing a mining right. Such systems therefore, offer better protection of mineral tenure than the public law based systems.⁸⁴

Regulation is not however, an end in itself. 'Governments regulate extraction of mineral resources for different reasons and in pursuit of varying objectives'.⁸⁵ Governments may for example, pursue optimal utilisation of mineral resources through regulation, environmental control, safety and health, requirements for local content as a way of stimulating economic growth in other sectors of the economy and indigenization as a means of ensuring broad based access to natural resources.

It is important therefore, to reconcile the public interest in regulation and the interests of investors. As discussed above, compliance with regulation may entail a cost spend on the part of the investor which may-be difficult to recoup and thereby make marginal investments un-economic. Governments

⁸⁰ H. Mostert; 'Principles and Policies in Perspective', Juta & Company, Cape Town.

⁸¹ *Ibid* note p.18.

⁸² This is the inverse of Dale's proposition that private law based systems offer better security of mineral tenure than public law based systems.

⁸³ *Ibid* note 15, p.303.

⁸⁴ *Ibid* note 80.

⁸⁵ *Ibid* note 18, p.19.

must therefore ensure that regulation protects public interests without necessarily impairing marginal investment or making the cost of compliance so high such that the cost of compliance may end up being viewed as a form of tax.

In summary, the manner and extent of regulation of a mining sector will determine the theoretical bases of a mining sector. Systems dominated by governmental discretion tend to weaken the security of mineral tenure, whilst those based in property law tend to strengthen security of mineral tenure through access to private law remedies. Whatever system is adopted by a government, the system must reconcile the interests of investors and the public interests in attaining sustainable mining.

3.2. Evolution of mineral policy in Zimbabwe and its effect on security of mineral tenure.

In order to fully understand the theoretical basis of Zimbabwe's regulatory system, a study of the evolution of mineral policy in Rhodesia to Zimbabwe is apposite. The current regulatory framework in Zimbabwe has its roots in the military conquest by Cecil John Rhodes and the British South Africa company (BSAC). The main motivation of the British South Africa Company (BSAC) in occupying the country was the anticipation of 'finding another bonanza bigger than the Witwatersrand'.⁸⁶ It was anticipated by the settlers that the country possessed huge amounts of gold deposits than those found in South Africa. 'The mining policy of the imperial state was therefore, designed in such a way as to facilitate the rapid discovery and exploitation of mineral resources.'⁸⁷ The colonial administration quickly instituted a 'finders keepers' law similar to the Californian mining policy.⁸⁸ The policy was designed to reward members of the pioneer column and to facilitate easy development of mineral resources.

As a result of the adoption of the 'finders keepers' policy, the mineral policy in what was then Rhodesia was largely *ad hoc*, whose major driver was the desire to take full advantage of whatever was economic to mine.⁸⁹ The law reflected conquest, the ultimate right to mineral title was vested in the Charter Company (the BSAC) until 1933 when the right reverted to the state.⁹⁰ The law however, allowed easy acquisition of mineral title and other rights which could be passed on through arrangements such as tribute agreements. Two other features of the policy introduced by the colonial

⁸⁶ J. Howard; 'Mineral policy in Zimbabwe: its evolution, achievements and challenges', Resources Policy, vol. 23, No.1/2, pp27-32(1997), p28.

⁸⁷ *Ibid* note 87 para 3.

⁸⁸ *Ibid* note 87.

⁸⁹ *Ibid* note 87 p.28, para 8.

⁹⁰ *Ibid* note 87.

state which shape the current mining policy are worth mentioning. Discovery of a deposit was a prerequisite for granting of mineral title and the obligation to maintaining a mineral right through a work program were part of the legal framework.⁹¹

Another important feature of the colonial mineral policy which still pervades mining policy to this date is state participation in mining ventures. Up until about 1903, 'only companies could develop mines, and in theory at least, a 50% free carried interest was granted to the BSAC for making available mineral title.⁹² This policy inhibited the development of mineral resources and led to the emergence of small scale mining.⁹³ In 1903, the 50% free carried interest for the BSAC was reduced to 30%. This was meant to encourage mining majors to participate in mining. In 1908, the 30% free carried interest was completely abandoned and replaced by a 5% mineral royalty.⁹⁴ This helped in attracting more players to the industry. To this date, mineral royalty remain on the statute books.

In the late 1950s, the government introduced the Exclusive Prospecting Orders (EPOs) which remains on the statute books to this date. The EPOs gave the holder the right to prospect large areas for a period of up to six years.⁹⁵ An application for an EPO was accompanied by a demonstration of technical and financial competence as well as an exploration programme. The introduction of an application process introduced 'significant discretionary element into the allocation of mineral rights for the first time.'⁹⁶ The granting authority was the Mining affairs Board which was dominated by bureaucratic officials together with representatives of farming and other interests.

The post-independence government adopted 'lock stock and barrel' the colonial mineral policy. The government's pro-socialist policies led to the creation of a state owned company, the Zimbabwe Mining Development (ZMDC), to develop mining assets on behalf of the state.⁹⁷ A mineral marketing authority was introduced as a means of curtailing transfer pricing by mining companies. The Minerals Marketing Corporation of Zimbabwe (MMCZ) was tasked with marketing and selling all exported mineral production.⁹⁸ In addition, gold could and to this date can only be sold to Fidelity Printers, a company wholly owned by the central bank. These measures had a telling effect on an investor's right to dispose of mined resources profitably. Under the broad conception of the security of mineral tenure, an investor must have the liberty to dispose of mined resources to a market of his choice

⁹¹ *Ibid* note 87.

⁹² *Ibid* note 87, p.29.

⁹³ *Ibid* note 87, para.4.

⁹⁴ *Ibid* note 87, para 6.

⁹⁵ *Ibid* note 87, para 10.

