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**Mitigating Uncertainty in Mining Infrastructure Development:  
A Case of Zimbabwe`s Extractive Industry Legal Risk**

**By**

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Submitted in partial fulfilment of the requirements for the degree

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## ABSTRACT

The deterioration of Zimbabwe's infrastructure is evident after decades of far-reaching domestic reforms, a period of hyper-inflation, the effects of sanctions and difficulties to obtain long-term financing due to arrears with the international financing institutions. Additionally, populist policies held back necessary tariff increases meant to generate cash for infrastructure maintenance resulting in an erosion of productive value of existing assets. Important to note is the relationship between infrastructure and mining that brings about public infrastructure development as downstream linkage would come about through good governance and judicious allocation of mining revenues.

There is an increasingly growing consensus that both government and private sector have a shared responsibility for mining infrastructure development, though the latter has a compelling case to lead as an investor.

Over the past two decades, Zimbabwe's regulatory framework has undergone through immense reforms and adjustments that have impacted negatively to the business environment is concerned.

This study established that, there is an apparent lack of predictability, consistency and certainty on Legal framework<sup>1</sup> which makes Zimbabwean jurisdiction an unsafe capital destination for the investors. Unless the legal and regulatory landscape takes a paradigm shift and transits towards a trajectory of best practices in terms of democracy and good governance, conformity to the rule of law and consistence in the formulation of policies, uncertainty will remain a huge challenge to MID.

This study sought to analyse the measures of mitigating uncertainty caused by legal risk to MID in Zimbabwe's extractive industries. The study established a three thronged approach to provide a framework to mitigate uncertainty to MID. The approach outlines measures that the private sector and the public sector may take as measures to mitigate uncertainty. Further, this study also highlighted the international law aspects that are available to investors in MID.

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<sup>1</sup> <https://www.theeastafrican.co.ke/news/africa/US-EU-differ-with-AU-on-lifting-of-sanctions-on-Zimbabwe/4552902-5334334-view-asAMP-100ajhlz/index.html> (Accessed on 12/11/2019).

## **LIST OF ACRONYMS**

AFDB- African Development Bank.

AFMP- African Mining Partnership.

AU- African Union.

BIT- Bilateral Investment Treaties.

BMI- Business Mathematics Information.

BOT- Build-Operate-Transfer.

BRT- Build-Rent-Transfer.

BTO- Build-Transfer-Operate.

CDD- Community Driven Development.

CSSD- Colombia State on Sustainable Development.

DBB- Design-Bid-Build.

DBBO- Design-Build-Finance and operate.

EITI- Extractive Industry Transparency Initiative.

EU- European Union.

FTLRP- Fast Track Land Reform Programme.

FCA- Foreign Currency Accounts.

FDI- Foreign Direct Investment.

GDP- Gross-Domestic-Product.

GNU- Government of National Unity.

ICT- Information Communication Technology

MDC- Movement For Democratic Change.

MID- Mining Infrastructural Development.

PI- Public Infrastructure.

PPPs- Public-Private Partnerships.

SADC- Southern African Development Community.

SI- Statutory Instruments.

UN- United Nations.

UNCTAD- United Nations Conference on Trade and Investment.

UNECA- United Nations Economic Commission for Africa.

UNIDO- United Nations Industrial Development Organisation.

UNSDG- United Nations Sustainable Development Goals.

USA- United States of America.

ZANU-PF- Zimbabwe African National Union Patriotic Front.

ZIDERA- Zimbabwe Democracy and Economic Recovery Act.

ZLHR- Zimbabwe Lawyers for Human Rights.

**No table of figures entries found.**

#### **KEYWORDS**

Extractive Industry

Legal risk

Uncertainty

Regulatory framework

Mining Infrastructure development

Mitigatory

Public infrastructure

Economic sanctions

Indigenisation

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## CHAPTER 1: INTRODUCTION

### 1.1. BACKGROUND TO THE STUDY

The prevailing philosophy surrounding sub-Saharan African's extractive sector is expected to induce apprehension and uncertainty owing to recent growing regulatory considerations.<sup>2</sup> Further, several host nations, Zimbabwe included, have either implemented or announced a review of their mining codes to accommodate resource nationalisation, strategies of reviving ailing economies and to a greater extent sustainable development just to mention a few factors.<sup>3</sup> The reasons for the above strategies are, among other things, poverty alleviation, the need to address the infrastructural deficits, improving participation of indigenous companies and individuals.

However, in the case of Zimbabwe, over and above the aforesaid, unpredictable amendments and promulgation of laws let alone a record seventeen times constitutional amendments.<sup>4</sup> These amendments were convenient to the politics of the day. For example, the radical and infamous Amendment No 17 which promulgated the entire oust of the jurisdiction of the courts over cases of land acquisition by state. The Amendment Act No 17 triggered the fiercely contested case of Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe.<sup>5</sup> On 11 October 2007, Mike Campbell (Pvt) Limited and others filed an application with the Southern African Development Community (SADC) Tribunal challenging the acquisition of agricultural land by the Republic of Zimbabwe. Simultaneously, they filed an application in terms of Article 28 of the Protocol on Tribunal as read with Rule 61 (2)-(5) of the Rules of Procedure of the SADC Tribunal, for an interim measure. The interdict was meant to restrain the Respondent from removing or allowing the removal of the Applicants from their land, pending the determination of the matter. The Tribunal granted the application pending the determination of the main case. Also, another unprecedented and economically disruptive was the Indigenisation and Economic Empowerment Act of 2008<sup>6</sup> which gave Zimbabweans the right to own and control 51% stake in all business entities in the country. However, a recent amendment to the Act<sup>7</sup> now allows foreign entities to own 100% mining rights except for platinum and diamonds. Whenever such regulatory adjustments are made without

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<sup>2</sup> Legal Framework; Navigating the web of Laws and Contracts governing Extractive Industries; National Resources Governance Institute, NRG I Reader (March 2015).

<sup>3</sup> Ibid.

<sup>4</sup> The Constitution of Zimbabwe Amendment (no 20) Act, 2013.

<sup>5</sup> Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008).

<sup>6</sup> Zimbabwe Indigenisation and Economic Empowerment Act of 2008.

<sup>7</sup> The Finance Act 2018 (no1 2018) section 42 Amends the Indigenisation and Economic Empowerment Act.

holistically considering all material economic enabling factors, the results will not always be favourable and as such, may trigger uncertainty in the whole economy and let alone to mining infrastructural development projects.

Uncertainty simply means the lack of certainty or sureness of an event. In accounting, uncertainty refers to the inability to foretell consequences or outcomes because there is a lack of knowledge or bases on which to make any predictions.<sup>8</sup> This study will evaluate the available framework that may mitigate uncertainty to mining Infrastructure development caused by legal risk in Zimbabwe`s extractive industry. A literature review of infrastructure in general and mining infrastructure development from the global view, African and regional review, and Zimbabwe specifically will be provided. A further review of the regulatory framework of Zimbabwe`s extractive industry will be key to this study. The adjustment of the regulatory framework in jurisdictions to benefit from mineral resources that a host nation is endowed with is not in any way a problem. Every nation desire to transform its laws in order to meet socio-economic and political challenges in the country to improve the livelihood of its people. However, the challenge is about the way, the extent to, and the content of, such regulatory reforms should be. At the least, the reforms should attempt to achieve best practices, where citizens and other stakeholders are secure, certain and the regulatory framework is predictable. This deliberate commitment should see the level of uncertainty to Mining Infrastructure development (MID) settle within acceptable limits. Though it is very difficult to identify a point when uncertainty turns negative, its results will have an impact that can be deduced from the response in investor confidence in the jurisdiction. This study will examine how uncertainty is brought about in the process of reforming the regulatory framework for MID.

In order to extract resources from the ground, there are rules and responsibilities of states, companies and citizens, summed up is referred to as the legal framework or legal architecture which comprise of a set of documents namely constitution, legislation, policy and contracts.<sup>9</sup> A well-designed and comprehensive legal architecture provides for the following:

- a. rules on how institutions are structured;
- b. how companies acquire and manage licenses;
- c. the fiscal terms host state provides for payments;
- d. environmental management;

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<sup>8</sup> <https://corporatefinanceinstitute.com/resources/knowledge/other/uncertainty/> (Accessed 25/11/2019).

<sup>9</sup> Legal Framework; Navigating the web of Laws and Contracts governing Extractive Industries; National Resources Governance Institute, NRG Reader (March 2015).

- e. relationship between extractive projects and neighbouring communities;
- f. the behaviour of public officers involved in the sector;
- g. public information disclosure and accountability and;
- h. how government manages natural resources revenues.<sup>10</sup>

It is provided that, where the legal framework is well-designed, comprehensive and detailed it has less or not at all, details for negotiation in individual contracts as such, contextually, the host nation would have a stronger foundation to manage its extractive industries in a transparent manner according to national priorities.<sup>11</sup> A well-designed and comprehensive legal framework is predictable and as such, provides certainty, hence it reduces the legal risk to MID.

In some studies, risk has been defined as the probability of loss given an event.<sup>12</sup> There are four primary sources of legal risk or legal uncertainty namely: structural, regulatory, litigation, and contractual,<sup>13</sup> which translate to regulatory risk, compliance risk, contract risk, dispute risk and reputational risk,<sup>14</sup> as such these play a considerably essential role in influencing mining infrastructural development (MID) projects. This study will examine the definition of risk and analyse how legal risk gives rise to uncertainty to MID in Zimbabwe's extractive industry.

There is an increasingly growing consensus that both government and private sector have a shared responsibility for MID, though the latter has a compelling commercial case to lead as an investor, hence the need to mitigate uncertainty caused by legal risk.<sup>15</sup> Certainty is a general principle considered a virtue in a legal system whereas uncertainty is regarded as a vice.<sup>16</sup> Ambiguous legal texts, arbitrary selection of judges, a lack of transparency about the workings of the legal system are mostly cited as causes or shortcomings particularly in the judiciary section that impact negatively on legal certainty.<sup>17</sup> Therefore, if uncertainty causes legal risk that translates to such a vice to MID, then a substantive measure of attention should be remitted to mitigate such uncertainty which causes unfavourable extractive business environment in a jurisdiction. Finally,

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<sup>10</sup> Ibid 1.

<sup>11</sup> Ibid 2.

<sup>12</sup> Little, M. How to Measure and Manage Legal Risk, Berkman Solutions Risk Management (21 July 2019) Available at: <https://www.berkmansolutions.com/how-to-measure-and-manage-legal-risk> (Accessed on 21 July 2019).

<sup>13</sup> Ibid.

<sup>14</sup> <https://simplicable.com/amp/legal-risk> (Accessed 11/11/2019).

<sup>15</sup> Masilela E. Role of infrastructure for mining in Africa: Mining is not only about Engineering, Zimbabwe mining Indaba Harare, (8 October 2014).

<sup>16</sup> Davis, K.E. The Concept of Legal Uncertainty: New York University School of Law (2017).

<sup>17</sup> Ibid.

this study examines, analyse and recommend available measures or a framework of mitigating uncertainty to MID in Zimbabwe`s extractive industry.

## 1.2. AIMS AND OBJECTIVES OF THE STUDY

### 1.2.1. *Research aims*

Uncertainty is viewed as a vice because it carries imputed blame in that it undermines the rule of law and the ability to achieve some socio-economic objectives such as attracting high capital-intensive investments.<sup>18</sup> The aim of this research is to examine the framework available to mitigate uncertainty caused by legal risk to MID in Zimbabwe`s extractive Industry.

