



## FOREIGN DIRECT INVESTMENT & INDIGENIZATION IN ZIMBABWE'S PLATINUM SECTOR:

Is the Indigenization and Economic Empowerment Act a deterrent to foreign investors?

by

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## ABSTRACT

Indigenization and the economic empowerment of historically disadvantaged communities is a delicate subject in many mining jurisdictions. This dissertation seeks to assess the effectiveness of Zimbabwe's indigenization laws in balancing the interests of foreign investors, host communities, the state and indigenous Zimbabweans at large. The dissertation acknowledges that the law concerning indigenization and economic empowerment in Zimbabwe has evolved and evaluates whether the cumulative amendments have been progressive in redressing the historical injustices done to indigenous Zimbabweans. Before any amendments, the legislation mandated all foreign investors to cede 51 per cent of their investments to indigenous Zimbabweans. The amendments lifted the requirement and made the indigenization laws exclusively applicable to the extractive sector. While the responsible Minister is yet to declare the minerals subject to the indigenization laws, the industry finds itself operating at the mercy of the Minister's discretion.

This dissertation is premised on the idea that uncertainty is the primary factor that impedes FDI. The platinum sector is largely operated by foreign investors and was singled out together with the diamonds sector to be subject to indigenization laws in 2018 only to be exempted in 2021. The findings establish that the current framework disguises the regulation and implementation of state participation as indigenization. By doing so the State conflates two policies whose objectives are fundamentally divergent. One seeks to foster restorative justice and the other to enhance the State's share of the economic rents from mining. The former is an urgent cause, and the latter is a choice that can be foregone without serious consequences by merely adopting other tax tools. Consequently, the legislation creates an ambiguous policy direction and ultimately investor uncertainty. The research questions whether local parastatals can balance their fiduciary responsibilities to be loyal not only to the State but also to the foreign investor as a forced partner and whether indigenization is merely nationalisation. The dissertation concludes that the legal framework falls short of the tenets of empowerment. It further offers insight and recommendations on how the legislation burdens foreign investors with the need to implement 'double indigenization policies' parallel to each other at an added expense. One to acquire the social license to operate and the other for purposes of attaining indigenization accreditation which is merely state participation.

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# Chapter 1: Introduction

## 1. Introduction

Balancing the interests of investors, host communities, and of the state remains a difficult responsibility for most African countries.<sup>1</sup> Developing States find themselves in a delicate situation between attracting Foreign Direct Investment, (FDI) and meeting domestic needs. Providing incentives to attract FDI can slow the development of host countries to the extent that some scholars argue that it is preferable that the resources should be sterilized (left in the ground).<sup>2</sup> Profit based tax incentives reduce the revenue base for developing states. For instance, Zimbabwe is estimated to have foregone US\$346 million due to tax incentives in 2021 alone without any comparable increase in FDI.<sup>3</sup>

To counter this shortfall, developing states often adopt local content policies similar to the Black Economic Empowerment in South Africa,<sup>4</sup> Indigenization in Zimbabwe,<sup>5</sup> and Free Carry Rights in Tanzania<sup>6</sup> to benefit local people. However, if not developed and implemented properly, the policies may deter FDI. In the absence of FDI, the livelihoods of host communities may be worsened by illegal and artisanal mining activities which are characterised by violence and acute social and environmental degradation.<sup>7</sup> For complex minerals not extractable by rudimentary mining methods, such as platinum, companies may downsize or cease operations due to lack of FDI. Poorly drafted mining laws, irrespective of whether it is to incentivize FDI or to promote local content, can be detrimental to the local people. In either situation, host communities mostly bear the brunt of mining especially given that “it is all too easy for politicians to connive with those in the private sector to take what [host communities] have.”<sup>8</sup> It is often difficult to establish if a new resource law is motivated by political greed or the genuine need to serve the people.

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<sup>1</sup> M Qumba, “Balancing Investor Protection with A State’s Regulatory Autonomy in The Amended SADC FIP” (2021) *The Obiter* 652.

<sup>2</sup> J Stiglitz, “What is the role of the state?” (2007) *Columbia University Press* 23-52.

<sup>3</sup> K MUATABA, “The global minimum tax: an opportunity for developing economies (2023).

<sup>4</sup> See for example the Broad-Based Black Economic Empowerment Act No. 53 of 2003, Broad-Based Socio-Economic Empowerment Charter for The Mining and Minerals Industry of 2018.

<sup>5</sup> Section 3(1) of the Indigenization and Economic Empowerment Act of 2007 (Herein IndigenizationAct).

<sup>6</sup> The concept of free carry rights refers to an equity interest granted to the State by mining investors to be eligible for getting a mining license. See, D Lobe, S Nhleko, H Mtegha “Evaluation of government equity participation in the minerals sector of Tanzania from 1996 to 2015” (2019) *Journal of the Southern African Institute of Mining and Metallurgy* 119, 3 261-270.

<sup>7</sup> O George, A Dittmann, D Sarpong, & D Botchie, “Socio-Economic and Environmental Implications of Artisanal and Small-Scale Mining (ASM) on Agriculture and Livelihoods.” (2020) *Environmental science & policy* 106 210–220.

<sup>8</sup> J Stiglitz, “What is the role of the state?” (2007) *Columbia University Press* 23-52.

Local content requirements are common in mining legislation in most developing countries.<sup>9</sup> The Zimbabwean mining sector had no such statutes up until 2008. Both the Mines and Minerals Act of 1963 and its supporting regulations provide no concrete mechanism for benefiting local communities. The Indigenization and Economic Empowerment Act of 2008 (Indigenization Act) was enacted to close this gap.<sup>10</sup> It mandated foreign investors across all sectors to cede 51 per cent of their businesses to local indigenes.<sup>11</sup> The Act was harshly critiqued for scaring away investment, but the State argued that it was necessary in redressing injustices of the colonial era.<sup>12</sup>

This research seeks to establish whether the Indigenization Act impedes the attraction of FDI in the extraction of Platinum Group Minerals, (PGMs) in Zimbabwe. The primary objective of the research is to examine the balance of interests under the Indigenization Act and identify how it can contribute positively to the social and economic development of the country without deterring FDI.

## 2. Contextual Background

On 9 March 2008, the late president of the Republic of Zimbabwe Robert Mugabe signed the Indigenization and Economic Empowerment Bill into law.<sup>13</sup> The new law mandated all prospecting and existing foreign investors to cede 51 per cent of their companies' equity to indigenous Zimbabweans regardless of sector.<sup>14</sup> The policy was intended to empower indigenous Zimbabweans, women, youth and people living with disabilities among other demographics.<sup>15</sup> However, it was heavily criticised globally and nationally.<sup>16</sup> Following criticism from jurists and scholars regarding the impacts of the Indigenization and Economic Empowerment Act,<sup>17</sup> the Zimbabwean Government resorted to amending the statute in 2018. The Act was left explicitly relevant to diamond and platinum extraction.<sup>18</sup> Henceforth, the State could secure "at least fifty-one per centum of the shares or other ownership interest of every designated extractive business, that is to say, a company, entity or business involved in the extraction" of platinum

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<sup>9</sup> See, C Nwapi, "Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries" (2015) *Law and development review* 187–216.

<sup>10</sup> T Chowa, "An Analysis of Zimbabwe's Indigenization and Economic Empowerment Programme (IEEP) As an Economic Development Approach" (2013) *Journal of Economics* 2-18.

<sup>11</sup> Indigenization Act section 3(1).

<sup>12</sup> "Presidential Statement to clarify the Government's position on the Indigenization and Economic Empowerment Act" (2016) *Veritas Zimbabwe*.

<sup>13</sup> R Saunders "Crisis, capital, compromise: mining and empowerment in Zimbabwe" (2008) *African Sociological Review/Revue Africaine de Sociologie* 12 1.

<sup>14</sup> R Saunders (2008) *African Sociological Review*.

<sup>15</sup> R Saunders (2008) *African Sociological Review*.

<sup>16</sup> D Matyszak, "Everything you ever wanted to know (and then some) about Zimbabwe's indigenization and economic empowerment legislation but (quite rightly) were too afraid to ask." (2010) *Kubatana* 03-10.

<sup>17</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>18</sup> Section 42(1)(c) of the Finance Act No. 1 of 2018 section 42(1)(c).

or diamonds.<sup>19</sup> This provision annulled a more drastic clause that mandated foreign investors to dispose at least fifty-one per centum of shares to indigenous Zimbabweans across all sectors.<sup>20</sup> The amendments sought to guarantee that a controlling interest in mining companies is held by the Minerals Marketing Corporation of Zimbabwe (MMCZ), the Zimbabwe Consolidated Diamond Company (ZCDC), or the National Indigenization and Economic Empowerment Fund. Collectively these constitute what the Act defines as an appropriate designated entity.<sup>21</sup> Consequently, the amendments robbed women and youth of the preferential treatment that they were afforded before to directly benefit from the Indigenization Act.<sup>22</sup>

Two years later, in 2020, the State further amended the Indigenization Act by repealing the 2018 amendments that targeted the platinum and diamond sectors. The Indigenization Act is now applicable to any mineral the Minister of Industry, Commerce, and Enterprise Development may choose.<sup>23</sup> Jurists argued the 2020 amendments introduced “indigenization through the backdoor”<sup>24</sup> by affording the Minister with discretionary powers to prescribe minerals subject to indigenization.<sup>25</sup> The Minister has not yet prescribed any minerals for the purpose of the section. Thus, the amendment granted temporary relief for both the diamond and platinum sectors.<sup>26</sup> The section remains inoperative awaiting the Minister to exercise their discretion.

The platinum sector which was subject to indigenisation between 2018 and 2021 is largely operated by foreign investors in Zimbabwe. Among the three operational platinum mines, two are owned by South Africa’s Impala Platinum (Implats) and the other by Anglo American.<sup>27</sup> The platinum sector is already under the threat of unstable metal prices and substitution by other strategic minerals for the energy transition.<sup>28</sup> The urgency of this situation prompted the South African platinum sector to implore the South African government for intervention and collaboration to rescue the sector from further sinking.<sup>29</sup> Zimbabwe’s platinum sector is merely an extension of South Africa’s as it is operated by the same group of companies.<sup>30</sup> Therefore, it is equally plagued by the same challenges.

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<sup>19</sup> Section 42(1).

<sup>20</sup> Section 3(1) of the Indigenization Act.

<sup>21</sup> Section 42(a) of the Finance Act No. 1 of 2018.

<sup>22</sup> Section 3 of the Indigenization Act.

<sup>23</sup> Section 36.

<sup>24</sup> “Mining Industry: Indigenization Through the Back Door” *The Zimbabwean* (2021).

<sup>25</sup> “Mining Industry: Indigenization Through the Back Door” *The Zimbabwean* (2021).

<sup>26</sup> Section 42(a) of the Finance Act No. 1 of 2018.

<sup>27</sup> S Nkala “Predatory Politics and the Indigenization and Economic Empowerment Policy in Zimbabwe’s Mining Sector.” (2022) *Africa Review* 14 277-304.

<sup>28</sup> A Månberger and B Stenqvist “Global metal flows in the renewable energy transition: Exploring the effects of substitutes, technological mix and development” (2018) *Energy Policy* 119 226-241.

<sup>29</sup> See, “The National Platinum Strategy for South Africa” (2023) *Minerals Council*.

<sup>30</sup> S Nkala (2022) *Africa Review* 14 277-304.

The moment the Minister opts to set aside platinum or any other mineral of their choice for indigenization purpose, she can effect that choice by merely consulting with the Minister of Mines and the Minister of Finance,<sup>31</sup> whereafter the Minister is only required to publish a short notice in the Gazette.<sup>32</sup> Such a publication will immediately have the following implications: First, any miner of such mineral wishing to merge or demerge<sup>33</sup> should guarantee that the controlling interest is held by an appropriate designated entity.<sup>34</sup> Secondly, any miner relinquishing a controlling interest should dispose of it to an appropriate designated entity.<sup>35</sup> Lastly, foreign investors cannot be awarded mining rights unless there is an appropriate designated entity with controlling interests.<sup>36</sup>

The motivation for the 2020 amendments was significantly embedded in the mantra “Zimbabwe is open for business”<sup>37</sup> which intends to attract FDI into the country. However, like the Indigenization Bill of 2007 which later became the Indigenization Act in 2008, the process leading to recent amendments was equally rushed which could have compromised stakeholder consultation.<sup>38</sup> The rationale behind the exclusivity in the treatment of platinum and diamond in the first amendments remains unclear. The impression is that the 51 to 49 per cent share ownership provision deterred investors in all other sectors except for platinum and diamond extraction. The sector still operates in uncertainty whether the Minister will choose platinum and diamond again the moment she decides to put the recent amendments into effect.<sup>39</sup>

The impact of the Indigenization Act since its enactment in 2008 is clear. No impactful investment in the sector has been recorded for over a decade despite the country hosting the world’s second-largest platinum deposit in the Main Sulphide Zone.<sup>40</sup> The country’s ranking on the Ease of Doing Business Index improved from 47.8 in 2019 when the Act was applicable to all sectors to 54.47 in 2020 when indigenization was exclusively applicable and operational for platinum and diamonds.<sup>41</sup> The improvement can be attributed to the amendments to the Act which relieved all other sectors from indigenization demands. Nevertheless, the country is still to witness any significant influx in FDI. The Fraser Institute

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<sup>31</sup> Section 36.

<sup>32</sup> Section 36.

<sup>33</sup> To combine shares from different entities or split shares from a single owner to multiple owners.

<sup>34</sup> Section 3 of the Indigenization Act.

<sup>35</sup> Section 3(4).

<sup>36</sup> Section 3(5).

<sup>37</sup> As seen from the State’s website, the mantra is a call by Zimbabwe’s President E. Mnangagwa to investors the world over to “take up abundant opportunities in the country” see, [zim.gov.zw](http://zim.gov.zw). [accessed 2022/7/16].

<sup>38</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>39</sup> Section 3.

<sup>40</sup> T Tyavambiza "Corruption and Bad Policies Repel Foreign Capital and Cause Domestic Capital to Flee: Is Jovanovic Right?" (2017) *International Journal of Economics and Financial Issues* 7 204. [Refer to source on Zimbabwean Geological Society]

<sup>41</sup> “Ease of Doing Business Index, Zimbabwe” (2021) *World Bank*.

Annual Survey of Mining Companies ranked Zimbabwe last out of 84 countries on the Investment Attractiveness Index in 2021.<sup>42</sup> Capital flight increased by 0.4 per cent after the enactment of the Indigenization Act.<sup>43</sup> Russia's Afrimet Vi Holding recently pulled out of Great Dyke Investments (GDI), the only new platinum investment that had been on the cards since 2017 leaving the project solely owned by local investors.<sup>44</sup> Several medium to large-scale mining companies downsized or shut down operations between 2010 and 2020.<sup>45</sup> Major mining towns are grappling with illegal and artisanal mining of deposits formerly owned by multinational companies.<sup>46</sup> These structural changes are accompanied by the loss of jobs, development of ghost towns, environmental degradation and rampant violence among artisanal miners.<sup>47</sup> The deterioration of the socio-economic livelihoods of host communities in the absence of proper FDI is evident.<sup>48</sup>

### 3. Research Question, Premise and Hypothesis

The primary aim of this research is to establish whether the Indigenization and Economic Empowerment Act impedes foreign direct investment in the extraction of Platinum Group Minerals (PGMs) in Zimbabwe. The research seeks to identify potential legislative gaps for balancing the interests of the State, investors, and host communities. Further, the dissertation seeks to establish whether the 2020 amendments to the Indigenization and Economic Empowerment Act are a progressive transition towards the objects of indigenization or a regression.

This research is premised on the conviction that balancing investor, state, and community interests is key to fostering sustainable mining development in Zimbabwe.<sup>49</sup> FDI is central to mineral development in most developing countries.<sup>50</sup> The research hypothesizes that the discretionary powers vested in the Minister responsible for the Indigenization Policy<sup>51</sup> hinder the betterment of the socio-economic

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<sup>42</sup> "Ease of Doing Business Index, Zimbabwe" (2021) *World Bank*.