⁹⁶ *Ibid* note 87.

⁹⁷ *Ibid* note 87, p.30 para 4.

⁹⁸ *Ibid* note 94.

subject to reasonable statutory requirements. This made the mining sector unattractive, up until about 1994 a paltry USD\$150 million represented foreign direct investment into the sector.⁹⁹

In 1994, another important feature was introduced into the mining policy. A 25 year lease for foreign investors was introduced. An exemption from selling minerals produced through the MMCZ was granted.¹⁰⁰

Another important development was the introduction in 2004 of environmental regulations which introduced the requirement of an Environmental Impact Assessment (EIA) as a precondition to development of a mine. The Act also introduced decommissioning requirements as well as minimum environmental quality standards, controlled hazardous waste disposal and Environmental Management Plan (EMP).

Finally, the ghost of a free carried state interest buried in 1903 sprang to life in 2007 in the form of the Indigenization and Economic Empowerment Act (Chapter 14:33). The Act required a 51% free carried interest in foreign owned mining companies. This naturally impaired mining investments and made the development of marginal assets unprofitable. In 2018, the Indigenization and Economic Empowerment Act was repealed in all sectors save for the diamond and platinum sector considered strategic to the new government's development agenda.

The evolution of the mining policy in Rhodesia helps to explain the characteristics of Zimbabwe's mining policy. The state has always played a central role in the acquisition, maintenance and loss of mineral rights. The state grants mineral rights through a bureaucratic Mining Affairs Board. The Board exercises discretionary powers. The dominium in and the right of searching for and mining for and disposing of all minerals is vested in the President.¹⁰¹ The state controls the transferability, securitisation and disposal of mineral rights almost from 'cradle to grave' fashion.

Regulation of mining in Zimbabwe by administrative authorities is comprehensive. An investor must navigate through at least 35 acts of Parliament before obtaining a mineral right. It is safe therefore, to conclude that Zimbabwe is a public law-based system in which security of mineral tenure must be analysed in the context of the administrative procedures through which bureaucratic authorities grant mineral rights.

⁹⁹ *Ibid* note 87.

¹⁰⁰ *Ibid* note 94, para.7

¹⁰¹ Section 3 MMA.

3.3. Summative Remarks.

Governments regulate mining to achieve different objectives. Regulation maybe aimed at achieving optimal utilisation of mineral resources, equitable access to mineral resources and to encourage growth of other sectors. Regulation must however, reconcile the interests of the state and those of the investor whose primary goal is to realise profit for his investment. Over regulation may result in impairment of investments and ultimately affect the security of mineral tenure.

The evolution of the mineral policy from Rhodesia to Zimbabwe helps to shed light on the characteristics of regulation of mining in Zimbabwe. The colonial state mining policy was characterised by state participation in the granting of mineral rights, maintenance and loss of rights. This was achieved through the discretionary powers of the Mining Affairs Board. The state discretionary powers continue to dominate the present day mineral policy.

The predominance of the state in the acquisition, maintenance and loss of rights in Zimbabwe is ample testimony that the country is a public law based system as opposed to a property law based system. It is generally believed that public law based systems undermine security of mineral tenure whereas private law based systems enhance security of mineral tenure. Property law based systems offer better security of mineral tenure than public law systems because the transition to a mineral right occurs in the private sphere without any interference from the state. However, an accurate conclusion on whether a public law based system undermines security of mineral tenure can only be made after a careful study of the provisions of the relevant mining code.

CHAPTER FOUR - REGULATORY FRAMEWORK FOR THE ACQUISITION, MAINTENANCE AND LOSS OF MINERAL TITLES AND RIGHTS.

4.1. Introduction.

Chapter three discussed the underlying philosophy of regulation of mining policy in Zimbabwe from a historical perspective. This is important because regulation of mining activities in the colonial state helps to explain the character of regulation under the post-colonial state. The chapter concluded that Zimbabwe is a public law oriented system. This chapter develops concepts of regulation by setting out the mechanics of the acquisition, maintenance and loss of rights through the exploratory and exploitation phases of mining under the MMA and the Bill. In this I chapter will discuss issues that affect the profitable development of mining assets.

4.2. Exploration Phase.

4.2.1. Acquisition of Exploratory Permit under the MMA.

Exploration for minerals occurs through two permits, namely Prospecting Licence and Exclusive Exploration Orders (EPOs). The right to search for and prospect for minerals stems from a Prospecting Licence. A Prospecting Licence may be issued to any Zimbabwean who is permanently resident in the country and above the age of 18.¹⁰² A Prospecting Licence grants the holder, a right to prospect and search for any minerals, and natural gases on land open to prospecting without removing or disposing of minerals discovered, except for purposes of testing and determining the nature of the minerals discovered.¹⁰³ No drilling or excavation work is permitted save for purposes of testing and determining the nature of the minerals discovered. A Prospecting Licence holder is entitled, and in some instances, obliged, to post on the ground several types of notices; for example, a Prospecting Notice and a Discovery Notice where he has discovered deposits of precious minerals. He will be entitled, among other things, to the right of pegging of one block of, *inter alia*, precious or base minerals within the time frames for pegging as prescribed by the Act.

In terms of s 40 of the MMA, a Prospecting, Discovery or Registration Notice posted on a notice board shall be fixed on a peg. The notices shall be distinctly and legibly written, printed or painted. Paper or other material which is liable to be washed off, or writing liable to be rendered illegible by rain or exposure, shall not be deemed to be a proper marking. In terms of s 45 of the Act, within thirty-one days of posting a registration notice, the holder of a mining location may, on payment of the prescribed fee, apply to the mining commissioner for a certificate of registration. The documents to

¹⁰² Section 20 of the MMA.