### 1.2.2. *Research objectives*

- To examine the state of MID in Zimbabwe`s extractive industries.
- To analyse the legal framework in view of legal risk and the levels of uncertainty to MID in Zimbabwe`s extractive industries.
- To analyse measures of mitigating uncertainty caused by legal risk to MID in Zimbabwe`s extractive industry

## 1.3. RESEARCH QUESTIONS

### 1.3.1. *Primary research question*

What strategies may be used to mitigate the impact of legal risk to MID in Zimbabwe`s extractive industry?

### 1.3.2. *Secondary research questions*

- What is the state of infrastructure development in Zimbabwe`s extractive industry?
- What is the level of uncertainty to MID due to legal risk in Zimbabwe`s extractive industry?
- How may uncertainty to mining infrastructure development due to legal risk be mitigated in Zimbabwe`s extractive industry?

## 1.4. RESEARCH METHODOLOGY

### 1.4.1. *Methodology*

A desk research method or secondary research will be employed in this study, which will:

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<sup>18</sup> *Ibid* 1.

- review the existing legal framework for MID in Zimbabwe
- critically analyse the regulatory framework in relation to legal risk for MID in Zimbabwe.
- review a variety of reports and journals published regarding political risk on infrastructure development.

Desk research is when the researcher reviews previous research findings in order to acquire a wide understanding of the field<sup>19</sup>. The reason for this choice is that this study will broadly be based on reviewing regulatory policy and legal framework within the construct of the research topic. Secondary information that others have gathered through primary research will be utilised. As such, the information is already readily available, though at times it may be of suspect quality occasioned usually by strict media control from the government.<sup>20</sup>

#### 1.4.2. *Parameters*

This study shall be guided by the Zimbabwean legal framework for extractive industries and other studies and research on natural resource sectors. The study shall review legal risk and the impact that legal uncertainty causes to MID projects and available framework that may mitigate the uncertainty.

#### 1.4.3. *Limitations*

This study will be carried out as desk research. As such, by its very nature desk research limits the work to reviewing previous researched findings in order to gain a broader understanding of the field.

### 1.5. RELEVANCE OF STUDY

Primarily, this study will be an addition of literature to extractive industry studies. It will be a supplementary voice of concern for jurisdictions to adopt best practices on natural resources legal reforms. Among other aspects, it will contribute to national debates and inform policy direction in Zimbabwe's extractive industries.

### 1.6. CHAPTER OVERVIEW

Chapter 1 will be an introductory chapter that briefly introduces the topic which is being discussed. Research problems will be set out, and an explanation of the concepts that relate to the research problems will be explored. The aims of the research will also be explained and be clarified.

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<sup>19</sup> <https://www.userfocus.co.uk/articles/desk-research-what-and-how.html> (Accessed 11/11/2019).

<sup>20</sup> <http://designresearchtechniques.com/casestudies/secondary-research/> (Accessed on 17/11/2019).

Infrastructure provides a cornerstone of socio-economic progress because it is an economic enabler of both direct and indirect societal benefits as such, it is a core element of the United Nations (UN) Sustainable Development Goals (MDG).<sup>21</sup>

Chapter 2 will provide an overview in the form of historical background and the state of infrastructure in Zimbabwe. A definition of ID will be deliberated on the mineral value chain and the role of MID will be pointed out. Also, in this chapter a review of the economic and political climate and how it has impacted and how it is currently impacting on the MID. The legal uncertainty aspect will also be deliberated in this chapter in relation to legal risk. The last part of this chapter will focus and explain the concept of legal risk with special regards to legal risk in MID space.

Chapter 3 will be an analysis of the regulatory framework of Zimbabwe with specific reference to MID. The Constitutional, legislation, case law, policy and contracts (Legal Framework) on MID in Zimbabwe will be highlighted in this chapter. The National White Paper on Mining Infrastructure Development Policy, as well as the Acts on mining infrastructure development, will be discussed. Furthermore, the institutional framework that guides the mining industry, such as the Ministry of Mines and Mineral Resources and mining infrastructure agreements will be considered. In this chapter in order to give credence to the objectives of the study, a review of case law will be deliberated on. Lastly to be reviewed will be the International Law as it relates to Zimbabwe's extractive industry and the general state of the economy will be reviewed.

Chapter 4 provides an analysis of the areas reviewed in chapter 3. This chapter will establish a three thronged approach to analyse and recommend a framework to mitigate uncertainty to MID. The approach will outline measures that the private sector and the public sector may take as a framework to mitigate uncertainty. Further, this chapter will also highlight the international law aspects that are available to investors in MID.

Chapter 5 is the final part of this study and will summarise the entire study, presents the key findings, answer the primary question of this dissertation and consolidated the recommendations made in the preceding chapter.

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<sup>21</sup> Bughin, J. Manyika, J and Woetzel, J. Mckinsey Global Institute: Bridging Global Infrastructure Gaps (2016), p2.

## CHAPTER 2: LITERATURE REVIEW

### 2.1 INTRODUCTION TO LITERATURE REVIEW

The deterioration of Zimbabwe's infrastructure is evident after decades of far-reaching domestic reforms, a period of hyper-inflation, the effects of sanctions and difficulties to obtain long term financing due to arrears with the international financing institutions.<sup>22</sup> A further contributing factor was the populist pricing policies that have held back necessary tariff increases and prevented utilities from generating cash for infrastructure maintenance resulting in an erosion of productive value of existing assets.<sup>23</sup>

For any country, Infrastructure provides a cornerstone of socio-economic progress because it is an economic enabler of both direct and indirect societal benefits and as such, it is a core element of the UN Sustainable Development Goals.<sup>24</sup> Zimbabwe's economy has always been anchored around mineral resources therefore, infrastructure development plays an essential role as a driver for economic performance.

This study will review the concept of infrastructure and general state of infrastructure in Zimbabwe with an eventual focus on MID from 2008 to 2018 in order to enhance the objectives of this study and to sufficiently examine the level of uncertainty caused by legal risk. The literature on mineral resources activities from exploration, exploitation, production and eventual appropriation reveal that, across Africa, governments are grappling with infrastructure development as a central concern in increasing social and economic sustainability.<sup>25</sup> In this regard, it is of essence to review the global perspective and international best practice of Mining Infrastructure Development. This topic will deliberate on the overview perspective of the global, Africa's context, and specifically focus on the case of MID for Zimbabwe's extractive industry.

Further and finally, this chapter will deliberate on the connection between political risk and legal risk and subsequently focus deliberation on the of legal risk and its various forms and how it impacts on uncertainty.

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<sup>22</sup> Ringskog, K. Zimbabwe Infrastructure Policy Review. (December 2013), p12.

<sup>23</sup> Ibid.

<sup>24</sup> Bughin, J. Manyika, J and Woetzel, J. McKinsey Global Institute: Bridging Global Infrastructure Gaps. (2016), p2.

<sup>25</sup> <https://www.bbc.com/news/business-11642433> (Accessed on 17/11/2019).



## 2.2 THE CONCEPT OF INFRASTRUCTURE DEVELOPMENT

Mining Infrastructure may generally be described as installations and facilities necessary for the development of mines such as roads, railways, energy, water, communication networks and housing. Infrastructure/re could be part of the larger-scale networks and facilities that support the public as a whole<sup>26</sup>. Today the world invests nearly 14 percent of global GDP in infrastructure and real estate. Ailing infrastructure assets, rising populations, and demand of economic development are driving countries` desires to channel more funding into transport, power, and other systems that catalyse recover and growth.<sup>27</sup> According to Bughin, J (2016), the 2013 McKinsey Global Institute research found that the trajectory of spending would leave countries facing gaps in infrastructure, despite a recent rise in investment in economic infrastructure, gaps remains.<sup>28</sup> Though one can distinguish between social infrastructure and economic infrastructure, this study will not separate these as both are drivers of as well as driven by mining activities.<sup>29</sup> There has been strong recognition of the urgent investment need for many years, but being aware of the problem is not enough, there is need for national and global efforts to channel liquidity into much-needed infrastructure.<sup>30</sup> Consequently, countries that fail to act today could be placing future growth, economic development, and productivity on the line.<sup>31</sup>

It is critical to note of the reasoning, why good governance places a responsibility on mining companies, governments and all stakeholders to consider proper stewardship of revenues from natural resources and prudent prioritisation of infrastructure development. According to Mutemeri, mining depletes non-renewable natural capital, the environmental and social degradation that often accompanies mining.<sup>32</sup> As such, it can be mitigated through policy and the judicious allocation of mining revenues leading to significant infrastructure gains to the immediate and regional localities of the mines.<sup>33</sup> This study focuses on the relationship between infrastructure

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<sup>26</sup> Mutemeri, N. Callaghan, C. and Hermanus, M. Good Practice Note: Public Infrastructure and Mining: Centre for Sustainability in Mining and Industry (CSMI), University of the Witwatersrand (2010), p 7.

<sup>27</sup> Bughin, J. Manyika, J and Woetzel, J: Bridging Global Infrastructure Gaps. McKinsey Global Institute (2016), p3.

<sup>28</sup> Ibid.

<sup>29</sup> Acosta-Ormacchea, S and Marozumi, A. IMF Working Paper: Public Spending Allocations and Economic Growth Across Different Income Levels (2017).

<sup>30</sup> Bughin, J. Manyika, J and Woetzel, J: Bridging Global Infrastructure Gaps. McKinsey Global Institute (2016), p 10.

<sup>31</sup> Ibid.

<sup>32</sup> Mutemeri, N. Callaghan, C. and Hermanus, M. Good Practice Note: Public Infrastructure and Mining: Centre for Sustainability in Mining and Industry (CSMI), University of the Witwatersrand (2010), p 7.

<sup>33</sup> Ibid 1.

and mining that brings about public infrastructure development as down-stream linkage which would come about through good governance of mining revenues.

Although mining depletes non-renewable natural capital, the process of mining can with proper and careful stewardship of revenues and prudent prioritisation of infrastructure development become the basis for developing other types of capital.<sup>34</sup> For example, social and economic capital which collectively can be referred to as Public infrastructure.<sup>35</sup>

### *2.1.1 Public infrastructure*

Mutemeri, suggests that the term 'public Infrastructure' refers to large scale public utilities or systems, providing road and rail transportation, water, power, telecommunication, ports pipelines, schools, colleges, hospitals, clinics, and universities. Public infrastructure supports society in general and enables economic activity.<sup>36</sup> Therefore, in this study any reference to infrastructure shall mean public infrastructure unless otherwise specifically stated.

### *2.1.2 Models of infrastructure development*

Infrastructure delivery models have evolved tremendously over the past decades from traditionally being funded largely by public sector to partnerships with private sector.<sup>37</sup> This has been necessitated by the decline in public funding while re-construction of infrastructure is increasing.<sup>38</sup>

Public-Private Partnerships (PPPs) are often discussed as a solution for closing infrastructure gaps during times of budgetary constraints on public funding but MGI argues that it is not. Even in economies that make strong use of them, PPPs typically make up only about 5 to 10 per cent of overall investment in economic infrastructure. Nonetheless, PPPs in certain emerging economies account for a substantial share of infrastructure investment, in some case, the high share of PPPs conversely reflecting low levels of public investment rather than high levels of private finances. However, PPPs can play an exceptionally important role not only in financing but also in increasing efficiency and innovation in the sector, though these arrangements have to be undertaken thoughtfully as success has not been for all.<sup>39</sup>

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<sup>34</sup> Ibid 2.