<sup>43</sup> G Chiwunze, "Economic empowerment and foreign direct investment: The cases of Botswana, South Africa and Zimbabwe" (2014) *Polity*.

<sup>44</sup> G Marawanyika, F Njini, & A Sguazzin "Zimbabwe Signals State Mine Investment with Russia Platinum Exit." (2022).

<sup>45</sup> "The sad effects of Zimbabwe's shut down mines" *Mining Zimbabwe*. (2019).

<sup>46</sup> D Mwazvita, R J Wasserman & T Dalu "A Call to Halt Destructive, Illegal Mining in Zimbabwe" (2017) *South African journal of science* 113.

<sup>47</sup> Mwazvita (2017) *South African journal of science* 113.

<sup>48</sup> T Tyavambiza "Corruption and Bad Policies Repel Foreign Capital and Cause Domestic Capital to Flee: Is Jovanovic Right?" (2017) *International Journal of Economics and Financial Issues* 7 204.

<sup>49</sup> P N Milenko, "Balancing the Interests Between TNCs and Host Developing States - The Role of Law" (2017).

<sup>50</sup> G Plaxedes & S Boopen, "The Effect of Mining Foreign Direct Investment Inflow on the Economic Growth of Zimbabwe" (2020) *Journal of economic structures* 9 1–17.

<sup>51</sup> Section 36 of the Finance Act No 2 of 2020.

livelihoods of host communities by impeding foreign direct investment. The research aims to answer the following questions:

- Does the Indigenization and Economic Empowerment Act impede/deter Foreign Direct Investment?
- To what extent does the Indigenization Act promote the balancing of the interests of the investor, the state, and the indigenes?
- How can the Indigenization Act contribute to the social and economic development of the State and host communities without deterring Foreign Direct Investment?

## **4. Research Outline**

This dissertation is divided into five chapters. The current chapter introduces the study, provides contextual background to the research exploring the historical and legislative background of indigenization in Zimbabwe, and explains the justification of the study, research questions and objectives.

Chapter two provides an overview of the legal framework for Indigenization and Foreign Direct Investment. The overview focuses on the Indigenization and Economic Empowerment Act of 2008 together with its subsequent amendments of 2018 and 2020 and the Indigenization and Economic Empowerment (general) regulations of 2010. The chapter first discusses the concept of indigenization at the discretion of the Minister and further explores the various definitions provided by the legal framework to evaluate their influence in creating an imbalance between the State, investors, and host communities among all citizens. The chapter explores a comparative analysis between the old and the new indigenization legislative frameworks. The rationale is to establish whether the amendments are progressive in achieving the economic empowerment of historically disadvantaged Zimbabweans through the extractive sector.

Chapter three examines the balancing of interests under the Indigenization and Economic Empowerment Act. The chapter explores the impact of the Indigenization Act on FDI. To assess the potential investment impact of forced partnerships between foreign investors and State-Owned Enterprises (SOEs), the chapter explores the dynamics of risk sharing between foreign investors and the State. The chapter also seeks to assess whether the Indigenization Act threatens the security of tenure of existing platinum mining companies.

Chapter four discusses the possible policy changes that can be made to improve the outcomes of indigenization in Zimbabwe while maintaining foreign investor confidence in the mining sector. The discussion follows a brief overview of the indigenization and economic empowerment of indigenous people in various jurisdictions to highlight the outstanding best practices.

Chapter five provides the conclusion and an overall recommendation on State Participation and Indigenisation. The chapter discusses the answers to research questions posed in this Chapter. It briefly summarises major findings from the research before providing a final word on how the Government of Zimbabwe can navigate the crisis and ambiguity introduced into the nation's indigenization efforts by mixing state participation with indigenization and economic empowerment of historically disadvantaged Zimbabweans.

# Chapter 2: The Indigenization and Economic Empowerment Legal Framework

## 1. Introduction

Since its enactment in 2008, the Indigenization and Economic Empowerment Act (The Indigenization Act) has been subjected to a series of amendments. Initially, the Act was applied to all investment sectors in Zimbabwe.<sup>1</sup> All foreign owned businesses were mandated to cede at least 51 per cent ownership to indigenous Zimbabweans.<sup>2</sup> Before the first set of amendments in 2018, two issues were central to the indigenization in Zimbabwe. First, it sought to guarantee that controlling interests in any business across all sectors were ceded to indigenous Zimbabweans.<sup>3</sup> Secondly, and now omitted in the current Indigenization Act, was the role of procurement in promoting local content.<sup>4</sup> Both the private sector and state-run institutions were mandated to ensure that fifty-one per cent of their procurement was acquired from business entities whose controlling interests were held by indigenous Zimbabweans.<sup>5</sup> The Act sought to promote local content through mandatory indigenous Zimbabweans' majority shareholding and procurement from companies owned by native Zimbabweans. More interestingly, unlike the current Indigenization Act, the initial legislation had specific targeted groups among the indigenous Zimbabweans. It sought to empower women, youth, and people living with disabilities.<sup>6</sup> Among the indigenous Zimbabweans, the Act identified groups that were more disadvantaged. Most of the provisions that afforded these groups preferential treatment were repealed in 2018.

This chapter discusses the legal framework supporting the Indigenization and Economic Empowerment Policy. The framework includes the Indigenization Act, the Indigenization General Regulations<sup>7</sup> and the Zimbabwe Mineral Development Cooperation Act.<sup>8</sup> The chapter first discusses the concept of indigenization at the discretion of the Minister and how it creates an imbalance between the State, foreign investors, and host communities. The various measures to promote indigenization provided by the legislation are evaluated. These include the acquisition of equity in mining companies, employee share ownership schemes, community share ownership trusts, and through the Indigenization and Economic Empowerment Fund. The discussion follows a comparative analysis between the various

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<sup>1</sup> Section 3(1)(a) of the Indigenization Act.

<sup>2</sup> Section 3(1)

<sup>3</sup> Section 3(1)

<sup>4</sup> Section 3(1)(f).

<sup>5</sup> Section 3(1)(a).

<sup>6</sup> Section 4.

<sup>7</sup> Of 2010.

<sup>8</sup> Of 1983.

iterations of the Indigenization Act through its amendments. The rationale is to establish whether the amendments are progressive in achieving the objective of Indigenization which is to economically empower historically disadvantaged Zimbabweans through the extractive sector as provided by the Indigenization Act.<sup>9</sup>

## **2. Indigenization at the discretion of the Minister**

The Minister of Industry and Commerce in consultation with the Minister of Mines and the Minister of Finance currently has the power to decide which mineral should be subject to indigenization as and when they want.<sup>10</sup> The three ministers are not mandated to seek industry or public input.<sup>11</sup> Their decision becomes final and binding once published as a notice in the gazette.<sup>12</sup> It cannot be said with certainty that a consensus is necessary for this consultation.<sup>13</sup> The Act only requires the Minister of Industry and Commerce to consult the Minister of Mines and The Minister of Finance.<sup>14</sup> It does not require the Minister to seek their approval. Thus, the ultimate decision is at the discretion of the Minister of Industry and Commerce.

Prior to the 2020 amendments, it was clear which investment sectors were referred to under the Indigenization and Economic Empowerment Act. The legislation clearly spelt out which sectors were reserved for indigenous people. The Minister had no discretionary powers to choose minerals subject to the Indigenization Act.<sup>15</sup> However, under the current iteration of the Indigenization Act, foreign direct investors targeting any mineral in Zimbabwe are faced with the uncertainty that at any point during their operations, a law may be passed by an individual through a gazette forcing them to split their shares and become minority shareholders in their own enterprises.<sup>16</sup> The uncertainty complicates investment valuation and decision-making in Zimbabwe's platinum sector. The likely impact on investment valuation and decision-making is discussed further in Chapter three. However, it is important to understand who the reserved sectors will seek to benefit. The following section discusses the primary beneficiaries of indigenization as provided by section 3(1) of the Indigenization Act. Section 2.1 explores the discretionary powers of the Minister, followed by section 2.2 examining the amendments that shifted indigenization

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<sup>9</sup> Indigenization Act section 2.

<sup>10</sup> Section s3(1).

<sup>11</sup> Section 3(1).

<sup>12</sup> Section 4(1).

<sup>13</sup> Section 3(1).

<sup>14</sup> Section 3(1).

<sup>15</sup> Section 3(1).

<sup>16</sup> Section 3(1).

benefits from indigenous Zimbabweans to parastatals. Other beneficiaries are discussed in section 3 of this chapter.

## **2.1 Primary beneficiaries of indigenization**

For minerals set aside for indigenization by the Minister, section 3(1) of the Indigenization Act provides that at least fifty one per cent of the shares of every mining business should be owned by an appropriate designated entity with or without the participation of community or employee share ownership schemes.<sup>17</sup> Any miner of such mineral wishing to merge or demerge<sup>18</sup> should guarantee that the controlling interest is held by an appropriate designated entity.<sup>19</sup> The Indigenization Act further provides that any miner relinquishing a controlling interest should dispose of it to an appropriate designated entity<sup>20</sup> and that foreign investors cannot be awarded mining rights unless there is an appropriate designated entity with controlling interests in their proposed business.<sup>21</sup> Noting that section 3(1) provides the objective of the Indigenization Act which is to dictate who can have majority shareholding in certain mining businesses, primary beneficiaries of indigenization can therefore be determined through guaranteed equity participation.

A controlling interest is an ownership stake exceeding fifty per cent of a business which ultimately gives the holder substantial influence in how the company is run.<sup>22</sup> Thus, the holder of controlling interests possesses the majority of the voting rights.<sup>23</sup> Holders of such interests can exercise, directly or indirectly, any control whatsoever over the operations or properties of the business.<sup>24</sup> Such controlling interests were mandated to be ceded to indigenous Zimbabweans in 2007.<sup>25</sup> Now they can only be ceded to an appropriate designated entity with or without the participation of employee and community share ownership schemes as will be discussed in the following sections.<sup>26</sup>

Prior to the 2018 amendments which introduced the term 'appropriate designated entity' into the legislation, the controlling interests were required to be held by indigenous Zimbabweans.<sup>27</sup> The

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<sup>17</sup> Section 3 of the Indigenization Act.

<sup>18</sup> To combine shares from different entities or split shares from a single owner to multiple owners.

<sup>19</sup> Section 3 of the Indigenization Act.

<sup>20</sup> Section 3(4).

<sup>21</sup> Section 3(5).

<sup>22</sup> Section 2(1).

<sup>23</sup> IndigenizationAct s2(1).

<sup>24</sup> F Kento & A Yamada, "Conflicts Between Parent Company and Non-Controlling Shareholders in Stakeholder-Oriented Corporate Governance: Evidence From Japan" (2022) *Journal of business economics and management* 23.2 263–283.

<sup>25</sup> Section 3(1) of the IndigenizationAct, Section 42(1)(c) of the Finance Act No. 1 of 2018 section 42(1)(c).

<sup>26</sup> Section 3(1) of the IndigenizationAct.

<sup>27</sup> Matyszak (2011) *Kubatana* 03-10.

Indigenization Act defines indigenous Zimbabweans as persons or descendants of such persons who were historically and racially disadvantaged during the colonial era.<sup>28</sup> The definition has remained constant throughout the different iterations of the Act. However, section 3 of the Indigenization Act was amended to facilitate the ceding of controlling interests to the appropriate designated entities in 2021 instead of indigenous Zimbabweans as was the case in 2008. It is therefore important to understand the distinction between indigenous Zimbabweans and the appropriate designated entity. The following section discusses the transition from indigenous Zimbabweans to appropriate designated entities and the implications thereof on FDI and host communities.

## ***2.2 From indigenous Zimbabweans to the appropriate designated entity***

The 2018 amendments replaced “indigenous Zimbabweans” with “an appropriate designated entity” as primary beneficiaries of indigenization.<sup>29</sup> An appropriate designated entity refers to the Zimbabwe Consolidated Diamond Company (ZCDC), the Zimbabwe Mining Development Corporation (ZMDC), the National Indigenization and Economic Empowerment Fund or any other parastatal that may be formed by the State for purposes of section 3(1).<sup>30</sup> Both ZCDC and ZMDC are state-owned mining parastatals. The National Indigenization and Economic Empowerment Fund is also held and managed by the State.<sup>31</sup> The definition of the appropriate designated entity excludes Community Share Ownership Trusts (CSOTs) and Employee Ownership Schemes (EOSs) making it skewed in favour of the state.<sup>32</sup> Recalling that total compliance with the indigenization requirements is satisfied once an appropriate designated entity (whose definition excludes CSOTs and EOSs) holds controlling interests,<sup>33</sup> it becomes apparent that host communities are not intended as primary beneficiaries of the exploitation of their minerals.

Notably, in 2007 the Indigenization Act leaned more towards empowering black indigenous Zimbabweans in their individual capacity.<sup>34</sup> The indigenization Act had no mechanism to make the State a beneficiary of the Indigenization Act. However, the 2020 amendments make the state through its parastatals ZMDC and ZCDC the central beneficiary of indigenization.<sup>35</sup> While proponents of the current regime may argue that it addresses the need to ensure minerals benefit all Zimbabweans through SOEs<sup>36</sup>,

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<sup>28</sup> Section 2(1).

<sup>29</sup> Section 3(1) of the Indigenization Act.

<sup>30</sup> Section 2.

<sup>31</sup> Section 15(1).

<sup>32</sup> Section 2.

<sup>33</sup> Section 3(1).

<sup>34</sup> Section 3(1)(a) of the Indigenization Act.

<sup>35</sup> By virtue of qualifying as appropriate designated entities, see definition see section 3(1) of the Indigenization Act.

<sup>36</sup> Or avoids enclave development.

it paints a gloomy picture of the imminent nationalization of the mining sector in Zimbabwe. The initial clause which intended to empower indigenous Zimbabweans individually was likely to benefit a few nationals who could afford the shares disposed of by foreign investors to ensure controlling interests were held by black citizens. Nonetheless, it is imperative to establish whether indigenous Zimbabweans can benefit optimally if the state is the primary beneficiary or whether there is balanced legal framework to enable the State and indigenous Zimbabweans to mutually benefit from indigenization. This is further discussed in the following section of this dissertation.

## ***2.3 An Imbalance in the Interests of Parastatals and Indigenous People***

Several entities qualify as beneficiaries of controlling interests as intended by the Indigenization Act.<sup>37</sup> ZMDC, ZCDC, Community Share Ownership Trusts, Employee Share Ownership Trusts,<sup>38</sup> and indigenous Zimbabweans whose companies are incorporated by ZMDC or the Republic of Zimbabwe.<sup>39</sup> However, the appropriate designated entities are the primary beneficiaries.<sup>40</sup> Foreign investors can be fully accredited for indigenization without the participation of individual indigenous Zimbabweans or employee and community trusts.<sup>41</sup> The Indigenization Act gives priority to parastatals by treating community and employee share ownership trusts as optional.<sup>42</sup> The Act does not provide minimum and/or maximum quotas through which the fifty-one per cent stake may be shared among state parastatals, indigenous privately-owned companies, and community or employee trusts. Therefore, Indigenous Zimbabweans and their share ownership schemes have no claim to a specific indigenization quota reserved for them. They have no legal basis to demand indigenization quotas or to determine which mining projects they qualify to get indigenization quotas. Indigenous Zimbabweans have no guaranteed equity participation in indigenisation.

The fifty-one per cent can be wholly owned by a parastatal,<sup>43</sup> thus, questioning whether this amounts to indigenization or state participation. This question will be explored in chapter three of this dissertation. Nonetheless, the leverage of the state over indigenous Zimbabweans in the acquisition of controlling interests is apparent.<sup>44</sup> It is in the interest of foreign direct investors to ensure that certain

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<sup>37</sup> Section 3(1) of the Indigenization Act.

<sup>38</sup> Section 3(1).

<sup>39</sup> Section 2.

<sup>40</sup> Section 3(1).

<sup>41</sup> Section 3(1).

<sup>42</sup> Section 3(1).

<sup>43</sup> Section 3(1).