¹⁰³ Section 27 of the MMA.

be lodged with such an application include, among others, copies of the Prospecting licence, Discovery notice, Registration Notice, a map of the block, drawn to the prescribed scale, and the consent of the owner of the land on which the area falls, where such consent is required.¹⁰⁴

4.2.2. Duration and Renewability of Prospecting.

An ordinary prospecting licence is valid for a period of two years from the date of issue.¹⁰⁵ There is no provision for the renewal of an ordinary prospecting licence.

4.2.3. Right to Sale, Transfer & Encumber Prospecting Licence.

The sale or transfer of a Prospecting licence is prohibited.¹⁰⁶ Any sale, transfer or encumbrance of the licence is void.¹⁰⁷

4.2.4. Grounds upon which a Prospecting Licence may be lost.

The MMA does not state the grounds upon which the prospecting licence may be lost. However, a reading of sections 17 and 18 of the MMA may give an indication of the grounds upon which a prospecting licence may be terminated. Prospecting in terms of the act is carried out by approved prospectors.¹⁰⁸ The certificate of registration for a prospector is issued by the mining commissioner. A certificate of registration as a prospector may be cancelled or suspended by the Secretary on the direction of the Minister where an approved prospector has been convicted of an offence or where the approved prospector has conducted himself in a manner which in the opinion of the Minister renders it necessary to suspend or cancel his registration as an approved prospect.¹⁰⁹ It would appear to me that the same grounds for which an approved prospector's licence may be revoked are the same grounds on which a prospecting licence may be terminated. The Licence may be terminated for failure to comply with the terms of the licence, for breach of the MMA or where it is necessary in the opinion of Minister to suspend or cancel the licence.

¹⁰⁴ See also *Buby Mineral (Pvt) Ltd. v. Min. of Mines and Mining Development* HH-31/2007.

¹⁰⁵ Section 23 of the MMA.

¹⁰⁶ Section 25 of the MMA.

¹⁰⁷ Section 25 (1). It is however submitted that any acts performed before the sale, transfer or encumbrance are valid. Any other interpretation will lead to an absurd conclusion which may never have been contemplated by the legislature.

¹⁰⁸ Section 15 of the MMA.

¹⁰⁹ Section 17 of the MMA.

4.2.5. Nature of Prospecting Licence.

The MMA does not state the legal nature of a prospecting licence. It is clear however, that a prospecting licence is nothing more than a statutory authorization which only exists at the pleasure of administrative authorities.

4.3. Exclusive Prospecting Order.

An Exclusive Prospecting Order is meant to facilitate large scale mining. Any person may make an application for an exclusive prospecting order to the mining affairs Board.¹¹⁰ The applicant must deposit USD\$100 per month for every hectare or part of a hectare of the area in respect of which the order is sought.¹¹¹ In addition, the applicant must provide details of his financial capacity, where required by the Board provide performance guarantees, particulars of the minerals he wishes to explore and mine, a sketch plan of the area sought to be embraced by the order, a statement on whether he wishes the order to authorise him to mine specific minerals, a program of the prospecting operations which he intends to carry out and any other information the Board may request.¹¹²

If the Board is satisfied that the applicant is a 'fit and proper person' to obtain the order, that he possess sufficient financial capacity and that it is would not be against national interest, the Board may recommend to the Minister that an order be made.¹¹³ The Minister will make a recommendation for the issuance of the order to the President.¹¹⁴ The President is empowered to approve or reject the application as he may deem fit.¹¹⁵

4.3.1. Duration and Renewability of Order.

An Exclusive Prospecting Order is valid for a period of 3 years. However, this period may be extended by the Minister on recommendation by the Board for a period not exceeding 3 years.¹¹⁶

¹¹⁰ Section 87 of the MMA.

¹¹¹ Section 87 (2) of the MMA.

¹¹² Section 87 (2) (b.)

¹¹³ Section 89 of the Board.

¹¹⁴ Section 90 of the MMA.

¹¹⁵ Section 90 (2) of the MMA.

¹¹⁶ Section 94 of the MMA.

4.3.2. Right to Sale, Transfer or Encumber Exclusive Prospecting Order.

The Exclusive Prospecting Order may not be sold, transferred or encumbered without the permission of the Minister in writing.¹¹⁷ The terms upon which the cession or encumbrance of an Exclusive Prospecting Order maybe made are at the discretion of the Board.

4.3.3. Legal Nature of an Exclusive Prospecting Order.

The Act does not define the legal nature of an exclusive prospecting order, save to state that the rights granted under an exclusive prospecting Order are personal to the holder and may not be passed to a third party. It must follow therefore, that the rights under the order are also statutory authorisations and not real property.

4.4. Changes proposed to the Prospecting Licence and Exclusive Exploration Order under the Bill.

The Bill introduces the concept of ‘limited real rights’. An exclusive prospecting licence, exclusive exploration title and mining rights granted under the Bill are ‘limited real rights’.¹¹⁸ The Bill does not however, elaborate on the nature of this ‘limited real right’. The Bill also introduces an Exclusive Prospecting Licence.¹¹⁹ An application for an exclusive prospecting order may be made by an individual, body corporate or a syndicate of either one or the other. The application for the licence is made to the Cadastre Registry, this is another innovation introduced in the Bill. The Mining Cadastre Registrar may refuse to issue the order on similar grounds that the Board can under the MMA, refuse to issue a licence. The holder of an Exclusive Prospecting licence may not export any minerals without the written permission of the Minister which permission shall not be unreasonably withheld. The purpose of such exportation is limited to having such minerals analysed, valued or tested outside Zimbabwe.¹²⁰ An Exclusive Prospecting licence under the Bill is valid for a period of twelve months with no option of renewal.¹²¹ Sale or cession of the right is prohibited.

¹¹⁷ Section 92 of the MMA.