<sup>35</sup> Ibid 3.

<sup>36</sup> Ibid 4.

<sup>37</sup> Alim, S. "Making the Case for Greater Involvement of the 'Public' Sector in PPP Infrastructure Delivery", *Delivery Model for Future Infrastructure Development* (2014), P 6.

<sup>38</sup> Idem. P7-8.

<sup>39</sup> Ibid 1.

According to Mutemeri, there are several aspects of PPPs for Infrastructure Development used worldwide depending on the jurisdiction's legal framework and other related provisions that regulate the sector. Among such aspects are:

- BRD – Build – Rent - Transfer. This is also a PPP type
- BOT – Build-Operate-Transfer. This is a type of Public-Private Partnership (PPP) in which Private owners build an installation for example, (power station) operate it with the public utility buying the output (power) and transfer it to the public utility at the end of the contract.
- BTO – Build – Transfer – Operate. Ownership is transferred to the public Authority upon completion of construction of the facility.
- CDD – Community-Driven Development.
- Concession – This is a PPP in which a concessionaire (provider) can charge service fees.
- DBB – Design – Bid – Build is a typical public sector procurement approach for Infrastructure development where the public Authority supply the design, puts out tenders and the entity which wins the tender builds the Infrastructure.
- DBBO – Design – Build – Finance and Operate which is also a type of PPP again.<sup>40</sup>

Shared Infrastructure is another model of infrastructure development commonly used in low-middle size income countries. This refers to large scale public facilities .or systems that meet the public needs and enable economic activity and this may be categorized as economic public Infrastructure.<sup>41</sup> The attributes of public infrastructure (PI) are, among other things being large, essential, capital intensive and high initial capital requirements whose development involves several stakeholders among which government plays a very central and pivotal role in engagement, agreements, development and operation. The social infrastructure category includes hospitals, colleges, universities, clinics, social housing and amenities.<sup>42</sup> Generally, stakeholders include high levels of government or government authorities, owners of the infrastructure who may be public or private, operating entities, beneficiaries of the services, and suppliers.<sup>43</sup> Public infrastructure is either wholly or partly owned by government, depending on the model and concept under which the infrastructure was developed.

### 2.2.1 *Global views and approach to Infrastructure Development*

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<sup>40</sup> Ibid 2.

<sup>41</sup> Ibid 3.

<sup>42</sup> Ibid 4.

<sup>43</sup> Ibid 5.

MGI reports stated that Infrastructure provides a cornerstone of socio-economic progress because it is an economic enabler of both direct and indirect societal benefits as such it is a core element of the UN Sustainable Development Goals.<sup>44</sup> These are:

- Ensuring the availability and sustainable management of water and sanitation for all.
- Ensuring access to affordable, reliable, sustainable, and modern energy for all and,
- Building resilient infrastructure, promoting inclusive and sustainable industrialization and fostering innovation.

In this regard, MGI estimates that infrastructure has a socio-economic rate of return of around 20%, meaning for every one dollar of infrastructure investment, the GDP can be raised by 20% in the long run.<sup>45</sup> The economic effects derived largely from making a region more productive through aspects such as reduction of travel time and costs, access to reliable electricity, and broadband connectivity that allows individuals and business to plug into the digital global economy.<sup>46</sup>

The MGI report reveals that the world invests about \$2.5 trillion per year in power, water, and telecom systems on which business and population depend yet this amount continues to fall short due to the world's ever-expanding needs resulting in a decrease in economic growth thereby depriving citizens of essential services. Further, the MGI analysis suggests that in short term basis, increase in infrastructure investment by one per cent of GDP could generate an additional 3.4million direct and indirect jobs in India, 1.5million in the USA, 1.3million in Brazil and 700,000 in Indonesia.<sup>47</sup>

Columbia Centre on Sustainable Investment (CCSI) has researched how mining-related infrastructure can best be leveraged for economic development such as railway, ports, power infrastructure, water, internet and telecommunications.<sup>48</sup>

It is therefore, beneficial in this regard, if non-renewable resources extraction is leveraged to build long-term assets, such as infrastructure, that supports sustainable and inclusive growth. This is particularly crucial for countries facing an infrastructure-funding gap. According to an estimate of the World Bank's Africa Infrastructure Country Diagnostic, Africa faces an annual infrastructure funding gap of US\$31 billion) and as such leveraging extractive industry-related investment could

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<sup>44</sup> Bughin, J. Manyika, J and Woetzel, J: Bridging Global Infrastructure Gaps. McKinsey Global Institute (2016), p2.

<sup>45</sup> Ibid 1.

<sup>46</sup> Ibid 2.

<sup>47</sup> Infrastructure productivity: How to save \$1 trillion a year, McKinsey Global Institute (2013).

<sup>48</sup> Columbia Centre on Sustainable Investment: A Framework to Approach Shared Use of Mining Related Infrastructure (2013).

be beneficial to closing this gap.<sup>49</sup> In both developed and developing jurisdictions, concessionaires have adopted an enclave approach to infrastructure development, providing their own infrastructure services to ensure that basic infrastructure needed for operations is available and reliably.<sup>50</sup> This enclave approach has further been modified to formulate the concept of “shared use” or “open access”.

According to CCSI, shared use or open use refers to leveraging extractive-industry related infrastructure investments in developing countries for a broader benefit of the nation and the regional community.<sup>51</sup>

The institutional investors appear to be the obvious source of capital for infrastructure projects as they can match very long-term liabilities with relatively low volatility.<sup>52</sup> These are banks, investment companies (asset managers, wealth managers, investment trusts), insurance companies and pensions, public pensions, sovereign wealth funds, infrastructure operators and developers, infrastructure private equity funds, and endowments and foundations.<sup>53</sup>

In order to attract these institutions investors, governments and other stakeholders who need to develop their infrastructure projects should make the business environment conducive by eliminating regulatory constraints, structural barriers, and building stronger markets for such infrastructure assets.<sup>54</sup> According to World Economic Forum, modern and efficient infrastructure is a prerequisite for sustainable and inclusive growth worldwide, with an estimated budget of \$4 Trillion per year until 2030, which public sector alone may not be able to raise without the support from the private sector.<sup>55</sup> This mismatch will have to be levelled up by private sector investors who are as a matter of business practice and due process, are cautious when it comes to large and long-term infrastructure investments. The fact that infrastructure asset lifetime is typically longer than political cycles private causes private investors to become concerned about political and regulatory risk owing to the impacts on the investors` revenues and cost base which heavily depend on regulation.<sup>56</sup>

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<sup>49</sup> Ibid.

<sup>50</sup> <http://ccsi.columbia.edu/work/projects/leveraging-infrastructure-investments-for-development/> (Accessed: 18/10/2019).

<sup>51</sup> <http://ccsi.columbia.edu/work/projects/leveraging-infrastructure-investments-for-development/> (Accessed: 18/10/2019).

<sup>52</sup> Bughin, J. Manyika, J and Woetzel, J: Bridging Global Infrastructure Gaps. McKinsey Global Institute (2016), p2.

<sup>53</sup> Ibid 1.

<sup>54</sup> Ibid 2.

<sup>55</sup> Legal Framework; Navigating the web of Laws and Contracts governing Extractive Industries; National Resources Governance Institute, NRG Reader (March 2015).

<sup>56</sup> Ibid.

Corporate investors, such as energy companies, telecoms, public utilities are attracted when only risk-adjusted financial returns are tangible. Unexpected policy and regulatory changes can alter the basic feasibility equation for a private operator.

### *2.2.2 Sustainable Mining Infrastructure Development and the Global Context*

This refers to mining Infrastructure projects that are planned, designed, constructed, operated and decommissioned in a manner that ensures economic and financial, social, environmental and institutional sustainability over the entire life cycle of the project.<sup>57</sup> Mutemeri, suggests that natural capital is the ultimate among the five models of capital from which society derives the goods and services needed for a quality life. However, when stocks of natural capital are consumed faster than is produced or replenished, a sustainability crisis develops. Therefore, the mining process should be directed towards sustainable development. Although mining depletes non-renewable natural capital, the process of mining can provide a platform to develop other types of capital such as social and economic capital in the form of Public Infrastructure.<sup>58</sup>

The objective of this part of the study is to ultimately identify good practices in mining which enables sustainable MID. Among other factors, a jurisdiction with a legal framework that offers certainty and judicious allocation of mining revenue attains significant MID gains that benefit immediate and regional spheres of the project. According to Mutemeri, the planning and development of public infrastructure is at the centre of good practice and as such policies for linking mining infrastructure development and consultative processes are the key input factors.<sup>59</sup>

### *2.2.3 The African Mining Vision: Infrastructure development*

UN Economic Commission for Africa (UNECA), convened a meeting on the 20-22 August 2008 to draft the new African Mining Vision. The task-force included AU, and UNECA, and the African Mining Partnership (an intergovernmental forum for African Ministers responsible for mining), the African Development Bank (AfDB), UNCTAD and UNIDO.<sup>60</sup>

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<sup>57</sup>Inter-American Development Bank: A Framework to Guide Sustainable Development Across the Project Cycle: What is Sustainable Infrastructure? (2018).

<sup>58</sup> Ibid.

<sup>59</sup> Mutemeri, N. Callaghan, C. and Hermanus, M. Good Practice Note: Public Infrastructure and Mining: Centre for Sustainability in Mining and Industry (CSMI), University of the Witwatersrand (2010), P5.

<sup>60</sup> African Union: African Mining Vision (2009), p8

The key element of the African Mining Vision among others was to use mineral resources to catalyse broad-based growth and development strategies through resource endorsement opportunities in the form of.<sup>61</sup>

*resource rents*: The use of resource differential and windfall rents to improve economic and social sustainability through investment in physical infrastructure and social and human infrastructure. However, on the other hand, this concept has come under attack extensively from the literature on “*resource curse*”<sup>62</sup> wherein, proponents advocate this as a classical diversion of rents into short-term imported consumption, clandestine forex outflows resulting in low levels of reinvestment. This is attributed to weak governance, particularly the lack of or effective and appropriate institutions which may have succumbed to corruption, or lack of capacity and or “immature” legal frame-work which end up offering overly investor-friendly outcomes.<sup>63</sup>

*Collateral use of resource infrastructure*: Collateral use of high-rent resource infrastructure to open another resource potential such as agriculture, tourism etc, to access zones of economic potential with lower returns because they cannot afford their own requisite infrastructure. To some extent, resource-based economies have overly taken advantage of this concept and over-looked investing in or maintaining the necessary feeder infrastructure linking to the resource infrastructure resulting in severely constrained by macro-economic impacts of resource boom (*Dutch Disease*)<sup>64</sup> creating an economic problem of a spontaneously single streamed strong currency.

## 2.3 ZIMBABWEAN PERSPECTIVE

### 2.3.1 *Background: Zimbabwe as a resource-based economy*

Zimbabwe is sitting on a plateau that forms a watershed between the Zambezi and the Limpopo River. By 2011 it had a population of about 11.3 million relatively evenly distributed across the

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<sup>61</sup> Ibid.