<sup>44</sup> Section 3(1).

marginalized groups especially local, affected communities are represented in ownership and management since only they can "give" a social licence to operate.<sup>45</sup> Thompson and Boutilier describe social licenses as an "idea of informal or 'tacit' licensing that signals the presence or absence of a critical mass of public consent, which may range from reluctant acceptance to a relationship based on high levels of trust".<sup>46</sup> Corporate social investment (CSI) continues to be a key commitment used by foreign investors to acquire the social license to operate.<sup>47</sup> CSI will be further discussed in chapter four of this dissertation.

Incorporating host communities, women and youth in management, ownership, and other spaces of influence has emerged as a critical strategy for global competitiveness and attaining the much-needed social license to operate.<sup>48</sup> The 2018 amendments repealed section 3(3) of the Indigenization Act gave priority to women and youth in indigenisation. Consequently, host communities, youth, women, people living with disabilities, and employees no longer have preferential treatment and come second after Zimbabwe's parastatals. While the foreign investors may wish to ensure equity participation of indigenous Zimbabweans to acquire the social license to operate, they have limited leverage in incorporating these marginal groups as shareholders unless they intend to cede shares from their remaining forty-nine per cent. This is supported by the fact that foreign investors must seek approval from the Minister on who owns shares constituting controlling interests in their companies.<sup>49</sup> The approval is sought in form of a license to invest which is discussed in section 4 of this chapter. Alternatively, indigenous Zimbabweans can benefit from indigenization through the Indigenization Fund discussed in the following section.

## ***2.4 The Indigenization Fund: Opportunities and challenges for indigenous people***

Section 12(1) of the Indigenization Act provides for the creation of the National Indigenization and Economic Empowerment Fund (the Fund). The Minister through an appointed Director of the Fund is responsible for the administration of the Fund.<sup>50</sup> The Fund is to be used to assist indigenous Zimbabweans in the acquisition of shares, financing of business start-ups and expansion, rehabilitation, capacity building, and market research.<sup>51</sup> It can be used for any other purpose that the Minister presumes

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<sup>45</sup> JR Owen & D Kemp, "Social Licence and Mining: A Critical Perspective" (2013) *Resources policy* 38.1 29–35.

<sup>46</sup> I Thomson & R Boutilier, "The social licence to operate. SME mining engineering handbook." (2011) *Colorado Society for Mining, Metallurgy, and Exploration* 1779–1796.

<sup>47</sup> Thomson & Boutilier *Colorado Society for Mining, Metallurgy, and Exploration* 1779–1796.

<sup>48</sup> D Melanie, J Schirmer & F Vanclay, "Community engagement and social licence to operate" (2014) *Impact assessment and project appraisal* 32.3 188-197.

<sup>49</sup> Section 3A(4), 3A(7) and 3(5) of the Indigenization Act.

<sup>50</sup>Section 15(1).

<sup>51</sup> Section 12.

will advance the economic interests of indigenous Zimbabweans.<sup>52</sup> Section 12 of the Indigenization Act is yet to be amended since the enactment of the Act in 2007. It is evident from its provisions how it sought to economically benefit individual indigenous Zimbabweans when the object of the Act was to transfer controlling interests of all businesses from foreigners to indigenous Zimbabweans.<sup>53</sup> However, after the 2018 and 2020 amendments to the objects of the Indigenization Act in section 3 and other clauses, section 12 was robbed of the legal clauses that supported it. How section 12 relates to the rest of the Indigenization Act particularly section 3 after the amendments is problematic.

It is important to establish how the legislation affords individual indigenous Zimbabweans to acquire shares after the 2020 amendments. Section 3 provides that 51 percent should be ceded to the appropriate designated entities with or without community or employee share ownership schemes. Therefore, to benefit from this provision and participate as owners in the extractive sector, individuals ought to either be part of the appropriate designated entity or the share ownership schemes.<sup>54</sup> Indigenous people's participation through employee and community share ownership schemes is not guaranteed<sup>55</sup> therefore they should consider partnering with of ZMDC, any other company registered by the Republic of Zimbabwe<sup>56</sup> or through the Indigenization Fund.<sup>57</sup> To be part of the Zimbabwe Minerals Development Company the individual indigenous Zimbabweans should be owners of companies partly owned by ZMDC or by the State.<sup>58</sup> Therefore, apart from seeking state participation in foreign owned companies, the government of Zimbabwe seeks to ensure state participation in indigenous people's companies.

ZCDC was exclusively established for exploitation of diamonds while ZMDC's mandate extends to the exploitation of all minerals including platinum and diamonds.<sup>59</sup> Section 27(5) of the Zimbabwe Mining Development Corporation Act of 1983 provides that at least 51 percent of ZMDC's shares shall be held by the State at any given time.<sup>60</sup> The remaining shares can be issued to individuals who meet any conditions that are set by the ZMDC board and are approved by the Minister.<sup>61</sup> Individuals can enter into joint ventures with the ZMDC upon meeting the terms and conditions that may be demanded by the ZMDC board and after the approval of both the Minister of mines and the Minister of finance.<sup>62</sup> Consequently,

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<sup>52</sup> Section 12(2)(c).

<sup>53</sup> Section 12.

<sup>54</sup> Section 2(1) of the Indigenization Act.

<sup>55</sup> Section 3(1).

<sup>56</sup> Zimbabwean parastatals

<sup>57</sup> Section 2(2).

<sup>58</sup> Section 2(1) and 3(1).

<sup>59</sup> Section 20 of the Zimbabwe Mining Development Corporation Act of 1983.

<sup>60</sup> Section 27(5).

<sup>61</sup> Section 27(3).

<sup>62</sup> Section 27(3), 22(20), 21, 23, 24, and 26.

individual indigenous Zimbabweans require the approval of the two ministers and the ZMDC board to get the indigenization quotas.<sup>63</sup> Therefore, indigenous people's participation is not guaranteed unless involving state participation and approved by the two ministers of finance and mines. The alternative is through the Indigenization Fund discussed below.

It is unclear how individual indigenous Zimbabweans can acquire indigenization quotas through the Indigenization Fund. Section 2(1)(c) provides that the Fund is an appropriate designated entity together with ZCDC and ZMDC or any other company that may be registered by the State.<sup>64</sup> The Fund is administered by the National Indigenization and Economic Empowerment Unit (the Unit) in the Ministry of Industry and Commerce.<sup>65</sup> The Fund can be perceived as a form of public trusteeship held by the Minister of Industry and Commerce through the Unit on behalf of and for the benefit of indigenous Zimbabweans.<sup>66</sup> Public trusteeship in the context of mineral resources is a legal concept that refers to the administration of funds or resources belonging to the community by a public trustee that is mandated to ensure that the funds are distributed in a manner that serves the public interest and protects the rights of current and future generations.<sup>67</sup> Similarly, the Fund can be seen as a form of stewardship, where the trustee which is the Unit acts as a guardian or custodian of the funds remitted to the Fund on behalf of the public.<sup>68</sup> Section 12(1)(b) provides that the Fund can be used "to provide finance for business start-ups, rehabilitation, and expansion". It can be used to finance indigenous Zimbabweans to acquire indigenization quotas from foreign direct investors<sup>69</sup> and may be used to fund business start-ups initiated by the Unit. It is not clear whether indigenous Zimbabweans financed by the Fund automatically qualify as an appropriate designated entity.

Section 2(1)(c) of the Indigenization Act provides that the Fund is an appropriate designated entity. The provision leaves room for ambiguity considering that a fund is not an organization or person therefore cannot be regarded as an entity. Therefore, it is not clear who qualifies as an appropriate designated entity between the Unit administering the Fund and indigenous Zimbabweans funded by the Fund or both. Nonetheless, assuming both qualify as appropriate designated entities, to be issued with the funding, individual indigenous Zimbabweans ought to apply through the Unit which is a state

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<sup>63</sup> Section 27(3).

<sup>64</sup> Section 2.

<sup>65</sup> Section 6.

<sup>66</sup> See, H Mostert & Y Cheri-Leigh, "Natural resources as "regulated property": the challenges of resource stewardship in South Africa" (2017) *Regulatory Property Rights* 141-168. JL Sax, "The public trust doctrine in natural resource law: effective judicial intervention" (1970) *Michigan Law Review* 68.3 471-566.

<sup>67</sup> Mostert & Cheri-Leigh (2017) *Regulatory Property Rights* (2017) 141-168.

<sup>68</sup> Sax (1970) *Michigan Law Review* 68.3 471-566.

<sup>69</sup> Section 12(2)(a).

department.<sup>70</sup> Similarly, the incorporation of indigenous Zimbabweans into ZMDC or any other company registered by the state is at the organisation's discretion.<sup>71</sup> Consequently, indigenous people's participation in the mining sector is left at the mercy of state-controlled entities regardless of whether they have their own capital or not. Excessive discretionary powers on who may participate in indigenization can present an imbalance between the stakeholders. In conclusion, this section exposed that after the 2020 amendment, parastatals became primary beneficiaries of indigenisation and not indigenous Zimbabweans as was the case before the amendments. The following section discusses how indigenous Zimbabweans may benefit from indigenization as optional or secondary beneficiaries.

### **3. Other beneficiaries of indigenization whose participation is unguaranteed**

This section discusses how the indigenization creates an insignificant category of 'other' beneficiaries through section 3(1). It is crucial that the immediate communities hosting deposits of platinum group metals be among the chief beneficiaries of the Indigenization Act.<sup>72</sup> Note that the benefit envisioned in this discussion emphasises on equity ownership as defined by the Indigenization Act that the benefit should translate to guaranteed and equitable ownership of minerals.<sup>73</sup> This is supported by the fact that the primary objective of Indigenization Act is to transfer controlling interests from foreign investors.<sup>74</sup> Therefore, this dissertation places emphasis on the maximum possible equity participation of all stakeholders and how it is guaranteed by the law in analysing the balancing of interests.

Host communities are key among these stake holders and they bear most of the socio-ecological damage brought by mining therefore they should be prioritised among beneficiaries of the minerals.<sup>75</sup> Owen and Kemp argue that host communities do not get something out of nothing from mining companies.<sup>76</sup> There are vast costs to the benefits they get (or should get) and these costs should be measured to establish whether the benefits are commensurate to the costs.<sup>77</sup> Their means of survival are

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<sup>71</sup> Section 27(3), 22(20), 21, 23, 24, and 26.

<sup>72</sup> SC Nthai, "Host communities and mining projects in South Africa: towards an equitable mineral regulation" (2009) *Obiter* 30.1 120-130.

<sup>73</sup> Section 2(1) of the Indigenization Act.

<sup>74</sup> See definition of indigenisation, empowerment, and indigenous Zimbabwean in section 2(1) of the Indigenization Act.

<sup>75</sup> JR Owen, D Kemp & L Marais, "The cost of mining benefits: Localising the resource curse hypothesis" (2021) *Resources Policy* 74.

<sup>76</sup> Owen, Kemp & Marais (2021) *Resources Policy* 74.

<sup>77</sup> Owen, Kemp & Marais (2021) *Resources Policy* 74.

seldom left intact because of the development of a mining community.<sup>78</sup> Although there are diverging views on the effectiveness of Community Share Ownership Schemes (CSOTs)<sup>79</sup> it is imperative that if the legal framework incorporates CSOTs, then it should endeavour to aid their effectiveness and not their failure. The following discussion highlights that by making CSOTs optional, the legislation does not only disadvantage host communities but also introduces several legislative shortfalls.

### **3.1 Unguaranteed participation of host communities**

The Indigenization Act recognises the need to empower host communities through community share ownership schemes.<sup>80</sup> Section 3(1) of the Indigenization Act provides that the controlling interests may partly be owned by the Community Share Ownership Trusts (CSOTs). However, this is not a mandatory requirement under the Indigenization Act. The host community is not awarded any preferential treatment as this is optional and there is no penalty for non-compliance. Investment licenses can be issued to foreign direct investors without incorporating community-owned shares.<sup>81</sup> Mining companies are not required by law to ensure communities have a share in their operations.<sup>82</sup> A foreign direct investor can be issued with a license to invest without the equity participation of host communities.<sup>83</sup>

Whilst the Indigenization Act provides discretion on the adoption of community share ownership schemes, it does not state the principal powers to exercise this discretion.<sup>84</sup> It is not clear whether it should be the Minister's or the investor's decision to incorporate the schemes.<sup>85</sup> Furthermore, the indigenization Act does not outline the criterion for deciding which communities deserve CSOTs. Considering that the foreign investor applies for a license to invest, and the license is only issued upon the Ministers satisfaction, it can be concluded that the investor has no discretionary powers to afford the community an indigenization quota.<sup>86</sup> The state is both a shareholder and a regulator determining who gets the indigenization quotas. In the absence of indigenization quotas reserved for host communities, it can only be hoped that either the foreign investor or the State acts in their agency. Without any agency, the outcome will be skewed in favour of the State as it will acquire all the indigenization shares.<sup>87</sup>

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<sup>78</sup> M Magidi & PM Hlungwani, "Development or destruction? Impacts of mining on the environment and rural livelihoods at Connemara Mine, Zimbabwe" (2022) *South African Geographical Journal* 1-22.

<sup>79</sup> E Gilberthorpe *Silver Bullets or White Elephants? An assessment of the effectiveness of Community Share Ownership Trusts in Zimbabwe's* (2015) Mining Industry PhD Dissertation, University of East Anglia.

<sup>80</sup> Section 3(1) of the Indigenization Act.

<sup>81</sup> Section 2.

<sup>82</sup> Section 2.

<sup>83</sup> Section 2.

<sup>84</sup> Section 3(1).

<sup>85</sup> Section 3(1).

<sup>86</sup> Section 3(5).

<sup>87</sup> Section 3(1).

Without a concrete legal framework guaranteeing mandatory ownership of shares by host communities, it is difficult to foster transparency and accountability in the administration of CSOT funds. Furthermore, it complicates the negotiation process between communities and investors given that no indigenization quotas are reserved for the Host communities. It is unclear whether Host Communities can negotiate for a share and at what stage. Should the community be given the shares on a free carry rights basis? The share acquisition process by the community is a potential source of contention. A minimum indigenisation quota for host communities would not only guarantee indigenous people's participation but ensure transparency and accountability as is the case of the South African Mining Charter which reserves at least 8 per cent free carried shares in every mining venture for host communities within five years from the date a mining right is issued.<sup>88</sup> The Indigenization and Economic Empowerment (General) Regulations<sup>89</sup> are silent on the issue of community share ownership schemes.

The absence of a reserved CSOTs indigenization quota introduces a lack of transparency in the sector. Mining companies may or may not implement CSOTs regardless of having pledged to involving CSOTs during application for a license to invest. For instance, in the Marange-Zimunya CSOT disputes, the Minister of the then Ministry of Indigenization and Youth Empowerment claimed that the diamond mining companies had pledged US\$10 million each towards CSOTs but the communities alleged that they had not received the funds.<sup>90</sup> The parliamentary investigations indicated that some of the mining companies claimed that they had never committed to CSOTs contrary to the submissions of the Minister.<sup>91</sup> The investigations also indicated that US 1.5 million that had been released by the companies on the launch of the CSOT in 2012 had not been remitted to the CSOT.<sup>92</sup> The host communities could not ascertain which companies had pledged to the CSOT and public accountability was difficult.<sup>93</sup> Therefore, the discretion afforded in the adoption of CSOTs disadvantages the communities whose access to confidential documentation pertaining to licensing may be limited. Employee Share Ownership Schemes which are discussed in the following section are subjected to almost similar challenges seen in this section.

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<sup>88</sup> Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry of 2002.

<sup>89</sup> Statutory instrument 21 of 2010.

<sup>90</sup> 2016 *Fourth Session- 8th Parliament, Parliament of Zimbabwe*.

<sup>91</sup> The Ministry was later abolished in 2017.

<sup>92</sup> 2016 *Fourth Session- 8th Parliament, Parliament of Zimbabwe*.

<sup>93</sup> 2016 *Fourth Session- 8th Parliament, Parliament of Zimbabwe*.