¹¹⁸ Section 2A of the Bill.

¹¹⁹ Section 20 of the Bill.

¹²⁰ Section 27(4) of the Bill.

¹²¹ Section 21 (2) of the Bill.

The Bill also introduces an Exclusive Exploration licence.¹²² An application for a licence is made to the Board, the same considerations for an Exclusive Prospecting Order under the MMA are considered by the Board for the grant of an Exclusive Exploration Licence. The Board will submit a recommendation to the Minister who must forward the recommendation to the President who will exercise discretion on whether or not to issue the licence.¹²³ The rights under an Exclusive Prospecting Licence are personal to the holder and may not be sold, transferred or assigned without the written authorisation of the Minister.¹²⁴ A licensee is also required to submit a programme of works every 6 months.¹²⁵ A licensee is further required to pay fees to the mining Cadastre Registrar.¹²⁶ Where a licensee has breached terms of his licence, the Board is obliged to notify the licensee of the fact in writing and call upon the licensee to remedy the default within a 'reasonable time'.¹²⁷

4.5. Exploitation Stage.

Mining rights can be held under various forms, the simplest of which is a mining claim and a mining right.¹²⁸

4.5.1. Mining Claim.

A mining claim is a permit to mine. A single claim will normally cover a very small area. It is common to have several contiguous claims grouped into a block of mining claims. The pegging has to be maintained and annual reports have to be submitted to the Mining Commissioner for the relevant district for the preservation of the mining right.¹²⁹

4.5.2. Mining Leases.

Any person who holds a contiguous mining location may make an application for a mining lease to consolidate his mining location.¹³⁰ A mining lease gives the holder an exclusive right to mine any ore or deposit of any mineral mentioned in his mining licence.¹³¹ Although the Act does not define the

¹²² Section 87 of the Bill.

¹²³ Section 90 (2) of the Bill.

¹²⁴ Section 100(1) of the Bill.

¹²⁵ Section 101.

¹²⁶ Section 103.

¹²⁷ Section 104 (b).

¹²⁸ S. Moyo; 'The Future of Mining Law in Zimbabwe,' Paper presented at Mine Entra Conference, September 2013.

¹²⁹ *Ibid* note 129.

¹³⁰ Section 135 of the MMA.

¹³¹ Section 135 of the MMA.

legal nature of a mining lease, it is submitted that a mining lease issued in terms of the act is a personal right.

4.5.3. Special Mining Leases.

A special mining lease may be issued to a holder of one or more contiguous mining locations to develop a mine provided that the investment in the mine will wholly be in foreign currency and will exceed USD\$ 100 million in value and the mine's export is principally intended for export.¹³²

4.5.4. Special Grant.

A special Grant gives the holder the right to carry out prospecting operations or mining operations.¹³³ Special Grants are mainly issued in respect of coal, mineral oils and natural gases.¹³⁴ A special grant is a personal right specific to the grantee.¹³⁵

4.6. Preservation of Mining Rights.

The rights under the MMA are maintained by annual inspection of works by the mining commissioner.¹³⁶ The amount of work and capital expenditure required to obtain an inspection certificate on a base mineral claim is ZW\$400 and on precious metal claims ZW\$250.¹³⁷ The holder of the right must submit a programme of works. The Act also defines the period within which work must be carried out, being 6 months after registration or issue of a mining lease in respect of a first inspection certificate.¹³⁸ A second inspection certificate must be obtained within 12 months from the date of the registration of the block or the issue of the mining lease.¹³⁹ Succeeding inspection certificates shall be obtained for every 12 months from the date of expiry of the first inspection certificate. The holder of Precious stones blocks is required to work the block continuously.¹⁴⁰

¹³² Section 159 (1) (a), (b) of the MMA.

¹³³ Section 291 (1) (a), (b) of the MMA.

¹³⁴ Part XX section 298 of the MMA.

¹³⁵ Section 302 of the MMA.

¹³⁶ Section 205 of the MMA.

¹³⁷ Section 205(1)(c).

¹³⁸ Section 204 MMA.

¹³⁹ Section 198 (1) of the MMA.

¹⁴⁰ Section 218.

4.6.1. *Right to interrupt production.*

The MMA allows the investor to interrupt production by the issuing of a retention licence where he has reason to believe that he or she is likely to fail to develop or work, or adequately develop or work a block by the time that the inspection falls due.¹⁴¹ The MMA also allows the holder of a right to interrupt production on the basis that market conditions prevailing in respect of any other circumstances relating to any mineral are such as to discourage production of such mineral and such conditions have prevailed for at least two years *prior* to the application for a retention licence.¹⁴² No more than 3 consecutive retention licences may be issued.¹⁴³

4.7. **Transferability of mining rights.**

Mining rights cannot be transferred or alienated in any manner without the approval of the Mining Commissioner. Mining leases may not be transferred except to a person approved by the Mining Affairs Board in consultation with the owner of the ground covered by the lease. The Board exercises discretion in approving the transfer and will consider the financial status of the transferee. Similar provisions are applicable to a Special Mining Lease. The transferability of a Special Grant will ordinarily be regulated in terms of the special grant. The consent of the President is required for the transfer of a mining lease and special grant.

4.8. **Securitisation of mining rights.**

Mining locations may be hypothecated with the consent of the Mining Commissioner. The hypothecation may be for the whole or part of the mining location. The consent of the Minister is necessary for the hypothecation of a precious stone or mining lease on which the principal mineral being mined or to be mined is a precious stone. Upon approval, the hypothecation is recorded at the office of the secretary of the Ministry of Mines and Mining Development. A register with full particulars as to the date and nature of the transaction, the names of the parties concerned, the official number of the mining location, the stipulated amount of the hypothecation to be effected and the rate of interest if any for such hypothecation. Note however, that a mining location does not include an exclusive prospecting reservation, special grant or special grant issued in terms of part XX of the Act.