<sup>62</sup> Resource curse is a concept that highlights on the social, political and economic issues that affect a country that is rich in non-renewable natural sources. It is very prevalent in developing countries whereby there is no diversification of industry and when the discovery of a natural resource is made, all means of production are diverted to that industry often neglecting other sectors. This affects the GDP of a country as it becomes extremely volatile. In addition, lack of resource rights and an income distribution framework result in corruption from political institutions as there will be unfair regulation.

<sup>63</sup> Frankel, J, A. The Natural Resource Curse: A survey. National Bureau of Economic Research (March 2010).

<sup>64</sup> Dutch Disease is a process where there has been an increase in the value of a country’s currency through the discovery of non-renewable natural resources. The increase in a country’s currency can be coupled with negative consequences on the economy such as unemployment as manufacturing jobs will be moved to jurisdictions where there are lower production costs. In addition to this, it is evident how there is also a diminishing rate in the price competitiveness of the manufactured goods from the country, which has a negative ripple effect on the economy. It should be noted that Dutch Disease is a theory of resource curse.

country although it is densely populated in and around urban cities.<sup>65</sup> In the early years of independence, Zimbabwe made significant progress in infrastructure development thereby achieving a national electricity network with regional interconnections in power sector, building good road networks countrywide and further into regional transport corridors, laying water and sewage system and building dams intended for irrigation purposes.<sup>66</sup> Mining in Zimbabwe is credited for most of the present-day Infrastructure in Zimbabwe, evidenced by the majority of towns and cities developed in the vicinity of mining areas such as Hwange, Kadoma and Kwekwe just to mention a few. Many industries emerged to meet the mining activities needs hence the mining sector continues to be used as a magnet for investment in Zimbabwe.<sup>67</sup>

By the beginning of 2007 political and economic crisis was reaching the boiling point in Zimbabwe, and with it came egregious physical violence meted out on the political opponents of the government and the ruling party Zimbabwe African National Union-Patriotic Front (ZANU PF) in order to retain power. The repressive nature of the government earned it international condemnation,<sup>68</sup> for further violations of human rights and the absence of the rule of law. A failed and disputed election of 2008 led to the formation of the Government of National Unity (GNU) on the 15<sup>th</sup> of September,<sup>69</sup> which was facilitated by SADC. This political space ushered a spell of hope after almost a decade of unprecedented high levels of Inflation at the historic and a record rate of 230 million per cent.<sup>70</sup>

In the period under review (2008-2018), very little foreign exchange has trickled into the country because the jurisdiction is perceived as a high-risk destination chief among the risks being the legal risk according to the Business Mathematics Information (BMI) research in 2016.<sup>71</sup> The foreign exchange regulations have contributed significantly to the thick cloud of uncertainty,<sup>72</sup> in terms of infrastructure development and other sectors which ordinarily have a very high appetite for new money to meet rehabilitation and/or new projects requirements.

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<sup>65</sup> Pushak, N. Bruceno-Garmendia, C. M. Africa Infrastructure Country Diagnostic (AICD): Zimbabwe's Infrastructure: A Continental Perspective report (2011).

<sup>66</sup> Ibid.

<sup>67</sup> Mugandani, E.T. "Status of mineral exploration and Development in Zimbabwe" Zimbabwe Geological Survey (2017).

<sup>68</sup> Muvingi, I. The politics of Entitlement and State Failure in Zimbabwe. Peace Research 40(1) (2008).

<sup>69</sup> Mukulu, & Trda, "Zimbabwe's Government of National Unity: Successes and Challenges in Restoring Peace and Order" Journal of power, politics & Governance (2014), p169-180.

<sup>70</sup> Mukulu, & Trda, "Zimbabwe's Government of National Unity: Successes and Challenges in Restoring Peace and Order" Journal of power, politics & Governance (2014), p169-180.

<sup>71</sup> <https://www.fin24.com/Economy/zim-poses-high-risk-for-trade-and-investment-survey-20160623> (Accessed on 16/10/ 2019).

<sup>72</sup> <https://www.iol.co.za/business-report/international/the-real-impact-of-zims-shift-in-monetary-policy-emerge-27936954> (Accessed on 16/10/2019).



### 2.3.2 *State of Infrastructure in Zimbabwe*

Decades of deferred maintenance and lack of long-term financing have taken a heavy toll on Zimbabwe's infrastructure that was once ranked at the top of Africa. Electricity output is now about half the level of demand characterised by daily load-shedding not convenient for production enough to repel investors in the mining sector.<sup>73</sup>

The power sector is barely capable to provide a reliable output of 1,300MW compared to peak demand of 2,000MW shortfall being managed by load-shedding resulting in loss of production and unfavourable as an investment destination.

Water supply and sanitation sector in the urban at one time boast of the highest access rates to reliable and safe services in Africa. The combination of deferred maintenance and lack of funding for rehabilitation and expansion has created constant threat to health.

Zimbabwe is landlocked as such, it takes advantage of regional synergies. The transport sector comprised of three sub-sectors: road, railways, and aviation. According to Ringskog, 40% of Zimbabwe roads need rehabilitation, as regards the National Railways of Zimbabwe has only a third of locomotives are operational and the track infrastructure has deteriorated.<sup>74</sup>

The Information communication Technology (ICT) sector is favoured by strong demand that has made it possible to keep tariffs high helping produce operational surpluses that have been for investment into infrastructure.<sup>75</sup>

The geology known as the Zimbabwe Craton which is the remnants of volcano-sedimentary piles referred to as Greenstone Belts, covering 60% of the country, central in location and marked by The Great Dyke which stretches about 550km long and 4-11km wide cutting across the entire Craton in the N-S direction. Among several deposits are the metamorphic minerals which host numerous gemstones, precious stones and base metal mines. Mineral deposits of Zimbabwe are among the best documented in the region and a search through available literature always forms the first stage in the exploration of any mineral.<sup>76</sup>

In the early years of independence, as mentioned earlier in the introduction of this chapter, Zimbabwe made a significant progress in infrastructure thereby achieving a national electricity network with regional interconnections in power sector, building good road networks countrywide

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<sup>73</sup> Ringskog, K. Zimbabwe Infrastructure Policy Review (December 2013), P 4.

<sup>74</sup> Ringskog, K. Zimbabwe Infrastructure Policy Review (December 2013), p 12.

<sup>75</sup> Ibid 1.

<sup>76</sup> Ibid 2.

and further into regional transport corridors, laying water and sewage system and building dams intended for irrigation purposes.<sup>77</sup> Nevertheless, the major setback was triggered by political risk and legal risk that have continued to cast a heavy veil of uncertainty to MID in Zimbabwe.

Zimbabwe is currently faced with a down turn of the economic situation where it is increasingly becoming difficult to maintain and rehabilitate its infrastructure as the country is sieged by economic and political quagmire since the late 1990s<sup>78</sup>. The World Bank Report on Zimbabwe`s infrastructure further provides that, the unfavourable environment has resulted in the lack of new investment in infrastructures such as roads, power and water and the accumulation of huge infrastructure rehabilitation agenda. The report indicates that the power system has become unjustifiably costly, inefficient and unreliable and it further, provides that the condition of roads has deteriorated such an extent that even rural connectivity hardly exists<sup>79</sup>. Looking ahead, Zimbabwe faces several important infrastructure challenges that would need sustained expenditure of almost US \$2 billion<sup>80</sup> per year over ten years to address<sup>81</sup>.

#### 2.4 THE CONCEPT OF LEGAL RISK

The definition of the word risk according to Burton (2007) is the possibility of loss or harm occurring.<sup>82</sup> This definition suggests that this occurrence is caused by uncertainties. Therefore, legal risk is the potential for losses due to regulatory or legal action and the following are such types of legal risks namely regulatory risk, compliance risk, contract risk, non-contractual rights, non-contractual obligations, dispute risk, reputational risk and compliance risk.<sup>83</sup>

*Regulatory risk* – This type of risk arises due to changes in regulations resulting in new compliance costs.

*Compliance risk* – The potential for fines and penalties for an organisation that fails to comply with laws and regulations.

*Contract risk* – The potential for a partner, customer or supplier to fail to meet the terms of a contract resulting in losses resulting in penalties or legal disputes.

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<sup>77</sup> Idem P19.

<sup>78</sup> Idem P14.

<sup>79</sup> Idem P98.

<sup>80</sup> Zimbabwe is currently facing a currency crisis. At the time of putting up this study, the country has no credible currency that would provide a standard measurement. The figures herein are expressed as a quantum in United States Dollars.

<sup>81</sup> Ringskog, K. Zimbabwe Infrastructure Policy Review (December 2013), p 12.

<sup>82</sup> <https://legal-dictionary.thefreedictionary.com/risk> (Accessed on 11/11/2019).

<sup>83</sup> <https://simplicable.com/amp/legal-risk> (Accessed on the 02/11/2019).

*Dispute risk* – The potential for a legal dispute to arise as a result of your business activities.

*Reputational risk* – The potential for a decline or damage in reputation due to legal actions resulting in loss of customers and investors.

It has proved difficult to establish a satisfactory definition of legal risk because most, if not all types of risk (operational, credit, market and liquidity risk) contain a legal component that makes categorisation difficult. Moreover, not every issue containing a legal component should be defined as a legal risk. In addition, differences in jurisdictional cultures may play a role in identifying legal risk.<sup>84</sup> However, for the purpose of this study, the above definition will be used as the working definition and also to enhance the achievement of the objective of the study. The establishment of a generally acceptable definition of legal risk in the context of operational risk management would clearly facilitate proper risk assessment and risk management.<sup>85</sup> Legal risk management can be broken down into four components:

- *Identification* – What is legal risk?
- *Assessment* – this is difficult, as legal risk notoriously tend to have low probability and high impact
- *Monitoring* - quality control reporting mechanism.
- *Control/Mitigation* – review of legal documentation.

At an approach level, the central driver of government laws and policies is the political ideology of the ruling government of the day. As the governments serve for a specific term as defined by the Constitution of the country, the political ideology may be bound to change also depending on the country's ruling system and this change influences the level of political risk of that country and so in turn also on the legal risk. In a democracy, the business understands that most rules survive changes in government and any changes are usually a reflection of changing the economic environment and not the change of government. The case of the USA during the world economic crisis of 2008<sup>86</sup> is a typical scenario that explains certainty on general business policies in the face of change of government but only encounters changes motivated by economic factors. This contrast, with authoritarian governments or where democracy is either not in effect or simply a token process.

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<sup>84</sup> Wurtz, K, J. Definition of legal risk and its measurement by central banks: International In-house Counsel Journal Vol. 1, p 45 (June 2007).

<sup>85</sup> Ibid 45.

<sup>86</sup> <https://www.historyextra.com/period/modern/financial-crisis-crash-explained-facts-causes/> (Accessed on 29/10/2019).

Therefore, political systems work with ideologies that filter through to socio-economic systems of a country which resultantly impact on the country's legal system. The concept of political risk has a strong bearing on legal risk such that high political risk usually translates to high legal risk and vice-versa.<sup>87</sup> The two concepts are cousins which work hand-in-hand on impacting the economic environment. However, this study will focus on legal risk and how it gives rise to uncertainty on mining Infrastructure development in Zimbabwe.