### **3.2 Ministerial discretion on equity participation of employees**

Employee Share Ownership Trusts (ESOTs) refer to the equity participation of a firm's employees intended to enable them to acquire shares in the mine they work for.<sup>94</sup> It is a mechanism to give the workers a right to a share of the mine's wealth.<sup>95</sup> Primarily, ESOTs were promoted due to their potential to positively influence employee work attitude and behaviour.<sup>96</sup> However, in the context of the Indigenization Act, they are intended to increase indigenous ownership of mining companies<sup>97</sup> although they are optional and are not regarded as the appropriate designated entities.<sup>98</sup> The treatment of ESOTs as an integral component of the fifty-one per cent minimum indigenization and economic empowerment quota is provided for in section 14 of the indigenization and Economic Empowerment (General) Regulations.<sup>99</sup>

Section 14 provides four broad categories under which ESOTs compliance can be accredited towards the 51 per cent minimum indigenization quota.<sup>100</sup> First, all ESOT shares from 5 to 10 per cent are accredited towards the indigenization quota in their actual percentages.<sup>101</sup> Secondly, ESOTs exceeding 10 per cent but not more than 15 per cent in the mining right holder's company are accredited as 10 per cent despite the actual ESOT shareholding.<sup>102</sup> ESOT shares ranging from 15 to 25 per cent are accredited as 15 per cent regardless of the actual value of the ESOT shareholding.<sup>103</sup> Lastly, ESOT shares exceeding 25 per cent contribute 25 per cent only to the indigenization quota despite the actual allocation in the mining right holder's company.<sup>104</sup> Consequently, an investor cannot achieve full compliance with the indigenization Act by wholly ceding 51 per cent of their company to their employees as that amounts to 25 per cent only for purposes of accreditation.<sup>105</sup>

The fact emerging from the above is that a mining company may not directly convert ESOT shareholding towards indigenization accreditation. Therefore, ESOT shareholding is ring fenced, meaning that if the holder of a mining right does not allocate CSOTs shareholding within a certain range it will be

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<sup>94</sup> E Pendleton & Robinson A, "Employee stock ownership, involvement, and productivity: An interaction-based approach." (2010) *ILR Review* 64 3–29.

<sup>95</sup> L Mitchell, RA O'Connell & I Ramsey, "Employee share ownership: A review of the literature" (2017) *Employee Share Ownership Project: Melbourne Law School, The University of Melbourne, Australia*.

<sup>96</sup> See, J Tariq & S Idris "Impact of employee ownership on an organizational productivity: A mediating role of psychological ownership." (2018) *Academy of Accounting and Financial Studies Journal* 22.2 1-12.

<sup>97</sup> Section 2 of the Indigenization Act.

<sup>98</sup> Section 2.

<sup>99</sup> Of 2010.

<sup>100</sup> Regulation 14 of the Indigenization and Economic Empowerment (General) Regulations of 2010.

<sup>101</sup> Regulation 14(1)(a).

<sup>102</sup> Regulation 14(1)(a).

<sup>103</sup> Regulation 14(1)(b).

<sup>104</sup> Regulation 14(1)(c).

<sup>105</sup> Regulation 14(1)(c).

regarded as non-accreditable to indigenization.<sup>106</sup> ESOT shares below five per cent of the mine right holder's company are not accredited at all. In addition, shares can only be accredited for indigenization if at least 75 per cent of the employees are indigenous Zimbabweans.<sup>107</sup> This provision acknowledges the existence of foreign employees in mining companies. However, it fails to acknowledge that a minority can still own the bulk of the shares. For instance, foreign employees (constituting 25 per cent of the scheme by headcount) may own more than half of the employee shares leaving the indigenous employees (constituting 75 per cent of the beneficiaries of the scheme by headcount) with an insignificant portion of the shares. Similarly, the regulations limit the number of managerial employees to 35 per cent.<sup>108</sup> By using headcount in limiting the extent to which employees in managerial positions may benefit from the scheme to the detriment of low-level employees, the regulations leave room for a minority of managers to own the bulky of shares. This is also true for the provision mandating that at least 51 per cent (by headcount) of the employees should be women and/or people living with disabilities in all schemes where employees are allocated more than 25 per cent.<sup>109</sup>

This section followed a discussion on the exclusion of indigenous people and their employee and community trusts from equity participation through indigenization. It exposed how the legislation creates a category of the insignificant 'other' among beneficiaries of indigenization. The section concluded that the legislation fails to guarantee any form of agency for indigenous people's equity participation through indigenization therefore, the legislation is skewed in favour of the parastatals that stand to accumulate the entire 51 percent indigenization quota in the absence of CSOTs and ESOTs. The following section further discusses the challenges introduced by ministerial discretion on indigenization. However, unlike current section which focuses on the Ministers discretion to choose beneficiaries of indigenization, the following section emphasises on the Minister's discretion to issue or cancel foreign investors mineral rights.

## **4. Application for a License to Invest in sectors reserved for indigenization**

It is important to understand the legal procedure for obtaining or securing mining licenses for any minerals that may be put aside for indigenization by the Minister as provided by section 3(1). This section seeks to establish the requirements set out by the Indigenization Act for existing mining right holders and prospecting foreign investors to acquire or keep their mineral rights. The section discusses how the

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<sup>106</sup> This is true for both CSOT shares above or below the specified ranges.

<sup>107</sup> Regulation 14(2)(b)(i).

<sup>108</sup> Regulation 14(2)(b)(ii).

<sup>109</sup> Regulation 14(4).

commitments demanded by the legislation over and above the existing procedures for acquiring and securing mining rights may contribute to imbalances between stakeholders or may impede foreign direct investment. Section 4.1 discusses how the Indigenisation Act introduces a new license titled the License to invest over and above the licensing required under the Mines and Minerals Act. Section 4.2 further discusses the effect of the new licensing provisions on security of mineral tenure.

#### **4.1 Local Content Requirements for the Acquisition of a License to Invest**

Once the Minister has chosen a certain mineral to be reserved for the acquisition of controlling interests by an appropriate designated entity, foreign investors targeting such minerals will have to seek a license to invest from the Ministry of Industry and Commerce.<sup>110</sup> Apart from guaranteeing that 51 per cent of their mining project is owned by an appropriate designated entity, the foreign direct investor is mandated to satisfy several local content requirements to qualify for the license to invest.<sup>111</sup> Foreign Direct Investors of such minerals will be required by law to prove to the minister's satisfaction that their investment will create significant and sustainable jobs in Zimbabwe, transfer skills and technology, create sustainable value chains and satisfy social and economic objectives that may be prescribed by the Minister.<sup>112</sup> This will introduce regulated Corporate Social Responsibility (CSR),<sup>113</sup> a phenomenon that has been absent in Zimbabwe's mining law.<sup>114</sup>

The concept of CSR which refers to a company's overarching approach or strategy for improving the social, environmental and economic well-being of host communities they operate in will be discussed further in chapter 4 of this dissertation.<sup>115</sup> The requirements can also be viewed as local content provisions.<sup>116</sup> Local content in the extractive sector refers to the amount or proportion of locally produced or retained materials, skills, capital or financing, goods and services used in mining sector value chains of a particular country.<sup>117</sup> Local content laws are often entrenched in the legislation pertaining to the

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<sup>110</sup> Section 5 of the Indigenization Act.

<sup>111</sup> Section 3A(4).

<sup>112</sup> Section 3(5) and 3A(4) of the Indigenization Act.

<sup>113</sup> Regulated CSR is when the state uses legislative and extra-judicial pressure to stipulate what is ordinarily considered voluntary CSR contributions and how mining companies should contribute towards social and economic development in areas where they operate. See more, PA Haslam, "Beyond voluntary: state-firm bargaining over corporate social responsibilities in mining" (2018) *Review of International Political Economy* 25.3 418-440.

<sup>114</sup> See, G Djeynaba & JB Jacquet "Local content policies in West Africa's mining sector: Assessment and roadmap to success" (2022) *The Extractive Industries and Society* 9: 101030; V Ikodia & N Oko "Local content act implementation and its impact on Nigeria economy: an appraisal"(2020) *Journal of Policy and Development Studies* 13.2 99-105.

<sup>115</sup> Ndhlovu (2011) *Journal of African business*, 12(1), 72-92.

<sup>116</sup> Ikodia & Oko (2020) *Journal of Policy and Development Studies* 13.2 99-105.

<sup>117</sup> Djeynaba & Jacquet " (2022) *The Extractive Industries and Society* 9: 101030

acquisition and maintaining of mineral rights with the aim of promoting local development and participation.<sup>118</sup> Therefore, local content laws have a significant bearing on the security of mineral tenure as will be discussed in Chapter 3 of this dissertation.

Foreign investors are required to apply for an investment license. For an applicant to be successful, they should show the Minister how they meet or intend to meet the previously discussed local content or CSR obligations. The Minister has discretionary powers to decide whether their written application satisfies the requirements or not.<sup>119</sup> If the Minister grants the investment license, a notice of issuance of the license to invest should be published in the gazette.<sup>120</sup> However, the Act does not mandate the Minister to consult host communities or anyone when assessing the applicant's proposed CSR or local content obligations.<sup>121</sup> The Minister has the discretion to dictate whether the investors self-acclaimed obligations suffices, and the legislation does not provide benchmarks for the evaluation. Apart from satisfying the requirements for attaining a license to invest, the foreign direct investor may be required to pay levies that may be imposed by the Minister to contribute towards the creation of the National indigenization and Economic Empowerment Fund (The Fund).<sup>122</sup> Therefore, the Minister has overall discretion on the conditions that should be met by investors to secure their investments. Failure to satisfy the Minister puts the foreign investors investment under threat as discussed in the following section.

## **4.2 Security of mineral tenure under indigenization**

Section 3A(6) of the indigenization Act empowers the Minister of Industry and Commerce to direct the Ministry of Mines and Economic Development to cancel licences whose holders would have not satisfied the indigenization quota. Note that section 3(6)(a) affords the Minister discretionary powers to dictate how long the investor may take to fulfil the Indigenization quota. The risk presented by the combination of sections 3A(6) and 3(6)(a) is that the State through the Minister may make unreasonable demands for the fulfilment of the Indigenization quota to enable the termination of licenses and expropriate foreign investors' mines. It creates an opportunity for the State to make exigent circumstances to validate the termination of licenses on targeted investors. The *Minister of Mines and Mining Development v Grandwell Holdings (Private) Limited (Mbada Diamonds)* case presents a good example of how the state can create such opportunities.<sup>123</sup>

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<sup>118</sup> Djeynaba & Jacquet " (2022) *The Extractive Industries and Society* 9: 101030

<sup>119</sup> Section 11 and 3A(10).

<sup>120</sup> Section 11(c).

<sup>121</sup> Section 11(c).

<sup>122</sup> Section 14, 15 and 17.

<sup>123</sup> *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

In the *Mbada Diamonds* case, Grandwell Holdings, a private foreign investor was in a Joint Venture Agreement with the State through the Zimbabwe Consolidated Diamond Company (ZCDC).<sup>124</sup> Together they formed Mbada Diamonds which was responsible for mining diamonds in Manicaland Province, Zimbabwe.<sup>125</sup> ZCDC was responsible for ensuring that Mbada Diamonds Mining licenses are up to date and renewed timeously while Grandwell carried out the day-to-day mining operations.<sup>126</sup> During the tenure of this agreement, ZCDC decided to consolidate all the diamond mines it co-owned across the country into one mega-mining company in which it would be the majority shareholder.<sup>127</sup> Grandwell Holdings was not opposed to the idea, but it had its own conditions that it wanted to be considered.<sup>128</sup> While the negotiations were ongoing, the Minister of Mines and Economic Development suspended Mbada Diamonds' operations. Grandwell Holdings had to find out that ZCDC had not renewed Mbada Diamonds' license as had been agreed by the parties during contracting.<sup>129</sup> Consequently, it was later evicted from the mine.<sup>130</sup> This case further puts the fiduciary reliability of the parastatals as partners with foreign direct investors under scrutiny. However, this will be explored in detail in Chapter three. Of more interest at this point is how sections 3A(6) and 3(6)(a) create a conducive circumstances for the state to strategically plan to terminate foreign investors' licenses. In the *Mbada Diamonds* case, the court concluded that Grandwell was forcefully removed by the State from the mine and that the removal was unlawful.<sup>131</sup> The court concluded that it cannot be disputed that "agents of the State descended on the Mine"<sup>132</sup> premises and removed Grandwell from its physical possession of the mining fields.<sup>133</sup> It is therefore submitted that the discretion afforded the State through the Minister(s) or its parastatals create an imbalance between the State and other stake holders including foreign direct investors<sup>134</sup> and individual indigenous Zimbabweans.<sup>135</sup>

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<sup>124</sup> 1 para 1.

<sup>125</sup> 1 para 1.

<sup>126</sup> 1 para 1.

<sup>127</sup> 2 para 4.

<sup>128</sup> 2 para 5.

<sup>129</sup> 3 para 7.

<sup>130</sup> 13, 3 Para 8.

<sup>131</sup> See full judgement, *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

<sup>132</sup> Own emphasis added.

<sup>133</sup> *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

<sup>134</sup> By affording the Minister discretionary powers that may be abused to make unreasonable demands for the fulfilment of the Indigenization quota to enable the termination of licenses and expropriation of the foreign investors' mines.

<sup>135</sup> By requiring approval of individual indigenous Zimbabweans equity participation by the parastatals and the responsible Minister(s).

## 9. Conclusion

This chapter examined how extant legislation intends to promote indigenization and economic empowerment in Zimbabwe's platinum sector. The chapter explored the changes in the regulatory framework from the first set of amendments in 2014 until 2021. The key findings in this chapter are that the objective of the Indigenization Act is to transfer majority shareholding of mining companies from foreign investors to the parastatals. Moreover, the chapter established that both the 2018 and 2021 amendments sought to ensure state participation in both foreign owned companies and those owned by indigenous people. Indigenous Zimbabweans may only participate in indigenization if they are in partnership with a parastatal. Employee and community share ownership schemes are not mandatory for the satisfaction of the indigenization quota. The discussion above indicates that there has been a shift from an indigenous Zimbabweans focused indigenization towards a state participation-oriented approach. The findings prompted the question of whether the shift can be perceived as nationalisation, elitism, or state participation. This is further discussed in chapter 3.

# Chapter 3: The impact of the indigenization Act on Foreign Direct Investment

## 1. Introduction

The discussion on the legislative framework envisioned by the indigenization and Economic Empowerment Act<sup>1</sup> (Indigenization Act) in the previous chapter highlighted the skewness of the policy against host communities, employees, and the rest of the indigenous people of Zimbabwe. It revealed the extent to which the indigenization Act empowers the State through state-owned mining parastatals, the Zimbabwe Consolidated Diamond Company (ZCDC) and the Zimbabwe Mining Development Company (ZMDC). The discussion highlighted the potential of the indigenization Act to legislate mineral resource nationalisation. Further, the chapter posed a question as to whether the primary object of the Act had shifted from empowering indigenous Zimbabweans to promoting nationalisation and/or State Participation in any mineral sector that the Minister of Industry and Commerce may choose under the indigenization Act. The chapter discussed the Ministerial discretion in selecting minerals for indigenization purposes and posed a question as to whether this could create investor uncertainty and prompt capital flight. Having concluded that the Indigenization Act further marginalises host communities and employees, the chapter highlighted the need for an inquiry into the impact of these developments on the social license to operate in the mining sector.

This Chapter seeks to explore the questions that were raised in the previous chapter including the likely impact of coerced partnerships between foreign investors and parastatals on FDI. To assess the potential investment impact of the forced partnerships between foreign investors and State-Owned Enterprises (SOEs), the chapter explores the risk management and sharing structure between foreign investors and the State. In any partnership, loyalty and integrity should be the bedrock of productive cooperation.<sup>2</sup> Therefore, it is crucial to establish whether ZMDC and ZCDC can uphold such ethos based on their historical record of operating with foreign investors in the past. The major question is whether the SOEs can balance their fiduciary responsibilities to be loyal not only to the State but also to the foreign investor as a partner. Further, an inquiry is made as to whether the Indigenization policy could be perceived as an engineered business opportunity for the political elite by foreign investors. In the discussion of resource nationalisation and state participation, the chapter draws a comparison between the renowned fast-track land reform program of 2002 and the indigenization. It then follows an analysis

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<sup>1</sup> Of 2008.