¹⁴¹ Section 221 B.

¹⁴² Section 221B (c).

¹⁴³ Section 22b (6).

1.8.1 Cancellation of Rights.

Apart from other grounds upon which the Minister may cancel rights in the Act, he is also empowered to cancel mining rights on the basis that the miner has failed to commence mining operations, to declare any output from the mining location in terms of the MMA or any other act. He is also entitled to cancel the right where a false return regarding a miner's output from his location has been made. Where a miner's rights are cancelled, such mining location shall be declared to have been forfeited and the right shall revert to the President.

4.9. Changes to mining rights proposed in the Bill.

4.9.1 Registration of mining rights.

The Bill introduces a computerised Cadastre Registry of Mining rights and titles. Mining titles which may be registered in the cadastre of mining rights and titles include an exclusive prospecting licence, an exclusive exploration licence and a special grant for exploration. Mining rights which may be registered include a certificate of registration of a block of precious metal claims, a certificate of registration of precious stones, a certificate of registration of a block of base mineral claims, special mining lease, mining lease and special grants for mining. The mining Cadastre is a public institution and the register of mining titles and rights may be accessed by the public upon payment of a prescribed fee. The 'first come first served' principle applies where two or more applications for mining rights are received for the same overlapping areas.

4.9.2 Transferability of mining rights.

No changes are made by the Bill in respect of the transferability of mining rights. The approvals in the current MMA will remain applicable. The Bill however, introduces an auction system for the right to mine certain minerals whenever there is need and it is in the best interests of the nation. The process of auctioning shall be contained in the regulations which are not yet in place. Further, changes in shareholding of a company holding mining title or right must be notified to the Minister. No shareholder of a company holding a mining right or title shall sell, dispose or transfer a Zimbabwean registered security to a non-indigenous person without approval of the Minister.

4.10. Other issues in the Bill related to the continuity, stability of mining rights and profitable development of mining assets.

4.10.1 Localisation of shareholding of corporate holders of mining rights or title.

The Bill introduces a requirement that the majority of shares for a company holding mining rights or title must be registered on a local securities exchange. Any company listed on a foreign securities exchange which requires a mining licence or title must notify the Minister of such listing and eighty five percent of the funds raised from such listing must be used solely for the development of the mining rights and title in Zimbabwe.

4.10.2 Requirement Right and Title Holders to utilise local Financial Institutions.

Every holder of a mining right or title is required to utilise local financial institutions registered in terms of the Banking Act (Chapter 24:20) or any related institution when conducting any financial transactions. Failure to comply with this requirement attracts a fine or imprisonment or both.

4.10.3 Cancellation of Mining Rights in certain circumstances.

The Bill introduces the right to be heard (*audi alteram partem*) to a miner before his rights may be cancelled in terms of section 400 of the MMA. A miner is given the right to show cause within a reasonable period specified in the notice from the Minister why the right should not be cancelled. The Minister may also order that an investigation be conducted into the mining operations that have been operated on the mining location concerned before the direction to cancel the mining right.

4.11. Summative Remarks.

The regulatory framework in Zimbabwe controls the exercise of rights and titles by miners in respect of the right to prospect for and exploit minerals. A prospecting licence gives a miner the right to explore for minerals without however, uplifting any minerals. An Exclusive Prospecting Order however, grants exclusive rights to prospect for minerals in a reserved area. The Prospecting Licence and Exclusive Prospecting Orders are statutory entitlements and may not be sold, transferred or ceded. The Bill however, introduces an Exclusive Prospecting and Exclusive Exploration licences. The former replaces the ordinary Prospecting Licence and the later replaces the Exclusive Exploration Order. The holder of an Exclusive Prospecting licence and Exclusive Exploration licence is allowed to remove minerals for purposes of testing subject to approval by the Minister. The mining code also

grants various mining rights including, a mining claim, mining lease and special grant which may not be sold, encumbered or transferred without the consent of the Minister. The Bill introduces a Mining Cadastre Registry for the registration of mining rights and titles. Failure to commence work can be a ground for the cancellation of a mining right. The miner may however, apply for a retention licence where he is unable to commence work or continue with work as a result, among others of unfavourable economic circumstances which have existed for two years prior to the application.

CHAPTER FIVE-A COMPARATIVE ANALYSIS OF THE SECURITY OF MINERAL TENURE UNDER THE MMA AND THE BILL.

5.1 Introduction.

In Chapter four the regulatory framework for the acquisition, maintenance and loss of mineral rights was set out. The Chapter also set out the regulation of issues that have a bearing on the security of mineral tenure and the stability of mineral rights. In this Chapter, an analysis of the regulatory framework and its effect on the security of mineral tenure is made from a comparative perspective in the regulation of rights and titles under the MMA and the Code. In the ultimate, a conclusion is reached on the security of mineral tenure in Zimbabwe.

5.2 Character of Mineral Rights.

In general, the legal nature of mineral rights will determine the extent of interference by bureaucratic authorities.¹⁴⁴ The MMA does not define the character of mineral rights and titles. It is however, clear from the level of interference in the acquisition, preservation and loss of mineral rights that the rights granted under the MMA are nothing more than statutory authorisations. A mining right confers on the holder a licence to enter the land coupled with a grant to explore and mine the minerals consistent with the terms of the licence.¹⁴⁵ The rights may be taken away for failure to carry out work programs or failure to renew.¹⁴⁶ The Bill however, classifies mineral rights and titles as ‘limited real rights.’ Describing rights as ‘real rights’ gives the impression that rights are property and can therefore be protected under the constitutional property clause.¹⁴⁷ An indication of the legal character of the rights contemplated under the Bill is described in the South African case of **Minister of Mineral Resources. v. Mawetse (SA) Mining Corporation (Pty) Ltd**¹⁴⁸, in that case the court held that the granting of a prospecting right, as is the case with all other rights under the Mineral and Petroleum Development Act of 2002 (MPRDA) of South Africa, is not contractual in nature, but a unilateral act by the Minister or her delegate in terms of their statutory powers under the MPRDA.¹⁴⁹ In my view, our courts will likely follow this interpretation, if ever called to interpret the nature of the rights under the Bill.¹⁵⁰

¹⁴⁴ *Ibid* note 16.