The government may use key policy areas to create rules and regulations particularly in as far as regulating the conduct and practices of business especially trade. Depending on the way deliberations are carried out and the conduct of the regulator on these key policy areas, the trigger may impact on legal risk. Politically, a government may seek to protect jobs or specific industries considered essential for national security as well as motivated economic and social factors to protect young industries and as such make laws and policies in this regard. Further, government may craft policy to reward a specific country for political support on global matters as in the case of Zimbabwe look East policy<sup>88</sup>

Regulatory risk has many facets, During the different stages of a project's life cycle, infrastructure projects are exposed to very different types of political and regulatory risk.

- During the planning and construction phase: – delayed construction permits, and community opposition;
- During the operating phase: – changes to various asset-specific regulations,
- Outright expropriation; towards the end of a contract: – the non-renewal of licences and tightened decommissioning requirements.

In addition, some broader risks apply throughout the life cycle and can affect an entire infrastructure sector (or even the entire national economy): – changes to sector regulation or taxation laws, for instance, and endemic corruption.<sup>89</sup>

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<sup>87</sup> World Economic Forum: Mitigation of Political and Regulatory Risk in Infrastructure Projects. Strategic Infrastructure Initiative (January 2015).

<sup>88</sup> Ojatorotu, V. Kamidza, R. Look East Policy: The Case of Zimbabwe-China Political and Economic Relations Since 2000 (2018).

<sup>89</sup> World Economic Forum: Strategic Infrastructure Initiative: Mitigation of Political & Regulatory Risk in Infrastructure Projects (2015).

Uncertainty involves those risks that cannot be quantified and can occur either by the sheer complexity of the given situation or because the subject matter cannot be reasonably measured.<sup>90</sup> Therefore, Gregg, clarifies that if a situation of uncertainty persists, it will deter many from even considering whether to take economic risks. A suitable example of the workings of uncertainty is the American tax system as applied by Saunders, in the Wall Street Journal report:

*“The US, tax Code is slowly being turned into a temporary patchwork of provisions that need to be addressed every year or two, depriving individuals and business of the predictability they need for long-term plans”<sup>91</sup>*

There may probably be no single aspect which contributed more to the prosperity of the West than the relative certainty of the law which has prevailed in the region compared to Zimbabwe. (Gregg 2011). Further, Gregg argues that, A legal environment in which governments reconfigure the legal framework regulating commerce on almost daily basis erode some of the aspects of the rule of law for most of the institutions particularly those important as economic drivers.<sup>92</sup>

Legal risk constitutes one of the main reasons why some investors, even when urgently seeking investment opportunities, will simply not consider infrastructure assets in emerging and developing countries. Their concern is that laws and regulation can change unexpectedly. Typically, infrastructure investments involve a very long asset lifetime and contractual relationship, as such payback is well beyond the term of any individual government.<sup>93</sup> Given this mismatch between political cycles and the infrastructure cycle, infrastructure investors are understandably cautious hence they want to be sure not only that the current government meets its commitments but also that the decisions of a future parliament or administration will not affect their investment severely.

In developing jurisdictions whose legal framework is not “so mature,” the level of legal risk is correspondingly high due to unprecedented uncertainty.

## 2.5 CONCLUSION

The outline above has illustrated a deplorable current state of infrastructure in Zimbabwe’s extractive industry. Literature review of the current state of infrastructure in general and MID specifically was provided from a global, regional and Zimbabwean perspective. Also interrogated in

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<sup>90</sup> Gregg, S. Risk, Uncertainty, and Rule of Law: An Uncertainty legal Landscape puts Future Prosperity at Risk (2011).

<sup>91</sup> McKinnon J, D. Fields, G. Saunders, L. `Temporary` Tax Code Puts Nation in a Lasting Bind: Wall Street Journal (2010).

<sup>92</sup> Ibid.

<sup>93</sup> World Economic Forum: Strategic Infrastructure Initiative: Mitigation of Political & Regulatory Risk in Infrastructure Projects (2015).

order to enhance the objectives of this study was the concept of legal risk and how it gives rise to uncertainty to MID. The following chapter will provide a review of the regulatory framework and how such regulation considerations and or promulgations have given rise to uncertainty and hence the increased legal risk in MID projects.

## CHAPTER 3: A REVIEW OF THE REGULATORY FRAMEWORK AND IMPACT OF LEGAL RISK

### 3.1 INTRODUCTION

The prevailing philosophy surrounding Sub-Saharan Africa's Extractive Industry sector is expected to induce uncertainty which is largely caused by the recent growing regulatory considerations. Several host nations Zimbabwe included, have either implemented or announced a review of their mining codes. A basket of concerns for such regulatory reforms is listed as resource nationalisation, Infrastructure deficits, sustainable development, strategies to revive ailing economies, self-determination principle, and Indigenous companies and Individual participation among other factors. This chapter will examine the regulatory framework of Zimbabwe's extractive industry to find out how the regulatory framework and laws have contributed to the uncertainty into MID.

Legal frameworks comprise a set of documents that include the Constitution, legislation, regulations, and contracts. These documents relate to one another and have different levels of force as represented by the legal hierarchy as shown in the pyramid below.<sup>94</sup>

The constitutional history of Zimbabwe starts with the arrival of the white settlers and the colonisation of what was known as the Southern Rhodesia in the 1890s. This state was recognized under the British South African Company as Rhodesia in 1895. In 1923 Rhodesia became a self-governing body under the British rule. However, the rise of African consciousness in the 1950-s led to the struggle for Independence and self-rule, which subsequently led to the Second Chimurenga (the war for independence) in the 1970-s. The Lancaster House Agreement signed on 21 December 1979 declared a ceasefire which signalled the ending of the Chimurenga War and directly leading to the creation and the recognition of the Republic of Zimbabwe.

Under the Lancaster House Constitution, Zimbabwe enjoyed economic stability only but for a decade. The late 1990s saw the decline of the standard of living and the heightening of political instability which culminated into the emergence of a very strong opposition political party called the Movement for Democratic Change (MDC) in 2000. In Zimbabwe's constitutional history, the year 2000 is very significant in as much as it is in this study because this was the climax of political, economic and social instability, which was squarely blamed on centralised power of the executive and as such, this led to a referendum which ultimately ushered (the 2013 Constitution.<sup>95</sup>) However, the Lancaster House Constitution did not make any meaningful provisions for land reform. This lack

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<sup>94</sup> Idem NRG1.

<sup>95</sup> In this work, any references to the "-Constitution-" unless the context clearly indicates otherwise, should be taken to refer to 2013 Constitution.

of justice in the Lancaster land resolution precipitated the failure of the constitutionally provided “willing buyer-willing seller” principle. The position assumed that there would be willing sellers something that was unimaginable since the land was valuable and unavailable for sale by those that possessed it leading to the serious land conflict which is continuing until this day. This study will show that the constitutional redress of the past injustices such as the land question and economic inequalities among other critical issues is central in the philosophy of addressing historical disparities. The formulation and operationalisation of policies and laws by the Zimbabwean government were done in a way that inevitably raises several questions the of rule of law, human rights issues and the violation of International Bilateral Agreements<sup>96</sup> giving rise to legal risk reaching on an unprecedented level enough to scare Foreign Direct Investment (FDI) needed on Infrastructure Development. Socio-economic and political pressure on the beleaguered ZANU-PF government resorted to the fire-fighting enactment of laws, policies and constitutional amendments. The adverse impact of legal risk unavoidably, therefore, plunged the jurisdiction into an unsafe capital destination as capital is attracted by certainty in regulatory framework among other critical factors.

### 3.2 THE RULE OF LAW

In order to examine whether the jurisdiction is a high legal risk environment, the concept of rule of law should be considered in reviewing and analysing the regulatory framework of a jurisdiction. Tamanaha, defines the rule of law as government officials and citizens being bound and abiding by the law. This definition speaks to the concept of formal legality among other aspects and is the most dominant notion of the rule of law. Formal legality sets forth, that law must be provided in advance, publicly stated, must be general, applied to every one according to their terms, and not demand *an* impossibility. Additionally, it must provide predictability and be possibility to foresee with certainty, how the authority would use its powers in given circumstances and to plan one’s individual affairs based on knowledge and to know in advance which actions will expose them to risk of sanctions by the government apparatus.<sup>97</sup>

### 3.3 THE CONSTITUTIONAL ANALYSIS

The Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void.<sup>98</sup> Chapter 1 of the

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<sup>96</sup> Mike Campbell v Republic of Zimbabwe (2/2007) [2008] SADCT 2.

<sup>97</sup> Tamanaha, B. Z. The History and Elements of the Rule of Law: Singapore Journal for Legal Studies (2012).

<sup>98</sup> The Constitution of the Republic of Zimbabwe Chapter 3.



Constitution provides that Zimbabwe is a sovereign republic and shall be known as “the Republic of Zimbabwe”.<sup>99</sup>

Zimbabwe is a constitutional democracy as provided by the Constitution<sup>100</sup> though fundamentally the political space risks democratic regression rendering the future democracy bleak.<sup>101</sup> In a report, the Zimbabwe Lawyers for Human Rights (ZLHR) sadly mentioned that since Independence, the Executive and Legislature for some political reasons found it necessary to amend the Constitution a record seventeen times. Several of these Amendments sought to reverse judicial rulings which have set standards for constitutional conduct by the state whereas other Amendments have been a direct assault on the very liberties provided in the Constitution. The (ZLHR) report provides among other Amendments the following:<sup>102</sup>

- Amendment No. 7 (Act 23 of 1987) - Executive powers of the presidency was entrenched by this provision.
- Amendment No. 9 (Act 31 of 1989) - Abolish the bi-cameral legislature and introduces a single house.
- Amendment No. 11 (Act 30 of 1990) - Amended the Constitution to add a derogation expressly allowing corporal punishment. It provides that hanging by the neck did not amount inhuman and degrading treatment. This directly reversed a Constitutional Court ruling<sup>103</sup> and negatively impacted on the independence of the Judiciary and the principle of separation of powers.
- Amendment No. 13 (Act 9 of 1993), it again reversed the Constitutional Court ruling wherein it had ruled in favour of the unfortunate citizenry.<sup>104</sup> The compulsory acquisition of land was added as a derogation from the right to hold property in various amendments including Amendment No. 11 (Act 30 of 1990) which ousted the jurisdiction of courts in deciding whether compensation for the land thus acquired under land reform program was fair or not.
- The Amendment No 16 further limited such “unjustifiable” compensation to only improvements on the land.

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<sup>99</sup> Ibid Sec 1.

<sup>100</sup> Ibid.

<sup>101</sup> Mswelanto, T. “The Future of Democracy in Zimbabwe: Forward to the Past? Alternative Information & Development Centre (AIDC), (2018).

<sup>102</sup> Zimbabwe Lawyers for Human Rights (ZLHR): Amendments to the Constitution of Zimbabwe: A Constant Assault on Democracy and Constitutionalism.

<sup>103</sup> S v Juvenile 1989 (2) ZLR 61 (S), Catholic Commission for Justice and Peace v The Attorney General & Others 1993 (1) ZLR 242 (S) and 1993 (1) ZLR 291 (S).

<sup>104</sup> Catholic Commission for Justice and Peace v The Attorney General and others 1993 (1) ZLR 242 (S) and 1993 (1) ZLR 291 (S).

- Amendment No 17 was ultimately, promulgated to entirely oust the jurisdiction of courts over cases of acquisition of land by the state as in the landmark cases of (*Government of the Republic of Zimbabwe v Fick and Others*)<sup>105</sup>, and (*Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*)<sup>106</sup>.