<sup>2</sup> S Sanga "A Theory of Corporate Joint Ventures" (2018) *California law review* 106 5.

of the various approaches to State participation and the envisioned approach by the Government of Zimbabwe. The chapter acknowledges that various authors have explored the relationship between indigenization and land reform, however, such works were all limited to the first iteration of indigenization. The chapter also seeks to assess whether the indigenization Act threatens the security of tenure of existing platinum mining companies.

## 2. Is indigenization nationalisation?

The findings from Chapter 2 prompted the question of whether the 2021 amendments to section 3(1) amounts to resource nationalisation, elitism, or state participation. This section discusses the concepts of nationalisation and indigenisation simultaneously to address the question. The story of indigenization in Zimbabwe cannot be told in isolation from the land seizures that commenced in 2002 which resulted in the appropriation of land from white farmers following the service of a 24-hour eviction notice.<sup>3</sup> The seizures left a nationalisation legacy that prompted many scholars to draw a comparison between the indigenization Act and the seizures.<sup>4</sup> Analysing the 2008 indigenization legal frameworks, Fisco et al (2013) characterised nationalisation as a signature policy that could not be divorced from the way Zimbabwe was being run.<sup>5</sup> Tekere argues that the indigenization is a complete replication of the fast-track land reform program by the Zimbabwean Government, a move to provide the political elite with opportunities for accumulation with no meaningful contribution to industrialisation, social upliftment, and economic growth.<sup>6</sup>

However, Matyszak argues that the land seizures and the original Indigenization Act were ideologically different.<sup>7</sup> He argues that the provision which required foreign investors to cede 51 per cent shares to indigenous Zimbabweans, could not qualify as nationalisation because it sought to empower individuals, whereas, in the fast-track land reform program, the State assumed ownership of land issuing 99-year leases to indigenous Zimbabweans to reside thereon.<sup>8</sup> However, Matyszak's view can only be true up to and until the first set of amendments to the indigenization Act that came into effect in 2018. Before these amendments, the State was "omitted from the definition of specified beneficiaries –

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<sup>3</sup> R Craig, "The collapse of Zimbabwe in the wake of the 2000-2003 land reforms" (2004). See also R Craig, "The loss of property rights and the collapse of Zimbabwe" (2005) *Cato J.* 25 541 and T Njaya & N Mazuru, "Land Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects" (2010) *Journal of sustainable Development in Africa* 12 164-185.

<sup>4</sup> See for example, Matyszak 2010 and CA Chikumbu, "Would Easing the Black Empowerment Drive in Zimbabwe Boost International Investment in the Country?"

<sup>5</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering & Mining Journal*.

<sup>6</sup> E Tekere *A lifetime of struggle* SAPES Books (2007).

<sup>7</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>8</sup> Matyszak (2011) *Kubatana* 03-10.

indigenous Zimbabweans.”<sup>9</sup> Hence the policy could not fit into the framework of nationalisation. The following section further discusses the contrast between indigenization and nationalisation under the current iteration of the Indigenization Act.

## **2.1 Conceptualising Indigenization and Resource Nationalisation**

Indigenisation has been defined as the process of rendering indigenous or native wherein indigenous is defined as belonging, originating, naturally living, and growing in a particular country.<sup>10</sup> It is also defined as the domination of indigenous people of a country within their territory.<sup>11</sup> Indigenization is a preferred strategy for rebuilding post-colonial countries and fostering socio-economic transformation in Africa<sup>12</sup>. It is a “process of economic transformation from external domination and control to an authentically national economy regulated by its own citizens.”<sup>13</sup> These definitions fail to clearly distinguish between historically disadvantaged and privileged inhabitants. This distinction is captured by section 2 of the Indigenization Act which provides that indigenization is the involvement of people who were racially disadvantaged during the colonial era. Indigenization can be classified into four broad categories: ownership, control, manpower and technology indigenization.<sup>14</sup>

Ownership indigenization enables the state or its indigenous people to become owners of businesses operating in their countries.<sup>15</sup> Control indigenization promotes indigenous people in managerial and decision-making position.<sup>16</sup> Manpower indigenization promotes the employment of indigenous people while technology indigenization refers to efforts by states to ensure technological independence.<sup>17</sup> On the contrary, nationalisation refers to the transfer of business ownership from foreigners to the State and its citizens.<sup>18</sup> It is driven by the State’s desire for immediate economic gains and is usually characterised by the grabbing of established businesses.<sup>19</sup> Therefore, to be defined as

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<sup>9</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>10</sup> “Indigenization, n.” OED Online, Oxford University Press, December 2022, [www.oed.com/view/Entry/94473](http://www.oed.com/view/Entry/94473), accessed on 20 September 2023.

<sup>11</sup> OED (2022), *Oxford University Press*.

<sup>12</sup> Andreasson S. 2010. *Africa’s Development Impasse: Rethinking the Political Economy of Transformation*. Zed Books. London

<sup>13</sup> Business Council of Zimbabwe, 2011. *Indigenisation and Economic Empowerment in Zimbabwe: A Strategy for Wealth and Employment Creation for Poverty Reduction*.

<sup>14</sup> United Nations Development Programme, (2010). *Comprehensive Economic Recovery in Zimbabwe*.

<sup>15</sup> UNDP (2010).

<sup>16</sup> UNDP (2010).

<sup>17</sup> UNDP (2010).

<sup>18</sup> UNDP (2010).

<sup>19</sup> L Marazanye, *An Analysis of Indigenisation And Economic Empowerment In Zimbabwe* PhD Thesis (2016) Stellenbosch University.

nationalisation or at least partial nationalisation, equity shares should be transferred from foreign investors to state institutions.<sup>20</sup>

While the first indigenization framework failed to satisfy this condition, the current framework fits perfectly. It requires foreign investors to cede equity shares to Zimbabwe's mining SOEs.<sup>21</sup> Therefore, the envisioned indigenization is partial resource nationalisation.<sup>22</sup> More so, the same can be perceived as State Participation.<sup>23</sup> Both nationalisation and state participation are contentious as they are often argued to prompt capital flight and impede FDI in developing countries.<sup>24</sup> Mugure argues that the Zimbabwean government has always been inclined towards policy frameworks that seek to promote firm control of the economy through SOEs as opposed to indigenous people's ownership and promoting African capitalism.<sup>25</sup> Mugure's submissions are supported by the State's shift from the indigenization that purely intended to empower indigenous Zimbabweans in 2008 to one that put SOEs as the primary beneficiaries.<sup>26</sup>

Tekere contends that the Zimbabwean government has done more to contain than to promote the emergence and growth of an indigenous capitalistic middle class.<sup>27</sup> The push for Indigenization in Zimbabwe emerged from veteran nationalists and a politically connected professional middle class in 1990.<sup>28</sup> Both continue to be the thinktank behind today's indigenization policy in Zimbabwe.<sup>29</sup> However, their approach remains forceful and combative in nature.<sup>30</sup> Their radical approach sparked debate and speculation in 2011 on the rationale of the policy<sup>31</sup> and could be believed to be the motivation behind the resultant amendments of the policy in the years that followed. Several scholars have argued that Zimbabwe's indigenization is nationalisation. The following section discusses the consequences of this perception on FDI.

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<sup>20</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>21</sup> Section 3(1) of the Indigenization Act.

<sup>22</sup> RL Leslie, "Nationalisation and indigenization in Africa" (1976) *The Journal of Modern African Studies* 14.3 427.

<sup>23</sup> *Natural Resources Governance Institute* (2015).

<sup>24</sup> C McPherson, "9 State participation in the natural resource sectors: evolution, issues and outlook" (2010) *The Taxation of Petroleum and Minerals* 279-304.

<sup>25</sup> B Mugure "Foreign investment, black economic empowerment and militarised patronage politics in Zimbabwe" (2012) *Journal of Contemporary African Studies Routledge* 67-82.

<sup>26</sup> Section 3(1) of the Indigenization Act.

<sup>27</sup> E Tekere *A lifetime of struggle* SAPES Books (2007).

<sup>28</sup> Mugure (2012) *Journal of Contemporary African Studies Routledge* 67-82.

<sup>29</sup> Mugure (2012) *Journal of Contemporary African Studies Routledge* 67-82.

<sup>30</sup> Mugure (2012) *Journal of Contemporary African Studies Routledge* 67-82.

<sup>31</sup> Mugure (2012) *Journal of Contemporary African Studies Routledge* 67-82.

## **2.2 The impact of indigenization on FDI if perceived as nationalisation.**

Matyszak submits that whether indigenization is nationalisation or not does not make any difference with regard to its impact on foreign direct investment.<sup>32</sup> On the contrary, this research argues that indigenization without nationalisation has minimum potential to prompt capital flight or impede FDI compared to indigenization instituting resource nationalisation. The difference in the magnitude of induced capital flight or impeded FDI can be interrogated by assessing who between the State and the citizens the foreign investors prefer to partner with where such partnerships are required by law. Before amendments, indigenization was targeted on empowering indigenous Zimbabweans.<sup>33</sup> Foreign investors would become co-shareholders with individuals and not the State.<sup>34</sup> Under that framework, State interference was minimal as the State was only involved as a regulator.<sup>35</sup> On the contrary, state participation under indigenization entails relatively more State involvement in mine planning and operations which can amount to interference.<sup>36</sup> It involves the participation of the state as both a regulator and operator.<sup>37</sup> Therefore, the magnitude of induced capital flight cannot be expected to be the same for an indigenization instituting nationalisation in form of State Participation and one that is solely focused on empowering indigenous Zimbabweans.

In the context of Zimbabwe, resource nationalisation entails strong political interference, even involving military use.<sup>38</sup> A special report issued by the permanent secretary for the Ministry of Youth Development, Indigenization and Empowerment stated that “the army has a role in indigenisation”.<sup>39</sup> The report suggested that the National Defence Forces (NDF) should participate in indigenization by acquiring equity in foreign-owned mining companies.<sup>40</sup> The NDF can acquire equity from mining companies even under the current framework through the indigenization and Economic Empowerment Fund, as suggested

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<sup>32</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>33</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>34</sup> Matyszak (2011) *Kubatana* 03-10.

<sup>35</sup> *Natural Resources Governance Institute* 2015.

<sup>36</sup> *Natural Resources Governance Institute* 2015.

<sup>37</sup> *Natural Resources Governance Institute* 2015.

<sup>38</sup> See, Booker (2012) *Journal of Contemporary African Studies* 67-82; CA Chikumbu, “Would Easing the Black Empowerment Drive in Zimbabwe Boost International Investment in the Country?”

<sup>39</sup> “Armies have a role in indigenization: during peacetime, an army has to train and retool, but it must also deploy in activities that promote economic growth and general development. The Zimbabwe Defence Forces cannot escape this role in the indigenization and economic empowerment process, says George Magosvongwe, the permanent secretary of the Ministry of Youth Development, Indigenization and Empowerment.” Special Report. <https://www.thefreelibrary.com/Armies+have+a+role+in+indigenization%3a+during+peacetime%2c+an+army+has...-a0338119542> [accessed 2022/11/06].

<sup>40</sup> <https://www.thefreelibrary.com/Armies+have+a+role+in+indigenization%3a+during+peacetime%2c+an+army+has...-a0338119542> [accessed 2022/11/06].

by the permanent secretary.<sup>41</sup> Such a level of resource nationalisation cannot be compared to ceding equity to individual Zimbabweans. Further, empowering indigenous Zimbabweans provides mining companies with the much-needed social license to operate.<sup>42</sup> The benefits of empowering indigenous Zimbabweans to foreign investors cannot be compared with the risks associated with an indigenization instituting resource nationalisation.<sup>43</sup> This point does not mean the initial indigenization framework did not deter investment. In fact, it is submitted that the current framework surpasses the former in its potential to deter foreign investment because of the risks discussed in the following section.<sup>44</sup>

### **2.3 The risk of indigenization perceived as elitism.**

Indigenisation may be perceived as mere political elitism where a small minority of politically connected individuals dominate and influence the policy planning network of Zimbabwe using a socialistic rhetoric for their selfish gain.<sup>45</sup> This section discusses the concept of elitism through indigenization as a foreign investors' perception and how it influences their investment behaviour. This dissertation argues that the overarching factor influencing the decision to invest in any jurisdiction is legal certainty.<sup>46</sup> Uncertainty is the principal risk that influences capital flight and impedes FDI.<sup>47</sup> Consequently, risk perceptions of foreign investors whether factual or not may impede FDI.<sup>48</sup>

The risk that indigenization in Zimbabwe could simply be an engineered enrichment policy designed by politician-cum-businessmen cannot be ignored in analysing the potential impact of the Indigenization Act on FDI. Zimbabwean politicians have been accused of harbouring aspirations to become rich overnight by exploiting insider privileges and not through adopting sound risk-taking entrepreneurial behaviours.<sup>49</sup> Such tendencies are often associated with developing legislative frameworks designed to leverage their business interests at the expense of the public.<sup>50</sup> Consequently, indigenisation may be perceived as mere political elitism where a small minority of politically connected individuals dominate and influence the policy planning network of Zimbabwe.

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<sup>41</sup><https://www.thefreelibrary.com/Armies+have+a+role+in+indigenization%3a+during+peacetime%2c+an+army+has...-a0338119542> [accessed 2022/11/06].

<sup>42</sup> Duan (2005) *Journal of Innovation & Knowledge* 7.

<sup>43</sup> Duan (2005) *Journal of Innovation & Knowledge* 7.

<sup>44</sup> Section 3(1) of the Indigenization Act.

<sup>45</sup> Sandbrook *The politics of Africa's economic stagnation*.

<sup>46</sup> YA Camilio & A Rodriguez "Enhancing Legal Certainty in Colombia: The Role of the Andean Community." (2008) *Mich. St. U. Coll. LJ Int'l L.* 17 407

<sup>47</sup> Camilio & Rodriguez (2008) *Mich. St. U. Coll. LJ Int'l L.* 17 407

<sup>48</sup> G Gono 2007 Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement.

<sup>49</sup> Sandbrook *The politics of Africa's economic stagnation*.

<sup>50</sup> Sandbrook *The politics of Africa's economic stagnation*.

Indigenous Zimbabweans are also of this belief that economic empowerment laws are not meant for the public good but for the private gain of the political elite.<sup>51</sup> Therefore, the government of Zimbabwe is argued to have adopted capitalistic economic policies favouring political elites while enunciating a socialistic rhetoric.<sup>52</sup> Investment security concerns from private foreign investors and apolitical<sup>53</sup> domestic investors can therefore no longer be alleviated by simple word of mouth promising them security of investments. The inherent opportunistic behaviour of politicians in the Government of Zimbabwe is evident in the policy statements issued by the Governor of the Reserve Bank of Zimbabwe. The governor warned the government to hold accountable connected elites who were lobbying for Indigenization in 2007 to allow them to amass wealth greedily.<sup>54</sup>

In 2011 after the Indigenization Act had been enacted, the Governor once again acknowledged that the State had a tendency of benefiting a few politically connected elites through economic empowerment policies developed under the guise of benefiting indigenous Zimbabweans.<sup>55</sup> In his policy statement, the governor implored the State to hold accountable “greedy politicians against selfish practices” they had demonstrated in previous empowerment schemes.<sup>56</sup> The statements by the minister point out to the State’s tendency of disguising elitist policies as indigenization. The following section discusses how the current indigenization may be perceived as state participation in disguise.

### **3. The impact of State Participation Disguised as Indigenization**

This section discusses the likely impact of indigenization perceived as state participation by foreign investors. As noted earlier, the current legislative framework on indigenization can be seen as an effort by the Zimbabwean Government to foster State Participation.<sup>57</sup> The primary objective of the Indigenization Act is to ensure transfer of equity from foreign investors to the State.<sup>58</sup> State Participation refers to a mechanism through which the State employs State-Owned Enterprises (SOEs) to take a direct stake in mineral businesses either as a sole entity or in partnership with private mining companies.<sup>59</sup> Luhende submits that State Participation is a non-tax tool used by host governments to capture a reasonable share

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<sup>51</sup> Mugure (2012).