¹⁴⁵ *Ibid* note 145, p 89.

¹⁴⁶ See the case of **Grandwell Holdings .v. Zimbabwe Consolidated Diamond Company Limited HH-125-17**, in which the rights of a joint venture company lapsed and the joint venture company failed to renew the rights. It thereby lost the mining right with disastrous consequences.

¹⁴⁷ See also the case of **Newcrest Mining (WA) Ltd .v. the Commonwealth (1997)** in which the court held that the extension of the boundaries of a national park into an area covered by a mining right amounted to an acquisition of property without just terms and infringement of the constitution in Australia.

¹⁴⁸ [2015] ZASCA 82 (28 May 2015).

¹⁴⁹ *Ibid* note 149, p24.

¹⁵⁰ Our courts will have regard to judgments from foreign countries especially on statutes which are in *pari-materia*. The Bill describes designates rights as limited real rights in the same fashion as the MPRDA.

In the final analysis, the nature of rights under the MMA and the Bill are similar. The rights are not privately held but administrative authorisations. According to Dale, privately held rights strengthen the security of mineral tenure in that the transition from exploration to a mining right occurs in the private law sphere whilst that in an administrative law system requires the consent of administrative authorities.¹⁵¹

5.3 Acquisition of Mineral Rights and Titles.

The acquisition of an ordinary prospecting right is simple. The miner is required to appoint an approved prospector with a prospecting licence. This is designed to allow easy entry by small scale miners into mining. This is a legacy of the colonial regulation of mining. No financial or technical requirements are required for the acquisition of mineral rights. This strengthens the security of mineral tenure. However, a prospecting licence does not grant any exclusive rights to prospect for minerals. This weakens the security of mineral tenure by allowing prospectors to prospect minerals on the same ground presenting challenges of double pegging by different prospectors which is common in Zimbabwe.¹⁵² The Bill addresses this shortcoming by introducing an Exclusive Prospecting licence which grants the licensee an exclusive right to prospect and search for minerals on ground open to prospecting.¹⁵³ On the other hand, applicants for an Exclusive Prospecting Order are required to demonstrate financial and technical capacity under the MMA. This requirement is meant to facilitate large scale mining operations. The Exclusive Prospecting Order combines an exploratory right and a mining right under one licence. This is consistent with the Bolivian mining regulation which strengthens the security of mineral tenure.

Environmental and technical requirements are interposed between exploration and a mining right.¹⁵⁴ This is consistent with most mining jurisdictions except for Chile which ensures the security of mineral tenure in the narrow sense. The requirements for environmental compliance are meant to ensure sustainable mining and should not be seen as detracting from the security of mineral tenure. This is consistent with international Best Practice.¹⁵⁵

¹⁵¹ *Ibid* note 15.

¹⁵² This was the subject of the dispute in the case of, **Buby Mineral (Pvt) Ltd .v. Min of Mines & Mineral Development HH 31-2007.**

¹⁵³ Section 27 (1) (a) of the Bill.

¹⁵⁴ See **Debshan (Pvt) Ltd .v. The Provincial Mining Director, Mat. Province & Ors. HB-011-17.**

¹⁵⁵ A Good Practice Note: World Bank Project-Extractive Industries Source Book Program Final Report, University of Dundee, December 2010, p 10.

The Bill introduces auctioning of mineral resources for certain minerals. This ensures transparency in the allocation of mineral rights. However, International Best practice encourages auctioning of rights where the potential of the resource is known. An auction system should be employed in cases of extinction of mineral rights, new discoveries, strategic minerals or privatization of mineral rights.¹⁵⁶ This must however, be accompanied by predefined and simple rules for qualification. The Bill does not however, define the criteria employed for Bidders; this may militate against the transparency that is sought to be achieved.

5.4 Registration of Rights.

A manual registry for the registration of rights under the MMA is maintained by the Ministry of Mines and Mineral Development. The manual registry coupled with the fact that the MMA does not provide for an exclusive prospecting licence may result in competing rights being granted for the same mining location. This weakens the security of mineral tenure. The Bill introduces a computerised mining cadastre for the registration of mining rights coupled with the use of GPS system to strengthen the institutional administration and the positioning of mineral rights.¹⁵⁷ The mining cadastre registry coupled with the 'first come first served' principle in the Bill strengthens the allocation and administration of mineral rights.

5.5 Duration and Renewability of Mineral Rights and Titles.

Generally, the mining regime should allow sufficient time for exploration and development of resources to enable right holders to repay loans and realise a return on investment. A Prospecting Licences under the MMA is granted for a period of two years without any right of renewal.¹⁵⁸ This period is sufficient for the right holder to explore for minerals. However, the Bill provides for a period of twelve months in respect of an Exclusive Prospecting Licence.¹⁵⁹ Because of the absence of a right of renewal under the Bill, it is submitted that in this respect the Bill undermines the security of mineral time by providing insufficient time for prospecting for minerals. Mining leases are valid for 25 years. This period is sufficient for the development of mining assets and strengthens the security of tenure.

¹⁵⁶ *Ibid* note 156, p4.