The report concludes that, instead of seeking to improve and making the Constitution a “living document” that improves peoples` lives, protects and promotes their fundamental rights and freedoms and facilitates an environment conducive for economic, social and political development, the Amendments have since become a lethal tool to subvert judicial decisions rendering the court system lacking judicial integrity.<sup>107</sup> These constitutional developments where the Constitution is assaulted repeatedly and Judicial decision of entrenched provisions reversed for political patronage reasons has over the past two decades raised the legal risk to an unprecedented level. The environment has been turned a dark cloud of uncertainty hence impacting negatively on MID.

### 3.4 THE JUDICIARY SYSTEM

The judiciary is the branch of government that is responsible for the independent administration of justice in terms of the law. The term is used broadly to refer to the courts, the judges and other personnel that run the system further, the courts apply the law and settle disputes and punish law-breakers according to law.<sup>108</sup> However in the case of Zimbabwe, though the country has a framework that clearly shows the separation of power an assault to the integrity of the bench by series of clandestine reversal of its decisions through constitutional amendments as earlier mentioned in this chapter under the Constitution.

The unpredictable amendments and passing of laws convenient to the politics of the day and a record seventeen times Constitutional amendments, a condition apparently that exhibits a fragile, unstable and unreliable legal framework. Inevitably, it raises the question of uncertainty which speaks to unprecedented high level of the legal risk. Further, the Zimbabwean commercial farmers` famous case *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* which was triggered by a Constitution

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<sup>105</sup> *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22,2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

<sup>106</sup> *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

<sup>107</sup> *Ibid* ZLHR: Zimbabwe Constitution Amendments.

<sup>108</sup> Consultative Council of European judges (CCJE): “The Position of the Judiciary and its Relation with the other powers of state in a modern democracy” Opinion No (2015).

Amendment 17 that ousted the jurisdiction of the courts in Zimbabwe on matters of the land reform program. This is a clear violation of the principle of formal legality<sup>109</sup> in terms of the rule of law.

A key policy proposal in the 2019 National Budget Statement<sup>110</sup> on Extractive Industry was the improvement of transparency in the sector through the joining of the EITI, improving mining cadastre, but sadly the Mid-Term Budget Review<sup>111</sup> was mute on the feed regarding progress on the proposed mining sector reforms creating policy inconsistency that raises uncertainty.

Currency issue played a catalysing role on Zimbabwe's economic deterioration and further affected investor confidence. To understand the Zimbabwe currency reforms and the resultant currency crisis, it is critical to roll back to 2009 when the country was ravaged by hyper-inflation, and the Zimbabwe dollar in response to hyperinflation abandoned, and a multi-currency policy was adopted in February 2009. Resultantly, prices and wages were in USD and the economy was de facto dollarized coinciding with the Government of National Unity (GNU) between ZANU-PF and the opposition MDC which ended in August 2013. Dollarization offered price stabilisation for business and the employed however the negative effects of the omissions and commissions of this policy was that, a huge number of people lost their savings because banks did not convert deposits to USD. Pensions and insurance benefits similarly were adversely eroded to nothing.<sup>112</sup>

In 2016 the foreign currency situation had returned to haunt the struggling economy forcing the government to introduce a surrogate currency which upon pronouncement was valued at the rate of 1:1 to the US dollar but currently it is at 1:15.<sup>113</sup> While the government insisted and continues to insist on the use of the recently introduced Zimbabwean currency the market is informally rejecting the new currency due to loss of confidence in the local currency and as a matter of fact the economy in default has dollarized itself.

Against this backdrop, that Zimbabwe in its denial of the reality that the local currency has no legs to stand on given the state of the economy, adamantly employs the use of statutory Instruments (SI) as regulatory measures to deal with the deepening currency crisis;

- *SI 212 of 2019 Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019*

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<sup>109</sup> Gregg, S. Risk, Uncertainty, and Rule of Law: An Uncertainty legal Landscape puts Future Prosperity at Risk (2011).

<sup>110</sup> Zimbabwe 2019 National Budget.

<sup>111</sup> Zimbabwe 2019 Mid-Term Budget Review.

<sup>112</sup> Mate, R. Social Policy and Social Spending in Zimbabwe: 1980-2015, United Nations Research Institute for Social Development. Working Paper (October 2018).

<sup>113</sup> <https://qz.com/africa/1739416/zimbabwe-brings-back-zim-dollar-and-the-limits-of-mobile-money/> (Accessed on 12/11/2019).

- *SI 142 of 20S19 reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019*
- *S.I 2019-33 Amendment of the Reserve Bank of Zimbabwe Act and Issue of RTGS Dollars Regulations 2019*

The above are just but a sample from concoction basket of SI pronounced almost every fortnight as a crisis-management remedy. In June the US dollar and other currencies were banned via the SI 142 of 20S19 reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019 signalling the dramatic return of the Zimbabwe dollar. All this unpredictable, sporadic currency reforms have caused market distortions with some long-term investments by both foreign and local individuals and institutions trapped and counting their losses as each day passes. The clean reality is that, the people of Zimbabwe have lost trust in any currency mechanism that any medium of exchange is currently chasing after the US dollar which is perceived to be a stable currency. During the period of compiling this study the new Zimbabwe dollar notes introduced effective 12 November 2019, it remains to be seen whether currency crisis will be solved from this attempt to normalise the economy.

However, the history of Zimbabwe currency reforms trajectory from 2008 to date has been characterised by unimagined levels of hyper-inflation, daily if not hourly price increases, inconsistent and conflicting policy positions, policy uncertainty, making the jurisdiction very unsafe for investment.

Another aspect of legislation that was affected by legal framework considerations was the security of tenure policy. Land tenure reforms in Zimbabwe are highly emotive and complex political issues and closely linked to anti-colonial ideologies that focus on black empowerment and socio-economic justices. It is important to understand the political nature and the context within which racially skewed land and tenure arrangements developed. As such, it is against this backdrop that the post-independence government of Zimbabwe sought to redress and to address the injustices through the Fast Track Land Reform Programme (FTLRP).<sup>114</sup> The recommendations of Maguranyanga, highlighted the lack of conducive legal and institutional environment for land tenure reforms and policy implementation. The lack of transparency and open dialogue on land tenure issues, the need to create an efficient land tenure administration system and structure that would oversee the implementation of land tenure policy and allocation of land rights are also emphasized.<sup>115</sup>

These recommendations made post-FTLRP speaks to lack of certainty, predictability and transparency on the part of the introduced policy. It has been mentioned earlier that Zimbabwe's agriculture sector is heavily networked on infrastructure that was originally created for mining

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<sup>114</sup> Maguranyanga, B. Moyo, S. Policy Brief: Land Tenure in Post FTLRP Zimbabwe: Key Strategic Policy Development Issues. (2006), p 6.

<sup>115</sup> Idem 1.

activities and therefore it would take legal certainty, clarity and consistency of both sectors' legal frameworks to be very detailed and comprehensive in order to ward off the perspective of Zimbabwe being a legal risk capital destination.

One of the key measures to doing business well and fostering a good investment climate in any country is the respect of property rights largely because investment, economic prosperity and property rights are inextricably linked. Literature shows that, investment can only grow if the investor is guaranteed access to the property and the commercial benefits drawn from the use and ownership of it.<sup>116</sup> Property rights refer to the legal ownership of a resource or economic good, either tangible or intangible and how the owner can use it. The owner may be people, companies, charities, government, trusts etc. It has been established through research that, property rights give the owner or right holder the ability to do with the property personal choices including holding on to it, selling or renting it out for a profit or transferring it to another party.<sup>117</sup> This definition is comprehensively supported by Section 71(2) of the Constitution.<sup>118</sup>

Investors secure funding from financial institutions who naturally look at the precedence of how the government has handled cases on property rights. Cases such as the arbitrary invasion and appropriation of Foreign Currency Accounts (FCA) by the Central Bank in 2009<sup>119</sup>, arbitrary acquisition of land belonging to Zimplats, African Distillers, ZimAlloys, RioZim, and diamond mining companies in Chiyadzwa set a very bad precedent to potential investors on how Zimbabwe deals with property rights. According to Bhoroma, V, the above Arbitrary action by the Zimbabwean government has conditioned the private investors lose the confidence and more so the willingness to commit their capital even in PPPs, joint ventures or any other giveaway deals from the government largely because of tainted respect for property rights.<sup>120</sup> Therefore, legalities surrounding property rights issues have created uncertainty to investment in the country and as such capital has not found its way into MID.

### 3.5 MINING AND MINERALS AMENDMENTS BILL

The minerals Amendment Bill (2013) was introduced to amend the Mines and Minerals 1963 Act whose weaknesses were as follows:<sup>121</sup>

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<sup>116</sup> Bhoroma, V. Zimbabwe: Why Property Rights Matter for Zim's Economic Recovery (2019).

<sup>117</sup> Ibid.

<sup>118</sup> The Constitution.

<sup>119</sup> <https://www.insiderzim.com/gono-raided-fcas-to-pay-imf/amp/> (Accessed on 06/11/2019).

<sup>120</sup> Bhoroma, V. Zimbabwe: Why Property Rights Matter for Zim's Economic Recovery (2019).

<sup>121</sup> Masiya, T. Davids, Y.D. Ntola, S. Y. Muller, B. Zimbabwe's Minerals Amendment Bill (2015): Enhancing Natural Resources Governance? Human Sciences Research Council (2018).

- It did not promote transparency and accountability in the mining sector;
- There was a leakage of minerals and revenue, poor flows of taxes and royalties to fiscus;
- Opaque license deals;
- Rampant corruption; and
- Human-rights abuses and environmental degradation among other issues.

All the above-mentioned lacking factors in the mining regulatory framework presents a direct impact on MID as the much-needed capital for both new MID projects and maintenance of existing infrastructure tends to shy away from the unfavourable environment.

According to Masiya, the clause 6 of the Amendment Bill, aimed at amending section 7 of the Mines and Minerals Act, speaks to the composition of the Mining Affairs Board wherein the proposed bill in terms of Clause 6, the Board is Chaired by the Permanent Secretary and only he/she can chair it, and in her/his absence, the Deputy Secretary cannot chair. Further, this problem is exacerbated by the proposed appointments of principal directors in the ministry and this compromises a non-partisan Board and interests of the sector.<sup>122</sup> Therefore, when laws are this rigid and centralised to one and only that person who has to do a certain task where oftentimes the person has to attend to many other responsibilities in such a busy sector, may led to delays in decision making. This scenario highlights the need for laws and policies created with the view to provide certainty, predictability and consistency in order to attract the capital investment needed for MID.

### 3.6 INDIGENISATION POLICY

The Indigenisation and Economic Empowerment Act of 2008<sup>123</sup> which gave Zimbabweans the right to own and control 51% stake in all business entities in the country. This Act was passed when the heat generated by protracted legal battles emanating from the land reform program was on and therefore, it lacked sound economic sense in terms of investment but was seen as radical hit back to foreign stakeholders that did not approve of Zimbabwe`s land reform and which frowned at this by handing economic sanctions to the government.

The current position is that the Act was recently reversed as part of the 2018 government mantra “Zimbabwe is open for business” where foreign entities can hold 100% mining rights except for platinum and diamonds.<sup>124</sup> However, rule of law is hard to build and again economic confidence. Once lost it may be gone forever or will require some drastic overhaul of most facets of governance

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<sup>122</sup> Masiya T. Zimbabwe`s Minerals Amendment Bill (2015): HSRC (2018).