<sup>52</sup> Mugure (2012).

<sup>53</sup> Or opposition supporting domestic investors.

<sup>54</sup> G Gono, “Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement” (2007).

<sup>55</sup> G Gono, “Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement” (2011).

<sup>56</sup> G Gono, “Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement” (2011).

<sup>57</sup> Section 3 of Chapter 2 of this dissertation.

<sup>58</sup> Section 3 of Chapter 2.

<sup>59</sup> *Natural Resources Governance Institute* 2015.

of mineral resource rents.<sup>60</sup> Together with other tax tools, state participation contributes to a country's fiscal regime.<sup>61</sup> The competitiveness of the fiscal regime is critical in attracting investment.<sup>62</sup> A State that adopts State Participation in its mining fiscal regime expresses its interest in both controlling and fiscal aspects of its mineral sector.<sup>63</sup> Put differently, state participation refers to the combined operational and direct financial involvement of the state in the extractive sector.

It is imperative to establish whether indigenisation through state participation constitutes empowerment of indigenous Zimbabweans. Section 2 of the Indigenization Act defines empowerment as enhancing the "performance of the economic activities of indigenous Zimbabweans into which they would have been introduced or involved through indigenisation." The Cambridge dictionary defines economic activities as "actions and processes involved in producing, buying, and selling products and services."<sup>64</sup> Further, empowerment through indigenization implies "deliberate involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access."<sup>65</sup> Consequently, the empowerment envisioned by the Indigenization Act seeks to enable indigenous Zimbabweans to participate as producers, buyers and sellers of products and services in areas they had no access to prior to the indigenization Act.<sup>66</sup> However, under the current indigenization framework through section 3(1) the State through its parastatals may participate in the economic activities alone. Therefore, based on the provision of section 2 defining empowerment and section 3(1), such an indigenization legal framework may empower the state only and not the indigenous Zimbabweans.

The world bank defines empowerment as "addressing economic, social and institutional inequalities which prevent the poor and disadvantaged groups from having access to and influence over policies and interventions which in turn influence their lives."<sup>67</sup> On the contrary, the 2018 and 2021 amendments to section 3(1) of the Indigenization Act perpetuated the institutional inequalities by substituting indigenous Zimbabweans with state parastatals as primary beneficiaries of indigenization. As concluded in Chapter 2,<sup>68</sup> the current indigenization framework affords indigenous Zimbabweans equity

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<sup>60</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage in the upstream oil and gas industry in Tanzania: an analysis of the concepts, methods and options available in a public trusteeship model of natural resource holding* PhD Thesis UCT (2017).

<sup>61</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage*.

<sup>62</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage*.

<sup>63</sup> *Natural Resources Governance Institute* 2015.

<sup>64</sup> Definition "economic activity" Cambridge University Press <https://dictionary.cambridge.org/dictionary/english/economic-activity> [accessed 25/09/2023].

<sup>65</sup> Section 2 of the Indigenization Act.

<sup>66</sup> Section 2.

<sup>67</sup> World Bank, "World Development Report: Attacking Poverty" (2000/1) Oxford University Press <http://hdl.handle.net/10986/11856> [Accessed 25/09/2023].

<sup>68</sup> Section 2.4 of Chapter 2 of this dissertation.

participation only if they are in partnership with the state or through the Indigenization Fund.<sup>69</sup> Indigenous Zimbabweans may only operate in a reserved sector if in partnership with a parastatal.<sup>70</sup> Consequently, the legislation seeks to guarantee state participation in the extraction of certain minerals regardless of whether the mineral holder is indigenous or foreign.<sup>71</sup> Further, the current iteration of section 3(1) robs indigenous Zimbabweans the access to economic activities provided in section 2 and the opportunity to influence interventions as the Minister is afforded unparallel discretionary powers in who may benefit from indigenization and what form of socio-economic development foreign investors should invest in.<sup>72</sup> Therefore, the current indigenization framework fails to address the social and institutional inequalities preventing disadvantaged indigenous Zimbabweans from accessing and influencing socioeconomic interventions. Guaranteed indigenous people's participation in economic activities of the country and interventions that have an influence on their lives is therefore critical in formulating a pragmatic indigenization framework.<sup>73</sup> This is further discussed in Chapter 4 of this dissertation.

However, it is imperative to understand how the failure of the indigenisation legal framework to satisfy empowerment of indigenous Zimbabweans may impact FDI. First, the lack of alignment between section 2 and section 3 as seen in the discussion above creates ambiguity and uncertainty which can impede FDI.<sup>74</sup> Secondly, compliance with the Indigenization Act cannot guarantee foreign investors the social license to operate because legal framework fails to genuinely empower indigenous Zimbabweans.<sup>75</sup> Therefore, investors may have to engage extra cost to empower indigenous Zimbabweans and to acquire the social license to operate. The extra costs may impede FDI.<sup>76</sup>

If the Government of Zimbabwe adopts State participation in the platinum sector, the licensing system will cease to be purely concessionary.<sup>77</sup> In a purely concessionary regime, the government issues mining licenses to mining companies and relies on a mix of taxes and royalties to get a share of the resource rents.<sup>78</sup> Where state participation is concerned, the State and the foreign investors will be involved in contractual agreements outlining how risks, benefits, and management obligations will be shared between them.<sup>79</sup> How the business risks, benefits, and management obligations is shared

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<sup>69</sup> Section 2 and 3 of the Indigenization Act.

<sup>70</sup> Section 2 and 3.

<sup>71</sup> Section 2 and 3.

<sup>72</sup> Section 3 of the Indigenization Act.

<sup>73</sup> World Bank (2000/1) *Oxford University Press*.

<sup>74</sup> Camilio & Rodriguez (2008) *Mich. St. U. Coll. LJ Int'l L.* 17 407.

<sup>75</sup> World Bank (2000/1) *Oxford University Press*.

<sup>76</sup> Camilio & Rodriguez (2008) *Mich. St. U. Coll. LJ Int'l L.* 17 407.

<sup>77</sup> *Natural Resources Governance Institute* 2015.

<sup>78</sup> *Natural Resources Governance Institute* 2015.

<sup>79</sup> *Natural Resources Governance Institute* 2015.

between parastatals and foreign investors may impede or promote FDI. The following sections discusses these issues.

### **3.1 The lack of clarity on how the SOEs in Zimbabwe intend to acquire equity from foreign investors.**

This section discusses how the lack of a clear way through which the State intends to meet its equity or capital obligations for state Participation may impede FDI. State Participation refers to the process through which the State acquires equity in mining companies.<sup>80</sup> This is typically achieved through three different ways. First, through paid equity, the State through its parastatals purchases shares from mining companies at the market rate and commits to its share of the capital obligations as a shareholder.<sup>81</sup> This can enhance the parastatals focus on profit maximization and promote its development as a viable and competitive entity.<sup>82</sup> However, as highlighted earlier, it puts public funds at unnecessary risk.<sup>83</sup> Further, Zimbabwe is plagued by extreme social challenges such that it cannot afford to invest in mining using public funds.<sup>84</sup>

Secondly, the government can acquire free equity by demanding a stake on the basis that it is the owner of the platinum resource.<sup>85</sup> When using this approach, the SOE has no financial obligations in raising project capital.<sup>86</sup> This approach has the worst repercussions in sparking capital flight.<sup>87</sup> For existing platinum mining companies, it can be viewed as expropriation without compensation. This approach was preferred by the Zimbabwean government in 2013.<sup>88</sup> The president was on record saying that “the mineral resource is owned by us”<sup>89</sup> and indigenization was non-negotiable.<sup>90</sup> The then Minister of Youth Development, Indigenisation, and Empowerment<sup>91</sup> further stated that “our [the government’s] position is

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<sup>80</sup> *Natural Resources Governance Institute* (2015).

<sup>81</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage*.

<sup>82</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage*.

<sup>83</sup> African Union (2009).

<sup>84</sup> C Manyeruke, S Hamauswa & L Mhandara, “The effects of climate change and variability on food security in Zimbabwe: A socio-economic and political analysis” *International Journal of humanities and social science*, 3 270-286.

<sup>85</sup> *Natural Resources Governance Institute* (2015).

<sup>86</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage*.

<sup>87</sup> *Natural Resources Governance Institute* (2015).

<sup>88</sup> “Presidential Statement to clarify the government’s position on the Indigenization and Economic Empowerment policy” 2013 *Veritas Zimbabwe*.

<sup>89</sup> “Presidential Statement to clarify the government’s position on the Indigenization and Economic Empowerment policy” 2013 *Veritas Zimbabwe*.

<sup>90</sup> “South Africa’s Zimplats feels heat from Zimbabwe government as takeover looms” (2013) *Engineering & Mining Journal*. [INDICATE NAME OF AUTHORS OF JOURNAL ARTICLES]

<sup>91</sup> The ministry was later dissolved in 2018.

very clear that we will not pay for any of the resources.”<sup>92</sup> The current legislation does not specify how ZCDC and ZMDC should acquire equity if the platinum sector is to be subject to the indigenization policy. The Act was amended twice after the State had issued these statements and no changes were made to clarify how the State intends to acquire its equity. These developments question whether the State has ideologically changed from free equity. Such a lack of certainty makes investors hesitant to invest in Zimbabwe’s platinum sector hence causing capital flight.

Lastly, SOEs can participate in platinum mining through carried equity in which the host government’s parastatals receive equity on preferential terms while the foreign investor wholly funds the mining project, and the SOE compensates the foreign investor by means of foregone dividends.<sup>93</sup> The risk sharing under this model is skewed against foreign investors. However, it presents the best alternative for the Government of Zimbabwe. It provides the investor the opportunity to recoup their initial investment outlay before affording the State a share of the dividends.<sup>94</sup> The government can allow the investor to recoup the capital together with an agreed interest.<sup>95</sup> While these provisions delay the State’s chance to get a share of the dividends,<sup>96</sup> they provide the much-needed incentives for foreign direct investors to continue investing in the platinum sector even under the indigenization regime. The State may forego a portion<sup>97</sup> or all its dividends until the debt is fully paid.<sup>98</sup> Further, the State can use other fiscal tools such as taxes and royalties to get a share of the platinum proceeds during this delay.<sup>99</sup> It is submitted that by recognising the need for the investor to recoup their initial outlay, this approach is based on sound economic principles.

While the acquisition of ‘free rain equity’<sup>100</sup> is often justified by the argument that the state is the fiduciary owner of the resource, it negates the fact the State often has a royalty charge on mining revenues. Royalties are a form of payment made to the owner of a resource, idea, or invention under property rights.<sup>101</sup> Mining royalties are often paid ad valorem or per unit production.<sup>102</sup> The platinum mining sector in Zimbabwe is subject to a royalty rate of 10 per cent of the gross market value of platinum

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<sup>92</sup> “South Africa’s Zimplats feels heat from Zimbabwe government as takeover looms” (2013) *Engineering & Mining Journal*.

<sup>93</sup> *Natural Resources Governance Institute* (2015).

<sup>94</sup> *Natural Resources Governance Institute* (2015).

<sup>95</sup> *Natural Resources Governance Institute* (2015).

<sup>96</sup> *Natural Resources Governance Institute* (2015).

<sup>97</sup> For instance, the state will receive 10% of its dividends annually while the remaining 90% is accrued to the foreign investor until they recoup the portion of the initial capital outlay they financed on behalf of the State.

<sup>98</sup> See, “Mimosa Agrees to Zimbabwe Indigenization Plan” (2013) *Engineering & Mining Journal*.

<sup>99</sup> B Luhende, *Towards a legal framework for preventing tax revenue leakage* 2017.

<sup>100</sup> Free rain equity refers to State participation with no financial liability.

<sup>101</sup> J Otto, C Andrews, F Cawood, M Doggett, P Guj, F Stermole, J Stermole, & John Tilton, “Mining royalties A global study of their impact on investors, government, and civil society” (2006) *Washington DC, World Bank*.

<sup>102</sup> Otto et.al (2006) *World Bank*.

produced.<sup>103</sup> 'Free rain equity' can therefore be regarded as a tax or royalty on top of the existing royalty and tax regimes. Hence, allowing foreign investors to recoup their investment with or without interest remains a more appropriate approach.

Complications may arise in implementing this approach with existing platinum mining companies. For foreign investors in platinum mines already under production, the initial investment outlay could have already been recouped. Further, such adjustments necessitate a review of the mining projects' valuation. To facilitate the acquisition of carried equity by the State, the mining company has to offer the state a vendor loan<sup>104</sup> at the agreed cost of the equity.<sup>105</sup> Such adjustments may render the project less lucrative for the foreign direct investor already under operation. In fact, the project valuation reviews may be economically unviable in which case the investor does not have much freedom to pull out of the investment compared to prospecting investors due to sunk costs.<sup>106</sup> As an example: Mimoso Mine's<sup>107</sup> 2013 indigenization plan provides an interesting case of how the State can acquire equity using vendor loans. The plan was designed to enable Mimoso to cede 51 per cent of the company's equity for US 550 million at the agreed market value.<sup>108</sup> Mimoso Mine would provide a vendor loan to the indigenous recipients of the equity.<sup>109</sup> The loan would be payable in ten years at an interest rate of 9 per cent per annum.<sup>110</sup> The indigenous recipients of the equity would pay back the loan by waiving their right to receive 90 per cent of their dividends.<sup>111</sup> Whether the deal fairly accounted for the interests of all the involved parties could be a discussion for further research, but it provided a mechanism for the transfer of equity as was mandated by the law.

Regardless of the preferred approach, it is important to establish whether it is favourable for the government to adopt State participation. The African Mining Vision provides that the state should not be involved in mining business ventures and that African States should focus on mining revenue collection and distribution.<sup>112</sup> Further, the African Union argues that government investment in mining projects even

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<sup>103</sup> N Madya & M Muzaza, "Mining laws and regulations Zimbabwe" (2023) *ICLG*.

<sup>104</sup> In the first case, the vendor who is a foreign investor like Mimoso Mine facilitates financing from own funding sources. The credit does not appear on the vendor's balance sheet. By doing so, they become afford the state a chance to become a co-owner while retaining partial ownership. See more, Terlikowski, Pawel, Józef Paska, Karol Pawlak, Jakub Kaliński, and Dawid Urbanek. "Modern financial models of nuclear power plants" (2019) *Progress in Nuclear Energy* 110 30-33.

<sup>105</sup> P Warren "Two Financing Models" (2014) [https://www.ifnec.org/ifnec/jcms/g\\_5920/finance-and-project-structuring-panel-review-offinancing-models-paul-warren](https://www.ifnec.org/ifnec/jcms/g_5920/finance-and-project-structuring-panel-review-offinancing-models-paul-warren) [accessed 2023/1/06].

<sup>106</sup> See, R McAfee, M Hugo, M Mialon & SH Mialon, "Do sunk costs matter?" (2010) *Economic Inquiry* 48 323-336.

<sup>107</sup> Mimoso Mine is a platinum mine in Zimbabwe owned by Impala Platinum (Implats).

<sup>108</sup> "Mimoso Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>109</sup> "Mimoso Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>110</sup> "Mimoso Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>111</sup> "Mimoso Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>112</sup> Union, African, "Africa mining vision." *Addis Ababa African Union* (2009).

if free does not offer significant benefits but puts public funds at unnecessary risk.<sup>113</sup> However, State Participation has been viewed as a panacea for the information asymmetry<sup>114</sup> often existing between foreign mining companies and host governments where the foreign investor has more expertise in drafting and negotiating mining contracts than the State.<sup>115</sup> Further, Nakhle contends that State Participation is often motivated by political reasons rather than economic factors.<sup>116</sup> The need to exercise full sovereignty over natural resources is chief among these political factors.<sup>117</sup> Therefore, the host states' desire to adopt state participation cannot be negated.<sup>118</sup> However, it is crucial to determine the model of state participation that minimises risking public funds, prompting capital flight and ensuring reasonable benefits for the citizens.