¹⁵⁷ E.O. Girones, A. Pugachevsky & W Walser; 'Mineral Rights Cadastre,' Extractive Industries for Development Series #4, The World Bank, June 2001.p16.

¹⁵⁸ *Ibid*.

¹⁵⁹ A similar period is provided for under the Mines and Mineral Act in Zambia.

5.6 Issues undermining Security of Mineral Tenure under the MMA and the Bill.

5.6.1 *Transferability and Securitisation of rights and titles.*

Mining involves front loading of huge capital costs. Right holders must be allowed the right to use titles and rights as security in order to raise finance.¹⁶⁰ Prohibition against transfer and encumbrance of rights and titles in the MMA and the Bill undermines right holder's ability to raise finance.

5.6.2 *Administrative discretion.*

A major weakness of the MMA is the use of unregulated administrative discretion. Bureaucratic authorities play a significant role in the grant, renewal and preservation of mineral rights.¹⁶¹ Contemporary regulation requires minimisation of subjective bureaucratic decision making.¹⁶²

Although the Bill represents a significant improvement, issues of subjective bureaucratic discretion still abound. For example in section 20 of the Bill, the Mining Cadastre Registrar is given the power to reject an application for an exclusive prospecting licence on the basis that the applicant is not ,in the Cadastre Registrar's 'opinion,¹⁶³ a 'fit and proper' person to hold an exclusive prospecting licence.'¹⁶⁴ This provision gives the Cadastre Registrar enormous powers to reject an application on purely subjective considerations. There is no indication on the issues that the registrar will consider to constitute a 'fit and proper person'.

5.6.3 *Localisation of Shareholding.*

The motivation for listing on any stock exchange is to be able to raise capital. In the case of a mining concern, this capital may be used for exploratory work or development of assets. The capitalisation of the Zimbabwe Stock exchange is currently USD\$ 18 211 669.593.¹⁶⁵ This is obviously largely due to the over valuation of counters at the back of a mismatch between the United States dollar and the Real Time Gross Settlement (RTGS) Balances. The stock market in Zimbabwe presently is under severe strain as a result of liquidity challenges. Coupled with the severe shortage of foreign currency in the market, any requirement for mining right holders to list on the local stock market will militate against

¹⁶⁰ *Ibid.*

¹⁶¹ This arises from personal experiences in advising clients within the extractive industries.

¹⁶² *Ibid* note 33, p37.

¹⁶³ See also section 22 (1) (b) of the Bill, an exclusive exploration licence may be cancelled or suspended on the basis that an applicant has 'conducted himself or herself in a manner, which in the Minister's opinion renders him or her unfit to hold the licence.

¹⁶⁴ Section 20 (4) and (c) of the Bill.

¹⁶⁵ <https://www.zse.co.zw>.

the ability of right holders to raise capital. Right holders should be given the latitude to raise finance offshore.¹⁶⁶

5.6.4 Requirement to use local Financial Institutions in Transactions.

Local financial institutions are not spared from the shortage of foreign currency in the country. The high interest rates and the short term nature of financial instruments offered by local financial institutions makes production un-competitive.¹⁶⁷ The local financial institutions presently do not have the necessary capacity to raise finance for mining projects. Any requirement to use local financial institutions in raising finance would therefore, undermine security of mineral tenure. Further, local financial markets are small and have not yet developed to a level sufficient to sustain the capital needs of the mining industry.

5.6.5 Requirements to notify transfer of Shares.

Shares on stock market change hands in hundreds on a daily basis. It is not clear from the Bill whether each time such a change occurs, the Minister must be notified. If that is the intention, then, compliance with the provision will present logistical nightmares for mining right holders who might have to employ personnel for the purposes of following the trading of stocks on the market. This will obviously mean a cost spend in compliance. There are no justifiable policy considerations justifying such a requirement. This may be an instance of over regulation which weakens the stability of mineral rights.

5.6.6 Regulatory Timelines.

The MMA and the Bill weaken the security of mineral tenure by failing to provide timelines within which administrative decisions must be taken and consequences for failure to act within the timelines. This enhances administrative discretion and may present opportunities for corruption. The MMA and the Bill still employ such vague terms as the requirement that an action must be taken by

¹⁶⁶ <https://www.herald.co.zw/forex-shortage-hits-3-riozim-mines/>. At the time of writing, Rio Zim, one of the largest companies faced closure of three of its gold assets as a result of challenges in obtaining foreign currency from the Reserve Bank of Zimbabwe. Another mining concern, Metallon Gold is facing closure because similar challenges.

¹⁶⁷ www.afdb.or/en/countries/southern-africa/zimbabwe/zimbabwe-economy-outlook/. The African Development Bank reports that the real exchange rate remains overvalued, undermining external competitiveness.

administrative authorities 'without delay' or must be taken 'within reasonable time'. Such vague timeframes undermine the security of mineral tenure.

5.7 Summative Remarks.

The exercise of subjective discretion by administrative authorities under the MMA undermines the security of mineral tenure. Ministerial power looms large over most of administrative acts. This is against international best practice which provides that regulatory powers must be minimal and that administrative discretion must be limited.

The prohibition against transfer and encumbrance of mineral rights and titles undermines right holder's ability to raise finance for exploratory work and development of assets. Coupled with the requirements to list on a local securities exchange and to use local financial institutions in the Bill, the right holder's ability to raise finance in Zimbabwe is severely curtailed. This undermines the profitable development of mines and is therefore, an issue of security of mineral tenure.

Whilst the Bill makes significant improvements in the registration and administration of mineral rights, the retention of Ministerial discretion and absence of timelines within which administrative decisions must be taken remains a significant concern in the security of mineral tenure.

CHAPTER 6 - CONCLUSION AND RECOMMENDATIONS.

6.1 Introduction.

This Chapter summarises research findings and makes recommendations for reform.