<sup>123</sup> Zimbabwe Indigenisation and Economic Empowerment Act of 2008.

<sup>124</sup> The Finance Act 2018 (no1 2018) Sec 42 Amends the Indigenisation and Economic Empowerment Act. (2008).

which may entail a change of government and political vanguards in the country. In Zimbabwe, there has not been any deliberate and holistic reforms intended to shrug off the heavy blanket of uncertainty hovering over the economic stability of the country.

### 3.7 INTERNATIONAL LAW ASPECTS OF ZIMBABWE`S EXTRACTIVE INDUSTRY

#### 3.7.1 *Extractive Industry Transparency Initiative*

The Extractive Industries Transparency Initiative is a Global standard to promote the open and accountable management of extractive resources. EITI is guided by the belief that a country`s natural resources belong to citizens and can lead to social development and economic growth.<sup>125</sup> However poor resource governance has often led to corruption and conflict. Therefore, EITI upholds and advocates openness and public scrutiny of how wealth from a country`s extractive sector is managed to ensure that natural resources benefit all.<sup>126</sup>

The Zimbabwean Constitution provides for the opening of the extractive sector for public accountability. Section 62 and section 299 provides for parliamentary oversight on state revenue and expenditure to enhance public transparency and accountability.<sup>127</sup> These provisions speak to why Zimbabwe must join the Extractive Industry Transparency Initiative (EITI).<sup>128</sup> The present government has a simple and appealing message, “Zimbabwe is open for business” and as such if there is political will, and commitment to deal with political patronage on mineral resources and deal decisively with corruption which is particularly rife in the mining sector then they may meet the requirements of EITI.<sup>129</sup> Recently the current government has initiated the dialogue with the view to join the EITI and as such the success of this initiative will depend on its commitment to carry out sectoral reform.<sup>130</sup>

#### 3.7.2 *Stabilising clause*

This is clause in a contract between an investor and host state that addresses changes in Law in the host state during the life of the project. There are three broad categories of stabilisation clauses.<sup>131</sup>

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<sup>125</sup> <https://eiti.org/who-we-are> (Accessed 28/11/2019)

<sup>126</sup> <https://eiti.org/who-we-are> (Accessed 28/11/2019)

<sup>127</sup> Constitution of Zimbabwe Sec 62 & Sec 299.

<sup>128</sup> Sibanda, M. “Why Zimbabwe Must Join The Extractive Industry Transparency Initiative” (2019).

<sup>129</sup> Ibid.

<sup>130</sup> Zimbabwe 2019 Budget pronouncement.

<sup>131</sup> <https://negotiationsupport.org/glossary/stabilization-clause> (Accessed on 16/11/2019).

- *Freezing clause*- specify that the new law in place at the time of signing the contract will apply to the respective for its life cycle notwithstanding any subsequent changes in law.
- *Economic equilibrium clause*- requires an investor to comply with new laws but compensated by host state for doing so. Compensation can be in form of rebates, adjusted tariff, and extension of term of project or tax reduction.
- *Hybrid clause*- It is a combination of freezing clause and economic equilibrium clause.

The purpose of stabilisation clause is to offer investors and their lenders some assurance that the investment will not be subjected to unpredictable and costly changes in law.<sup>132</sup>

### 3.7.2 International sanctions.

The European Union (EU) sanctions on Zimbabwe were first imposed in 2002 by *Common Position 202/145/CFSP and amended in 2004*.<sup>133</sup> In a statement the EU foreign ministers in 2002 charged that the then President of the Republic of Zimbabwe, Mr Mugabe`s government had prevented the deployment of an EU election observation mission and added that EU remains seriously concerned about political violence, serious violations of human rights and restrictions on media which bring into question the prospects of free and fair election.<sup>134</sup>

In 2001, the US further and on its own account after the land reform program and what was generally perceived as a failed election enacted Zimbabwe Democracy and Economic Recovery Act (ZIDERA)<sup>135</sup> which made demands mostly bordering around rule of law, democratic and economic reforms as follows;<sup>136</sup>

- Reform of the Zimbabwe electoral commission
- Controversial land reform i.e., the enforcement of SADC tribunal;<sup>137</sup>
- Return to the rule of law; and
- Human rights abuses.

<sup>132</sup> <https://negotiationsupport.org/glossary/stabilization-clause> (Accessed on 16/11/2019)

<sup>133</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1435845554049&uri=CELEX:32002E0145> (Accessed on 12/11/2019).

<sup>134</sup> <https://amp.theguardian.com/world/2002/feb/18/zimbabwe> (Accessed on 12/11/2019).

<sup>135</sup> Zimbabwe Democracy and Economic Recovery Act of 2001.

<sup>136</sup> <https://www.thezimbabwemail.com/main/us-sanctions-on-zimbabwe-truths-history-and-lies/> (Accessed on 12/11/2019).

<sup>137</sup> Mike Campbell and Others v Republic of Zimbabwe.



These sanctions were meant to force Zimbabwe to provide a transition to democracy which supposedly would transform the country to a trajectory of economic recovery. The effects of ZIDERA were toxic as they extended to organisations and entities associated with the USA compelled to withdraw or not do business with Zimbabwe. Also included were financial institutions.<sup>138</sup> Donors withdraw while those that remained scaled down their support and only focused on humanitarian and emergency responses.<sup>139</sup> The sanctions were renewed under President Donald Trump's administration by the Amendment Act of 2018 of ZIDERA.<sup>140</sup> Unfortunately the Zimbabwean situation is internationally told from a single-story perspective "until the lions learn how to write every story will glorify the hunters<sup>141</sup>." Recently African Union (AU) and Southern African Development Community (SADC) have initiated a solidarity call for an end of the sanctions by the West.<sup>142</sup>

With all intends and for all purposes, effectively this international legislation on Zimbabwe meant that the legal risk of doing business in Zimbabwe inevitably heightened and internationally flagged Zimbabwe as an unsafe destination for investment. The legal certainty was only going to come return when ZIDERA was legislated out. As it stands recently USA has revised and even tightened the provisions

### 3.8 THE PRINCIPLE OF NATIONAL SOVEREIGNTY

International law usually regards a nation as having sovereignty or jurisdiction over natural resources within its territory,<sup>143</sup> which is the right to prescribe and enforce rules without outside interference over all conduct within its territory as regards natural resources.<sup>144</sup> A host nation may heavily and selfishly rely on the principle of sovereign and legislate laws motivated by populist tendencies and partisanship. The result mostly would be against best practices of natural resources governance creating uncertainty in the sector and as such mining infrastructure development will not be spared in the matrix.

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<sup>138</sup> Zimbabwe Democratic and Economic Recovery Act of 2001 sec 4.

<sup>139</sup> Chinyoka, I. 'Poverty, changing political and social cash transfers in Zimbabwe, 1980-2016'. United Nations University World Wide Institute for Development Economic Research (2017).

<sup>140</sup> <https://www.voanews.com/africa/zimbabwe-decries-us-renewal-sanctions?amp> (Accessed on 11/12/2019).

<sup>141</sup> African proverb.

<sup>142</sup> <https://www.theeastafrican.co.ke/news/africa/US-EU-differ-with-AU-on-lifting-of-sanctions-on-Zimbabwe/4552902-5334334-view-asAMP-100ajhlz/index.html> (Accessed on 12/11/2019).

<sup>143</sup> Article 1 and 2 of the 1974 United Nations Charter of Economic Rights and Duties of States.

<sup>144</sup> Bilder, R. B, International Law and Natural Resources Policies, 20 NAT. RESOURCES J. 451 (1980).

### 3.9 CONCLUSION

There is an apparent lack of predictability and consistency and certainty in Legal framework<sup>145</sup> which makes the Zimbabwean jurisdiction an unsafe capital destination for the investors. Unless the legal and regulatory landscape takes a paradigm shift and transits towards a trajectory of best practices in terms of democracy and good governance, conformity to the rule of law and consistence in the formulation of policies, uncertainty will remain a huge challenge to MID. The following chapter will provide a summary of intervention available and recommendations to mitigate uncertainty to MID in Zimbabwe`s extractive industry.

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<sup>145</sup> <https://www.theeastafrican.co.ke/news/africa/US-EU-differ-with-AU-on-lifting-of-sanctions-on-Zimbabwe/4552902-5334334-view-asAMP-100ajhlz/index.html> (Accessed on 12/11/2019).

## CHAPTER 4:

### MITIGATORY FRAMEWORK ANALYSIS AND RECOMENDATIONS.

#### 4.1 INTRODUCTION.

The quality of governance of a country is the key determinant for the development outcomes of extractive industry activities, as such no amount of local governance is enough if not accompanied by legal and fiscal frameworks designed to meet the development objectives which are implemented in the context of good international policies and rules.<sup>146</sup> It is important to observe that mining is a high risk, capital intensive industry, with long lead times between project inception and productivity, and has significant lack of profitability in its early stages as infrastructure related projects. The structure of any mining regulatory regime should mitigate as far as possible, the risk undertaken by the mining companies creating an environment that offers certainty and predictability.

As mentioned earlier, the concept of political risk has a strong bearing on legal risk such that high political risk usually translates to high legal risk and vice-versa<sup>147</sup> and the two concepts have a symbiotic effect which impacts on the economic environment. However, this chapter will focus on the impact of legal risk and on finding out how this concept gives rise to uncertainty to MID in Zimbabwe.

One fundamental legal risk faced by private infrastructure owners is the risk of outright confiscation or nationalization of their asset. More subtly, a series of renegotiations or regulatory changes can result in de facto expropriation, or “creeping expropriation”.

Risk of breach of contract may also contribute to uncertainty. In a PPP concession arrangement, the government might breach its contractual obligations on the grounds of safety, health or other public concerns. Whether these concerns are justified or not, the value of the asset would be adversely affected. Risk of asset-specific regulation may also further add to an unfavourable situation. For assets that could seriously impact on communities or on the natural environment – assets such as airports or dams – the operating regulations are obviously very specific. Any small change to the details to permissible noise levels, for example, or water-quality requirements can

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<sup>146</sup> Campbell B, Factoring in Governance is not enough. Mining Codes in Africa, Policy Reform and Corporate Responsibility (2003), p1.

<sup>147</sup> World Economic Forum: Mitigation of Political and Regulatory Risk in Infrastructure Projects. Strategic Infrastructure Initiative (January 2015).

have a hugely detrimental effect on revenues or cost. The same is true for price caps, which might retroactively reduce toll road charges, for instance, and thereby lower expected revenues.<sup>148</sup>

The economic performance of an infrastructure asset is closely linked to many regulations, therefore the risk of changes to regulation of industry negatively affects them.

- The regulations in question might be sector-specific, such as rules on the feed-in of renewable energy or on road usage, or they might be general laws, relating to labour relations or immigration quotas.
- Risk of taxation changes. Changes to tax rates are a special case of regulatory changes with a direct and immediate financial impact. The taxes affected might again be specific to the sector, or they might be general corporate taxes.
- Risks associated with currency transfers and convertibility. International investors expect the liberty to convert local currency and repatriate profits to their home countries. They are troubled by the risk that new legal restrictions might be introduced.
- Judicial risk. A further risk to investors is that the judicial system does not function in a timely, efficient and fully independent way. The effects can be lengthy legal processes, unpredictable rulings and the unenforceability of favourable court decisions.