### **3.2 Opportunities and challenges of the Guaranteed Ownership Stake State Participation model.**

There several models for equity participation through which SOEs can acquire mining shares in foreign owned companies. The common model being the Guaranteed Ownership Stake (GOS) in which the parastatal is guaranteed partial ownership in every mining company.<sup>119</sup> The GOS approach guarantees parastatals have equity share in all foreign owned mining companies.<sup>120</sup> The second approach is the Concessionary State Equity Participation through which the parastatal has the privilege to choose the foreign owned companies it wants to acquire equity from.<sup>121</sup> Alternatively, the state may use the Preferential Competitive Bidding approach which requires SOEs to compete with foreign owned companies while enjoying some degree of preferential treatment.<sup>122</sup> Contrarily, the Full Competitive Bidding approach puts parastatals at par with the foreign owned companies.<sup>123</sup> SOEs equity participation based on their competence to outperform the private sector. Finally, in a Monopolistic State Participation model, parastatals enjoy little to no competition as they are afforded a monopolistic regulatory

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<sup>113</sup> *African Union* (2009).

<sup>114</sup> In contract economics, information asymmetry refers to contractual arrangements where the mining company has more information and expertise than the State. Information asymmetry creates an imbalance of power in contractual transactions. See, CM Axel, VE Amelung, & C Juhnke, "Contract Design: The problem of information asymmetry" (2018) *International journal of integrated care* 18.1.

<sup>115</sup> Axel et. al (2018) *International journal of integrated care*.

<sup>116</sup> Nakhle (2010) *The Taxation of Petroleum and Minerals Routledge* 105.

<sup>117</sup> Nakhle (2010) *The Taxation of Petroleum and Minerals Routledge* 105.

<sup>118</sup> Nakhle (2010) *The Taxation of Petroleum and Minerals Routledge* 105.

<sup>119</sup> Natural Resources Governance Institute (2015).

<sup>120</sup> Natural Resources Governance Institute (2015).

<sup>121</sup> Natural Resources Governance Institute (2015).

<sup>122</sup> Natural Resources Governance Institute (2015).

<sup>123</sup> Natural Resources Governance Institute (2015).

environment in the exploration and production of metals.<sup>124</sup> Foreign owned companies are involved in the sector on a contract bases as service providers.<sup>125</sup>

Section 3(1) of the Indigenization Act indicates that if platinum is chosen by the Minister of Industry and Commerce to be subject to indigenization laws, Zimbabwe will adopt the Guaranteed Ownership Stake Model through ZMDC and ZCDC.<sup>126</sup> The major benefit of the GOS model to the Government of Zimbabwe is that it preferentially affords ZMDC and ZCDC unnegotiated equity in all foreign owned mining companies.<sup>127</sup> It is also applauded for its ability to ensure transparency through the provision of the government's share in mining companies in the primary legislation which makes public accountability easier.<sup>128</sup> However, it negates fundamental business prerequisites for ZMDC and ZCDC operate competitively for them to participate in mining by guaranteeing their participation. The SOEs are guaranteed a stake in all mining projects irrespective of how they perform or whether they are well suited to deliver the project efficiently.<sup>129</sup> It is therefore ideal for states with strong institutions to facilitate regular checks and balances to ensure efficiency. Unfortunately, Zimbabwe does not have such strong institutions to ensure efficiency and accountability in SOEs.<sup>130</sup>

Alternatively, the Government of Zimbabwe may adopt the Concessionary State Equity Participation approach as to promote its ambition for attracting foreign investors.<sup>131</sup> The concessionary model affords the host government the flexibility to treat mining projects using a case by case approach, reflecting the variations in inherent geological and geographical risk features mining projects.<sup>132</sup> The lack of a monopoly or unguaranteed equity that comes with the concessionary approach prompts mining parastatals to strive for efficiency.<sup>133</sup> It is however important to note that the concessionary approach introduces a lack of transparency that makes public scrutiny difficult as the deals are negotiated on a case by case basis in closed doors. This can lead to more complexities especially for a nation grappling with corruption and resource revenue leakages due to a lack unless the legislation clearly spells out how the

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<sup>124</sup> Natural Resources Governance Institute (2015).

<sup>125</sup> Natural Resources Governance Institute (2015).

<sup>126</sup> Section 3(1) of the Indigenization Act.

<sup>127</sup> Natural Resources Governance Institute (2015).

<sup>128</sup> Natural Resources Governance Institute (2015).

<sup>129</sup> Natural Resources Governance Institute (2015).

<sup>130</sup> AT Legend, "An Overview of the State of Electoral Justice in Zimbabwe" (2019) *African Renaissance* 16 1744-2532

<sup>131</sup> SM Nyamazana, "Foreign direct investment: does it matter? A case for Zimbabwe" (2015) *Research in business and economics journal* 11 34-52.

<sup>132</sup> F Victoria, O Dolina, & T Shpilkina "Investment risk management at mining enterprises" (2019) *EDP Sciences E3S Web of Conferences* 105 1054.

<sup>133</sup> Natural Resources Governance Institute (2015).

cases by case deals should be administered.<sup>134</sup> While the legislation afford the SOEs guaranteed participation, it leaves room for speculation the 51 percent can be wholly reserved for SOE. The potential implication of this perception is discussed in the next section.

### ***3.3 The impact of a perceived 51 percent flat equity rate for State Participation.***

The provisions of s 3(1) of the Act can be interpreted by foreign investors as demanding a 51 per cent fixed rate for State equity participation. The section provides that foreign investors should ensure that 51 per cent of the mining companies is owned by ZMDC and ZCDC with or without Community and Employee Share Ownership Trusts (CESOTs).<sup>135</sup> In the absence of CESOTs, the indigenization quota becomes a flat rate for State Participation explicitly stated in the law. This robs the foreign investor of the opportunity to negotiate with the State and makes the State a majority shareholder outright. Further, the mineral policy statement issued by the president in 2013 explicitly made it clear that compliance with indigenization is non-negotiable for mining companies.<sup>136</sup> This ignores the inherent geological variations existing across the mining industry which may require dealing with investors on a case-by-case basis.<sup>137</sup> Great Dyke Investments' platinum ore body presented such a classic case with extensive structural complications and highly fractured wall rock.<sup>138</sup> Unlike the rest of the platinum deposits mined by Zimplats, Implats, and Unki mines, Great Dyke Investments' deposit presents a huge challenge for the extraction of platinum using conventional mining methods.<sup>139</sup> The deposit has not been mined to date and the structural complexities remain one of the drawbacks although capital is the greatest challenge.<sup>140</sup> Such circumstances would otherwise require the government of Zimbabwe to incentivise its extraction by lowering equity participation. Investors may be threatened by the legislation's demands of 51 per cent equity participation outside of negotiations therefore result in impeding FDI.

Further, section 3(1) of the Indigenization Act creates a severe lack of transparency on how much the State gets from the mining sector through State Participation. Read together with the

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<sup>134</sup> See, G Zhou & A Madhekeni, "Systems, processes and challenges of public revenue collection in Zimbabwe" (2013).

<sup>135</sup> Section 3(1) of the Indigenization Act.

<sup>136</sup> "Presidential Statement to clarify the government's position on the Indigenization and Economic Empowerment policy" 2013 *Veritas Zimbabwe*.

<sup>137</sup> J Naldrett & AH Wilson, "Horizontal and vertical variations in noble-metal distribution in the Great Dyke of Zimbabwe: A model for the origin of the PGE mineralization by fractional segregation of sulfide" (1990) *Chemical Geology* 88 279-300.

<sup>138</sup> "Zimbabwe's Biggest Platinum Project Has New Challenges – Report" *Pindula* (2022).

<sup>139</sup> J Naldrett & AH Wilson (1990) *Chemical Geology* 279-300.

<sup>140</sup> J Naldrett & AH Wilson (1990) *Chemical Geology* 279-300.

Indigenization General Regulations,<sup>141</sup> State equity can be as low as 26 per cent where CESOTs are awarded the maximum possible equity shares.<sup>142</sup> Therefore, the rate ranges from 25 per cent to 51 per cent. The wide range makes public accountability difficult especially given that Zimbabwe is not yet a member of the Extractive Industry Transparency Initiative (EITI).<sup>143</sup> Contractual agreements between the State and private mining companies are not published publicly as required by the EITI.<sup>144</sup> Combined, these factors render holding the State and its SOEs accountable with respect to mining revenues difficult.

As discussed in Chapter Two,<sup>145</sup> indigenous Zimbabweans have very limited leverage and agency to participate in indigenisation as the state can acquire the entire 51 percent indigenization quota.<sup>146</sup> The absence of a legislative framework seeking to foster sustainable mining as discussed in chapter 1<sup>147</sup> and empower host communities in Zimbabwe can be perceived as the government's disinterest in seeking a social license to operate the mining sector.<sup>148</sup> Recent scholarship argues that the social license to operate should not be sought by the investor only, the State should seek its own social license to operate.<sup>149</sup> In the absence of this license, the investor risks operating in a highly volatile environment unless they pursue extensive corporate social investment.<sup>150</sup> This comes at an added cost and may inspire capital flight and impede FDI. A statement<sup>151</sup> on CSR by Neal Froneman of Sibanye Stillwaters, a shareholder of Mimosa Mine, reveals that mining companies do not want to carry the government's burden to get the social license.<sup>152</sup>

### **3.4 Foreign Investor's Interests in having Majority Shareholding in Mining Companies**

This section explores the probable impact of forcing foreign investors to become minority shareholders in their businesses. It is expected that regardless of the terms of the Indigenization Act, foreign investors

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<sup>141</sup> of 2010.

<sup>142</sup> Regulation 14 of the Indigenization and Economic Empowerment General Regulations of 2010.

<sup>143</sup> See, L Päivi, "An analysis of the Extractive Industry Transparency Initiative implementation process" (2018) *World Development* 107 358-381.

<sup>144</sup> L Päivi, "An analysis of the Extractive Industry Transparency Initiative implementation process" (2018) *World Development* 107 358-381.

<sup>145</sup> Section 3 of chapter 2.

<sup>146</sup> Section 3 of the Indigenization Act.

<sup>147</sup> Section 2 of Chapter 1 of this dissertation.

<sup>148</sup> H Mann, "IISD Handbook on Mining Contract Negotiations for Developing Countries" (2015) *International Institute for Sustainable Development*.

<sup>149</sup> Mann (2015) *International Institute for Sustainable Development*.

<sup>150</sup> Mann (2015) *International Institute for Sustainable Development*.

<sup>151</sup> Neil Froneman's statement reads, "We [foreign investors] have started recognizing that if we want to operate, *unfortunately*, we're going to have to become part of providing services to the communities that surround us." Own emphasis added.

<sup>152</sup> Stoddard E "Sibanye-Stillwater's Froneman speaks out – 'South Africa is a failed state with no leadership'" Daily Maverick 7 March 2022.

are more inclined towards ensuring that they have a majority shareholding in their mining companies to remain in control of their enterprises. It is possible to cede controlling interests to the appropriate designated entity while retaining majority shareholding. Foreign investors may achieve a majority shareholding of 49 per cent by distributing the 51 per cent Indigenization quota among many entities. For instance, the Mimosa Mine Indigenization Plan of 2013 allocated 10 per cent to the Community Share Ownership Scheme, another 10 per cent to the Employee Ownership Scheme and the remaining 31 per cent to the Indigenization Fund hence effectively making itself the majority shareholder with 49 per cent.<sup>153</sup>

Although this was possible in 2013, this flexibility may not be available under the current Indigenization Framework. The provisions of section 3(1) of the Indigenization Act empowers the Minister of Industry and Commerce to stop foreign investors from doing so. Section 3(1) affords discretion on the inclusion of Community and Employee Share Ownership Schemes while making it mandatory that SOEs are included for compliance with Indigenisation. Denying foreign investors an opportunity to retain majority shareholding while complying with the demands of the Indigenization Act may cause impede FDI because it goes against their interests. Majority shareholding and diversified ownership of the indigenization quota have strategic benefits for foreign investors. It enables the foreign investor to seek sympathetic shareholders when faced with an impasse during decision-making. As noted in *Minister of Mines and Mining Development & v Grandwell Holdings*, Grandwell Holdings could not save Mbada Diamonds by seeking a resolution from the Board of Directors because the State (ZMDC) and the foreign investor, Grandwell Holdings were equally represented and ZMDC had no interest in saving the entity.<sup>154</sup> Therefore, state participation that robs foreign investors the opportunity to have majority shareholding in their mining businesses may impede foreign direct investment.

#### **4. An unbalanced risk-sharing structure between foreign investors and State-Owned Enterprises**

This section explores how the management and allocation of risks between foreign investors and SOEs in forced partnerships can impede FDI. The implementation of section 3(1) of the Indigenization Act will result in contractual agreements in the private realm and the public domain.<sup>155</sup> Such contractual arrangements can be regarded as Public Private Partnerships (PPPs).<sup>156</sup> The State and the private foreign

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<sup>153</sup> Mimosa Mine Indigenisation Plan of 2013.

<sup>154</sup> *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

<sup>155</sup> R Sang Ayu, R Anitasari, & R Fidiyani, "Impact of Changes in Mining Regulations on the Concept of Public-Private Partnership in Indonesia" (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9, 2021.*

<sup>156</sup> Sang (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS.*

investors will share responsibilities, costs, profits, and risks.<sup>157</sup> The allocation and management of risks in PPPs is a crucial concern for both private investors and the State.

Traditionally, PPPs were developed to provide a mechanism for funding societal infrastructural needs.<sup>158</sup> The introduction of PPPs to the extractive sector is not new. Production Sharing Agreements in the Oil and Gas sector can be viewed as the early shifts from purely private or public extractives project financing towards PPPs.<sup>159</sup> However, there is very limited literature on PPPs in the mining sector.<sup>160</sup> Production Sharing Contracts in the oil and gas sector share similar peculiarities with PPPs for infrastructure development which cannot be generalised for the mining sector.<sup>161</sup> For instance, the State takes residual ownership of the infrastructure and assets after an agreed period has lapsed in both Oil and Gas PSCs and Infrastructure PPPs whereas this may not be the case in platinum mining projects.<sup>162</sup> Such peculiarities of PPPs in mining projects warrant investigation to probe how risk sharing equilibrium can be achieved and how the risks should be commensurate with the expected gain.

To arrive at a risk-sharing equilibrium point, it is crucial to know the risks that can occur during the mining project.<sup>163</sup> Ting identified various risks associated with infrastructure development and how they should be dealt with in risk sharing.<sup>164</sup> Risks in mining projects include geological, political, legal, and economic risks.<sup>165</sup> The risk bundling involved in mining PPPs is of particular concern under the Indigenization Act's mandatory 51 per cent state equity participation. Three distinct risk areas of concern can be identified. First, the ownership, financing and control<sup>166</sup> of the mining business are not clearly spelt out by the legislation.<sup>167</sup> Although the State does not explicitly own the asset as in the case of Petroleum PSCs and Infrastructural PPPs, its interest in residual ownership<sup>168</sup> of the property cannot be doubted. However, the indigenization Act is silent on the relinquishment of assets upon termination or expiry of a mining license. In the *Minister of Mines and Mining Development v Grandwell Holdings (Private) Limited*

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<sup>157</sup> Sang (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS*.

<sup>158</sup> Sang (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS*.

<sup>159</sup> T Gathii, & TO Ibironke, "The turn to contractual responsibility in the global extractive industry" (2016) *Business and Human Rights Journal* 1 69-94.

<sup>160</sup> Sang (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS*.

<sup>161</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>162</sup> Sang (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS*.

<sup>163</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>164</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>165</sup> A Badri, S. Nadeau & A. Gbodossou. "A mining project is a field of risks: A systematic and preliminary portrait of mining risks" (2012) *International journal of safety and security engineering* 2 145-166.

<sup>166</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>167</sup> Section 3 of the Indigenization Act.

<sup>168</sup> Ownership of the asset upon the termination of the contract. See Ting (2017) *Journal of Construction Engineering and Management* 143.