6.2 Administrative discretion and security of mineral tenure.

Bureaucratic authorities exercise wide discretionary powers under Zimbabwe's regulatory system. The Minister's power looms large over the grant, maintenance and loss of mineral rights. The Bill does not make any fundamental changes to the exercise of administrative discretion. Administrative discretion weakens security of mineral tenure.

6.3 Absence of regulatory timelines in administrative decision making and security of mineral tenure.

In general, no timelines are set in the MMA and the Bill for the exercise of administrative powers. The use of vague and wide terms such as 'within a reasonable time' or 'as soon as practicable,' only helps in entrenching administrative discretion. Absence of time-lines does not assist in the protection of mineral tenure.

6.4 Effect of prohibition against transfer of mineral rights and titles on the security of mineral tenure.

It is considered good practice that the regulatory framework should indicate timelines within which bureaucratic authorities must take decisions and the implications of failure to act within such a timeline. The MMA is characterised by a general lack of timelines guiding the making of administrative decisions in respect of applications for authority to prospect on reserved ground. Time delays constitute an element of security of mineral tenure. Similar concerns arise in the application for an exclusive prospecting reservation. An application is made to the Mining Affairs Board for an Exclusive Prospecting Reservation; the Board is mandated to publish a notice in the gazette calling for objections to the application. The application is eventually heard by the board. In all this, no time indication is made regarding when the publication in the gazette must be made or the time within which the Board must make its decision. To make matters worse, the regulatory framework does not indicate the consequences of failure by administrative authorities to make decisions.

6.5 Effect of prohibition of encumbrance of mineral rights and titles on the security of mineral tenure.

In order to develop mining assets profitably, investors should be allowed to securitise their rights in order to raise finance. A prohibition against encumbrance of rights limits the right holder's ability to use rights as security in capital raising. This coupled with requirements for local listing and use of local financial institutions greatly undermines the security of mineral tenure.

6.6 Recommendations.

This work has demonstrated that unlimited bureaucratic discretion, prohibition against transfer and cumbersome procedures for such transfer and absence of timelines for action by administrative authorities affect the security of mineral tenure. It is recommended that Zimbabwe adopts best practices in regulation in order to enhance the security of mineral tenure. Botswana is one example in which best practice has been adopted in the regulation of mineral resources. I consider this aspect in the mining code in Botswana below;

6.7 Botswana.

Botswana adopts the obligatory grant of permits or licences by administrative authorities where minimum conditions in the mining code are satisfied as a means of limiting administrative discretion. For example, application for a prospecting licence is made in terms of section 14¹⁶⁸ to the Minister, the section provides as follows;

'The Minister **shall grant** a prospecting licence if-

- a) The applicant has, or has secured access to, adequate financial resources, technical competence and experience to carry on effective prospecting operations;
- b) The proposed program of prospecting operations and makes proper provision for environmental protection;
- c) The proposed prospecting area is not the same as, nor does it overlap an existing prospecting area, retention area or minerals permit area in respect of the same mineral or associated mineral; and
- d) The applicant is not in default.' **(Underlining added).**

¹⁶⁸ Of the Mines and Minerals Act (Chapter 66:01).

What is significant about such a provision is that it takes away administrative discretion in instances where the grounds enumerated are satisfied. Put differently, the Minister is obligated to issue a certificate as soon as the grounds enumerated are satisfied. Stating the requirements for obtaining a licence also strengthens security of mineral tenure in that an investor is informed in advance of the regulatory requirements and can launch an application with the confidence that once the conditions are satisfied, a licence will be granted.

The provisions for renewal of a prospecting licence also take away bureaucratic discretion by giving an applicant an entitlement to the grant of a renewal where conditions stated in the code are met.¹⁶⁹ Unlike in Zimbabwe, the mining code sets a time limit within which an application for renewal of a prospecting licence must be made.¹⁷⁰ More importantly, before an application is rejected on the basis that the applicant is in default, the Minister is obliged to give the investor an opportunity to rectify the default within a reasonable time.¹⁷¹ The provisions on the duration of prospecting licence also strengthen mineral tenure in that it allows the investor to dictate the time required for prospecting with the only limitation being that the period should not exceed three years.¹⁷² It is considered good practice that decisions on when to or for how long prospecting should take place must be left to the investor. The law in Botswana also allows transfer of mining licences provided that the Minister is notified.¹⁷³ Note that the Minister is only notified but his consent is unnecessary.

In respect of transfer and securitization of mineral rights, the right holder should only be obliged to notify the Minister and where the transferee is not prohibited in holding the mineral right, the Minister should have no choice but to grant the transfer.¹⁷⁴

It is recommended that Zimbabwe adopts similar provisions to strengthen the security of mineral tenure under the MMA.

¹⁶⁹ Section 17, the only considerations for grant is whether the applicant is not in default or the programme proposed is adequate.

¹⁷⁰ The application must be made 3 months before expiry.

¹⁷¹ Section 17 (3)

¹⁷² Ibid note 169, section 17 (1)

¹⁷³ Ibid note 169, section 23 (1).

¹⁷⁴ Ibid note 169, section 23.

6.8 Conclusion.

The Extraction of minerals involves uncertainties related to the discovery of mineable ore and the volatility of commodity prices. Added to this is the long lead time between capital investment and realisation of profit. It is important therefore, that regulation of mineral extraction reduces uncertainties involved in the extraction of minerals.

This study has demonstrated that subjective administrative discretion, absence of a right to transfer and encumber rights undermine the right holder's ability to raise finance for the development of assets. This therefore undermines the security of mineral tenure in its wide conception. International Best Practice must be adopted in the Bill to strengthen the security of tenure in Zimbabwe. The power of the Minister should be kept at the core of regulation and on issues to do with social and environmental protection.

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