#### 4.2 PUBLIC SECTOR MITIGATORY FRAMEWORK

In 2013, the then Minister of Mines and Mining Development voiced some concern for lack of laws in the sector that are attractive to the investors.<sup>149</sup> This statement confirms that the state of mining legislations have not been updated and aligned with best practices of modern-day extractive industries. Therefore, according to the World Economic Forum (2015), the public sector in Zimbabwe must create a stable regulatory environment as recommended below:<sup>150</sup>

- the national government can enhance regulatory stability by enacting and enforcing appropriate laws and regulation as reviewed in Chapter 3.
- Further, the specific regulation of each infrastructure sector (transport sector, energy, telecommunication, water & sanitation housing etc...) should be robust, with changes to

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<sup>148</sup> World Economic Forum: Mitigation of Political and Regulatory Risk in Infrastructure Projects. Strategic Infrastructure Initiative (January 2015).

<sup>149</sup> <https://www.herald.co.zw/mining-sector-in-35pc-growth/> (Accessed on 14/11/2019).

<sup>150</sup> World Economic Forum: Mitigation of Political and Regulatory Risk in Infrastructure Projects. Strategic Infrastructure Initiative (January 2015).

sector rules that are as predictable as possible beyond specific sector regulation, the overall legal architecture may consider the following recommendations:

- Reforms must offer a stable regulatory environment, by providing constitutional guarantees or dedicated investment stability laws. The laws and regulation need to be stringently implemented, by the country's executive branch.
- To mitigate the risk of unexpected and adverse administrative decisions, governments need to ensure a reliable agency set-up, with efficient procurement and permit processes that never compromise on their integrity, as well as strong anti-corruption measures.
- Investors and the government also need to have confidence in the available dispute-resolution mechanisms, so countries must ensure a judicial capacity that administers the law in an independent, timely and efficient way.<sup>151</sup>

#### 4.3 PRIVATE SECTOR MITIGATORY FRAMEWORK

A project is vulnerable to cancellation if a new government sets different priorities from those set by the previous government, or if parliamentary approval is needed before major PPP contracts may proceed. Such a cancellation could hurt private companies, as they might already have made significant investments in the project to prepare their proposal. In addition, a decision on the part of public authorities to change the project scope at a late stage could have costly consequences for the private participants delivering the project. Therefore, the private sector must find ways of managing and mitigating the political and regulatory risk.<sup>152</sup>

- For “hard” risks, such as currency inconvertibility, recommend companies to make use of financial instruments such as political-risk insurance or guarantees, issued by multilateral organizations, national providers and the private market.
- In addition, political and regulatory risk could be mitigated by a carefully crafted ownership structure: international co-owners and co-financiers – such as multilateral development banks or institutions from an investor's home country – This study recommends a “deterrence” effect on political intervention, and joint ventures with local partners, this conveniently enables an infrastructure operator to be viewed as more than just a “foreign investor”.<sup>153</sup>

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid 2.

<sup>153</sup> Ibid 3.

#### 4.4 INTERNATIONAL FRAMEWORK TO MITIGATE LEGAL RISK

The mitigatory framework speaks more to international law aspects of extractive industry. Section 326(1) of the Constitution holds that, customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or a law of Zimbabwe.<sup>154</sup> An international treaty which has been concluded or executed by the President does not bind Zimbabwe until it has been approved by Parliament and it does not form part of the law of Zimbabwe until it has been incorporated into law by an Act of Parliament in terms of section 327(2).<sup>155</sup>

In the instance, international law for extractive industry provides a process, a set of techniques and a body of experience which can help nations to forge better solutions to resource problems. International rules are only some of the many factors which influence national policymaking and decisions.<sup>156</sup> No single body of doctrine so far has emerged that appropriately can be described as an “international law of natural resources”.<sup>157</sup> National sovereignty in terms of international law mentioned earlier in chapter 3, the host nation’s sovereignty over natural resources is limited by international agreements.<sup>158</sup>

Therefore, protection for investors as mitigation of uncertainty, can be provided by international commitments – hence the ongoing effort to (re-)negotiate bilateral investment treaties (BITs) and investment protection clauses in free trade agreements. Although BITs have been in place for a long time, some countries are still making very little use of them. And many BITs have shortcomings, such as vague protection clauses and controversial arbitration procedures, that cause concern to policy-makers and the public.<sup>159</sup> Those issues are being addressed, however, by emerging new standards and by innovative “Stabilising clauses”. So, countries might consider increasing their involvement in equitable international commitments as a way of mitigating political and regulatory risk and fostering private investment in infrastructure projects.<sup>160</sup>

- ✓ This study recommends that investors who are attracted by lucrative returns in jurisdiction with uncertainty should make use of stabilising clause to mitigate uncertainty particularly in a politically and economically volatile state like Zimbabwe.

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<sup>154</sup> The Constitution of Zimbabwe Sec 326(1).

<sup>155</sup> Ibid Sec 327(2).

<sup>156</sup> Builder, R.B. International Law and Natural Resources Policy, 20 NAT. RESOURCES J. p451-452 (1980).

<sup>157</sup> Idem p452.

<sup>158</sup> Idem p473.

<sup>159</sup> World Economic Forum: Mitigation of Political and Regulatory Risk in Infrastructure Projects. Strategic Infrastructure Initiative (January 2015).

<sup>160</sup> Ibid.

- ✓ *Extractive Industries Transparency Initiative (EITI):* Zimbabwe has a compelling urgency and need to join the EITI<sup>161</sup> in order to mitigate uncertainty
- ✓ that is soaring its jurisdictional legal risk.<sup>162</sup> It is recommended in this study to legislate the provisions of section 62 and section 299 of the Constitution<sup>163</sup> that speaks to the transparency and accountability in the management of extractive resources. The present government has a simple and appealing message, “Zimbabwe is open for business” if there is the necessary political will, and commitment to deal with political patronage on mineral resources and to deal decisively with corruption which is particularly rife in the mining sector then they may meet the requirements of EITI.<sup>164</sup> Recently the current government has initiated the dialogue with the view to join the EITI and as such the success of this initiative will depend on its commitment to carry out sectoral reform.<sup>165</sup>

#### 4.5 CONCLUSION

The private sector is not generally averse to risk and will venture to make risky investments provided that the risks are manageable – and provided that the expected returns are in proportion to the level of risk. High risk premiums translate into high return expectations, and if those expectations appear unrealizable, the result will be that the proposed projects fail to attract any private investment whatsoever.<sup>166</sup> This chapter has established a three thronged approach to provide a framework to mitigate uncertainty to MID. The approach outlines measures that the private sector and the public sector may take as a framework to mitigate uncertainty. Further, this study also highlighted the international law aspects that are available to investors in MID. The following and final chapter will summarise the entire study, presents the key findings, answer the primary question of this dissertation and consolidated the recommendations made in the preceding chapter.

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<sup>161</sup> <https://eiti.org/who-we-are> (Accessed 16/11/2019)

<sup>162</sup> Sibanda, M. “Why Zimbabwe Must Join The Extractive Industry Transparency Initiative.” (October 2019).

<sup>163</sup> The Constitution

<sup>164</sup> Sibanda, M. “Why Zimbabwe Must Join The Extractive Industry Transparency Initiative.” (October 2019).

<sup>165</sup> Zimbabwe 2019 Budget pronouncement.

<sup>166</sup> World Economic Forum: Strategic Infrastructure Initiative: Mitigation of Political & Regulatory Risk in Infrastructure Projects (2015).

## CHAPTER 5:

### CONCLUSION

The adjustment of the regulatory framework in jurisdictions to benefit from mineral resources that a host nation is endowed with is not in any way a problem. Every nation desire to transform its laws in order to meet socio-economic and political challenges to improve the livelihood of its people. However, the challenge is about the way, the extent to, and the content of such regulatory reforms should be. At the least, the reforms should attempt to achieve best practices, where citizens and other stakeholders are secure, certain and the regulatory framework is predictable.

The period 2009 offered Zimbabwe an opportunity to transform its economy by taking advantage of the new political dispensation as earlier noted. Very little foreign exchange trickled into the country because the jurisdiction is perceived as a high-risk destination, chief among the risks being the legal risk according to the Business Mathematics Information (BMI) research in 2016.<sup>167</sup> The World Bank Report on Zimbabwe's infrastructure further provides that, the unfavourable environment has resulted in the lack of new investment in certain infrastructures such as roads, power and water and the accumulation of huge infrastructure rehabilitation agenda.

This study established that, there is an apparent lack of predictability, consistency and certainty on Legal framework<sup>168</sup> which makes the Zimbabwean jurisdiction an unsafe capital destination for the investors. Unless the legal and regulatory landscape takes a paradigm shift and transits towards a trajectory of best practices in terms of democracy and good governance, conformity to the rule of law and consistence in the formulation of policies, uncertainty will remain a huge challenge to MID.

This study sought to analyse the measures of mitigating uncertainty caused by legal risk to MID in Zimbabwe's extractive industries. The study established a three thronged approach to provide a framework in mitigating uncertainty to MID. The approach outlines and recommended measures that the private sector and the public sector may take to mitigate uncertainty. This study also

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<sup>167</sup> <https://www.fin24.com/Economy/zim-poses-high-risk-for-trade-and-investment-survey-20160623> (Accessed on 16/10/ 2019).

<sup>168</sup> <https://www.theeastafrikan.co.ke/news/africa/US-EU-differ-with-AU-on-lifting-of-sanctions-on-Zimbabwe/4552902-5334334-view-asAMP-100ajhlz/index.html> (Accessed on 12/11/2019).



highlighted how the international law aspects could be deployed in Zimbabwe's regulatory framework to mitigate uncertainty in MID.

There is no silver bullet for addressing the many facets of political & regulatory risk. The risk-mitigating measures presented in this report all have their uses, and they complement one another. Public and private stakeholders should cooperate, to prioritize areas for action and to create a culture of open dialogue. It will always be a challenge to get the balance right – between the investors' need for regulatory stability and governments' freedom to adjust regulation in line with national priorities. But reasonable stability that offers certainty and predictability in terms of legal framework must be achieved to boost private investment, to increase the quality and quantity of infrastructure projects.

Though recommendation have been provided in chapter 4 of this study under both private, public and international law mitigatory strategies, below is a summary of recommendations that may be implemented at approach level.

- Zimbabwe need to deal with the issue of sanctions by complying with the requirements of both the EU and ZIDERA and discussed earlier and, particularly in this regard the rule of law.
- Respect the judiciary decisions and hold such decisions as progressive steps to law reforms and enhancement of justice, thus providing certainty in Zimbabwean jurisdiction.
- Provide a comprehensive and non-ambiguous infrastructure regulatory framework where the policy and legislation are consistent with best practice to attract investment.
- Constitutional amendments should not be deployed as mechanism to advance patronage but as means to deliver justice for all.
- Sovereignty principle though upheld by international law for host nations to make decisions regarding their natural resources, should be balanced with the need for inclusion and not withdrawal from global economic activities.
- Currency reform is urgently needed to stabilise the economy as opposed to resorting to Sis that are currently promulgated like newsletters.

The global economic participation is key for Zimbabwe to revive it deteriorated infrastructure and no longer fulfilling its function as an economic enabler for sustainable development. Therefore regulatory reforms as discussed in this study, if deployed would provide certainty and predictability, thus see Zimbabwe's MID on a progressive trajectory.



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