(*Mbada Diamonds*) case *Grandwell Holdings* a foreign investment company lost the assets upon termination of its operations and expiry of its license.<sup>169</sup>

The second dimension pertains to the differing risk perceptions of the two contracting parties based on the diverging objectives of the stakeholders they represent.<sup>170</sup> The SOE seeks to optimise the total social benefit while the foreign direct investor seeks to maximise profits.<sup>171</sup> This feature differentiates purely profit-driven contractual agreements between foreign and private indigenous investors that were possible before the 2018 amendments and the current iteration of indigenization which promotes state participation. The third dimension pertains to the differing abilities of the parties to diversify the risks.<sup>172</sup> The State can easily spread its risks to its taxpayers and thus can be less risk-averse compared to the investor.<sup>173</sup> Consequently, foreign investors are more likely to suffer the residual risks or risks that can be attributed to neither of the two parties.<sup>174</sup>

While partnerships between the state and foreign investors cannot be eliminate, two principles can be adopted to promote risk-sharing equilibrium. The first principle states that a risk factor should be allocated to the party that is operationally responsible for it.<sup>175</sup> The second principle states that the risk should be allocated to the party that is more able to bear it.<sup>176</sup> For instance, when dealing with the risk of cost overruns within the foreign investors' control due to malpractices such as process inefficiencies, the principle ascribes the risk to the private investor.<sup>177</sup>

Similarly, Guasch's model for risk allocation provides that risks emanating from project design defects should be allocated to the issuing party.<sup>178</sup> However, it is submitted that this principle is much easier to implement in infrastructure PPPs than in mining partnerships. Infrastructure PPPs are ordinarily awarded on a tender basis following a build-operate-transfer model.<sup>179</sup> In such an approach, the State issues design tender specifications when inviting bids.<sup>180</sup> Under the operational responsibilities principle,

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<sup>169</sup> *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

<sup>170</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>171</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>172</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>173</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>174</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>175</sup> JL Guasch, "Granting and renegotiating infrastructure concessions: doing it right" (2004) *World Bank Publications*.

<sup>176</sup> Guasch (2004) *World Bank Publications*.

<sup>177</sup> Guasch (2004) *World Bank Publications*.

<sup>178</sup> Guasch (2004) *World Bank Publications*.

<sup>179</sup> Guasch (2004) *World Bank Publications*.

<sup>180</sup> Guasch (2004) *World Bank Publications*.

the State, therefore, bears all risks owing from its tender designs while the winning investor bears all risks owing from its bid designs.<sup>181</sup>

On the contrary, mining projects in Zimbabwe are issued using a licensing system.<sup>182</sup> Often, the private investor is responsible for the mining engineering designs, project evaluations and operations.<sup>183</sup> It is therefore concluded that although the risk-sharing criterion developed by Guasch can be very beneficial to the extractive sector, it is largely applicable to infrastructure development projects and therefore there is a need for further research to develop a risk-sharing criterion for mining PPPs that are emerging. Nonetheless, the Indigenisation Act's lack of clarity on the ownership, financing and control<sup>184</sup> together with the differing risk perceptions and abilities of the parties to diversify the risks may impede FDI as the risks are more likely to be incurred by foreign investors. The following section further analyses SOEs' lack of integrity and loyalty as a risk factor that may impede FDI.

#### **4.1 Loyalty and integrity of State-owned Enterprises**

Loyalty and integrity of potential partners are crucial investment decision-making factors in any project, whether the partnership is required by law or not.<sup>185</sup> Foreign Direct Investors are therefore expected to question whether Zimbabwe's SOEs can be trusted as reliable partners for platinum mining joint ventures.<sup>186</sup> For such an inquiry, it is important to analyse the SOE's track record. Loyalty should be an inherent feature of every partnership.<sup>187</sup> For in the absence of it, the parties compete.<sup>188</sup> Therefore, foreign investors should probe whether the behaviour of the SOE in its previous joint ventures was competitive or disloyal against its partners.<sup>189</sup>

Parties in a partnership owe fiduciary responsibilities to one another.<sup>190</sup> "The rule of undivided loyalty is relentless and supreme" in joint ventures.<sup>191</sup> SOE's are therefore expected to be loyal to foreign private investors. However, the challenge often emanates from the diverging objectives of SOEs and foreign investors. While ZMDC's and ZCDC's thrust is on optimising public benefit, foreign investors seek

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<sup>181</sup> Guasch (2004) *World Bank Publications*.

<sup>182</sup> Part IV of the Mines and Minerals Act no 38 of 1961.

<sup>183</sup> Part IV.

<sup>184</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>185</sup> See, RW Hillman, "Professional partnerships, competition, and the evolution of firm culture: The case of law firms" (2000) *J. Corp. L.* 26 1061.

<sup>186</sup> NAC Mat, Y Cheung & H Scheepers, "Partner selection: criteria for successful collaborative network" (2009) *20th Australian conference on information systems* 2 4.

<sup>187</sup> S Sanga "A Theory of Corporate Joint Ventures" (2018) *California law review* 106 5.

<sup>188</sup> Sanga (2018) *California law review* 106 5.

<sup>189</sup> Mat (2009) *20th Australian conference on information systems* 2 4.

<sup>190</sup> Sanga (2018) *California law review* 106 5.

<sup>191</sup> Sanga (2018) *California law review* 106 5.

to maximise profits giving rise to a fiduciary conflict instead of a fiduciary responsibility.<sup>192</sup> The fiduciary responsibility is therefore limited in practice. Sanga argues that fiduciary conflict is inherent to joint ventures due to the application of both partnership law and corporate law to joint ventures.<sup>193</sup> While corporate law requires undivided loyalty to one's own company, partnership law imposes the same demands on their partner.<sup>194</sup>

Nevertheless, this does not indemnify SOEs in host countries from acting in the best interests of their partners especially where such partnerships are required by law. Zimbabwe's platinum sector requires FDI and the SOE's reputation is critical in attracting investment.<sup>195</sup> Lack of loyalty can cause capital flight. The *Mbada Diamonds Case* left a huge dent in ZMDC's reputation regarding partnership loyalty. In the *Mbada Diamonds Case*, ZMDC and Grandwell Holdings a private foreign company entered into an agreement which resulted in the incorporation of Mbada Diamonds a diamonds mining company that was equally owned by both parties.<sup>196</sup> Grandwell Holdings and ZMDC found themselves in what the government of Zimbabwe considered a deadlock while negotiating ZMDC's plan to consolidate Mbada Diamonds and all other diamond mines into one entity.<sup>197</sup> The move would effectively restructure the parties' equity ownership as ZMDC was meant to retain its 50 per cent share while Grandwell Holdings would share the remainder with other foreign investors.<sup>198</sup> Therefore, the new arrangement would render Grandwell a minority shareholder in the entity.<sup>199</sup>

Amid the impasse, Grandwell Holdings received a letter from the Permanent Secretary of Mines and Economic Development informing foreign investors that their mining license had expired.<sup>200</sup> The letter gave the investor 90 days to vacate the premises.<sup>201</sup> However, on that same day, armed police descended on the mine and forcefully removed Grandwell Holdings from the site.<sup>202</sup> An interesting similarity can be drawn between the *Mbada Diamonds Case* and the Fast Track Land Reform Programme in Zimbabwe.<sup>203</sup> In both cases, the property holders were evicted within 24 hours of notice regardless of the provisions of the law.<sup>204</sup> Although no proper costing research work has been advanced to ascertain the exact economic price Zimbabwe has incurred due to its attempts to indigenise the extractive sector, the agriculture sector

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<sup>192</sup> Ting (2017) *Journal of Construction Engineering and Management* 143.

<sup>193</sup> Sanga (2018) *California law review* 106 5.

<sup>194</sup> Sanga (2018) *California law review* 106 5.

<sup>195</sup> Mat (2009) *20th Australian conference on information systems* 2 4.

<sup>196</sup> *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.*

<sup>197</sup> 2 para 4.

<sup>198</sup> 2 para 3.

<sup>199</sup> 2 para 3.

<sup>200</sup> 3 para 6.

<sup>201</sup> 3 para 6.

<sup>202</sup> 4 para 9.

<sup>203</sup> HN Thomas, "Land reform in Zimbabwe" (2003) *Third World Quarterly* 24 691-712.

<sup>204</sup> Mugure (2012).

has been argued to have lost between US20 billion and US33 billion within the first decade of the land reform programme.<sup>205</sup>

Notably, the same permanent secretary who wrote the letter notifying Grandwell of the expiration of the mining license was the chair of ZMDC.<sup>206</sup> ZMDC was the owner of the mining license that the letter stated had expired and not Grandwell.<sup>207</sup> Therefore, it can be concluded that renewing the licence was part of ZMDC's fiduciary responsibility to Grandwell Holdings. Grandwell Holdings alleged that while it had the responsibility over the day to mining operations of the joint venture, renewal of the license was ZMDC's obligation.<sup>208</sup> Although the Court held that the State acted unlawfully by forcefully removing Grandwell Holdings from the mine, ZMDC successfully took over the mine and the foreign investor was evicted.<sup>209</sup> Consequently, the damaged reputation of Zimbabwe's Mining SOEs is likely to cause capital flight and impede FDI if the Indigenization Act is implemented in the platinum sector. Moreso, capital flight is not only prompted by policy facts.<sup>210</sup> Perceptions on indigenization that may not necessarily be true can cause capital flight.<sup>211</sup> Scholarship contends that capital "is a timid commodity, which always stands ready to jump ship at the slight inclination of attack whether factual or perceived."<sup>212</sup> Perceived lack of security of investment can equally impede FDI as discussed in the following section.

## ***4.2 The impact of indigenisation on the security of mineral tenure.***

Security of mineral tenure is a major factor used by foreign investors in choosing their investments' destinations and the lack of it may impede FDI.<sup>213</sup> Security of mineral tenure refers to the certainty and stability of mining rights through the entire life of mine.<sup>214</sup> Foreign investors are concerned with securing their investments especially during indigenization compliance disputes between the State and their

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<sup>205</sup> The "President's Address to the Commercial Farmers' Union Congress" (2011) estimate was set at US 33 billion, Cross, E. "The cost of Zimbabwe's continuing farm invasions" (2009) *Cato Institute Economic* put the cost at US 20 billion.

<sup>206</sup> 14 para 45.

<sup>207</sup> 14 para 45.

<sup>208</sup> 14 para 45.

<sup>209</sup> 3 Para 7.

<sup>210</sup> Mugure (2012).

<sup>211</sup> Mugure (2012).

<sup>212</sup> Mugure (2012) citing the Minister of Finance G Gono (2007).

<sup>213</sup> E Bastida, "A review of the concept of security of mineral tenure: Issues and challenges" (2001) *Journal of Energy & Natural Resources Law* 19.1 31-43.

<sup>214</sup> E Bastida (2001) *Journal of Energy & Natural Resources Law* 19.1 31-43. See also, PJ Badenhorst, "Security of mineral tenure in South Africa: carrot or stick?" (2014) *Journal of Energy & Natural Resources Law* 32.1 5-40.

companies.<sup>215</sup> Security of mineral tenure can be promoted through the restriction of ministerial discretion especially in the grant, cancellation and renewal of mineral rights or related licenses.<sup>216</sup>

The Indigenization Act affords the Minister discretions to choose minerals for indigenization,<sup>217</sup> to issue the license to investment,<sup>218</sup> and to decide whether a foreign investor has satisfied indigenization<sup>219</sup> among many other discretionary powers without providing clear rules to be followed when exercising the discretion. Zimplats found itself in this situation in 2013. Faced with growing pressure to comply when other platinum mining companies were announcing their indigenization plans, Zimplats found itself in a deadlock trying to negotiate better concessions with the State.<sup>220</sup> Amid the deadlock, the State announced that it was taking back 50 per cent of the land that was owned by Zimplats under its mining license to distribute it to other investors.<sup>221</sup> Eventually, the state appropriated the 27 498 hectares of the claims that Zimplats owned.<sup>222</sup>

It may not be ascertained whether the State's decision to appropriate the claims from Zimplats was motivated by Zimplats' disinterest in satisfying the government's indigenization demands as was stated by the country's president accusing Implats' subsidiary of giving the "state insufficient concessions".<sup>223</sup> However, the perception that Zimplats lost the mineral rights because of the impasse is enough to impede FDI as submitted by Mugure citing Gono.<sup>224</sup> Further, the Indigenization Act empowers the Minister of Industry and Commerce to suspend or cancel mining licenses of companies that fail to comply with the requirements.<sup>225</sup> Together with a judiciary system allegedly compromised by political interference,<sup>226</sup> these developments can present a huge threat to the security of mineral tenure for

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<sup>215</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering and Mining Journal*.

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<sup>217</sup> Section 3(1) of the Indigenization Act.

<sup>218</sup> Regulation 14 of the Indigenization General Regulations.

<sup>219</sup> Regulation 14.

<sup>220</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering and Mining Journal*.

<sup>221</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering and Mining Journal*.

<sup>222</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering and Mining Journal*.

<sup>223</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering and Mining Journal*.

<sup>224</sup> Mugure (2012) citing the Minister of Finance G Gono (2007).

<sup>225</sup> Section 4 of the Indigenization Act.

<sup>226</sup> P Ruhanya, "The militarisation of state institutions in Zimbabwe, 2002–2017 The History and Political Transition of Zimbabwe" (2020) *Palgrave Macmillan Cham* 181-204. See also, AAH Noyes, "New Zimbabwe Assessing Continuity and Change After Mugabe" (2020) *Rand Arroyo Center Santa Monica Ca Santa Monica*.

platinum investors.<sup>227</sup> Discretionary powers of the Minister to put section 3(1) into effect at a date they wish do so equally introduce uncertainty that may impede FDI as discussed in the following section.

### **4.3 The Impact of the pending effect of Section 3(1) on FDI**

The effect of the Indigenization and Economic Empowerment Act on the platinum mining industry remains pending until such a date when the Minister of Industry and Commerce chooses the minerals she so wishes to put under indigenisation.<sup>228</sup> The Act does not provide the criteria for which such a decision may be reached. In 2018 the Government of Zimbabwe expressed its interest to put platinum and diamonds under the Indigenization Act by making amendments that demanded a 51 per cent quota in all platinum projects.<sup>229</sup> The requirements were lifted in 2021 without stating the rationale. Currently, no minerals are subject to the indigenization provisions, until the Minister decides otherwise.<sup>230</sup> The State is clearly interested in getting some equity from the exploitation of its platinum resources. Without a clear justification why, platinum was singled out from the rest of the minerals to remain under indigenization when all other businesses and minerals<sup>231</sup> were exempted in 2018, platinum miners cannot ascertain the security of their investments.

The pending implementation of the act can be likened to the lengthy processes of developing mining legislation, especially in Zimbabwe and other African countries. The Mines and Minerals Bill which was recently published on the 23<sup>rd</sup> of February 2023 was first published in 2007 for public consultation. It has taken the country more than 15 years to formulate the law from the first publication of the Bill and no one knows when it will be enacted. Similarly, the Indigenization Act 2022 amendments though enacted, are still to go into effect. It is submitted that the process itself may become a bigger hindrance to attracting foreign investment than the Act could. When a country takes years debating enacting controversial mining legislation such as state participation, the lengthy process itself may deter investment. The long periods of uncertainty render project valuation complex and difficult for prospecting investors. This is not to underestimate the need for due diligence and procedural processes in law-making. The state should satisfy these tenets timeously considering the time-sensitivity of mining investment and the potential of unproductive, lengthy law-making processes in creating an uncertain investment climate.

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<sup>227</sup> R Sandbrook *The politics of Africa's economic stagnation* (1985) Cambridge.

<sup>228</sup> Section 3(1) of the Indigenization Act.

<sup>229</sup> Section 3(1) of the Indigenization Act as amended in 2018.

<sup>230</sup> Section 3(1) of the Indigenization Act.

<sup>231</sup> Except diamonds.

The Mines and Minerals Amendment Bill (The Bill) has been in parliament since 2007.<sup>232</sup> Together with a mining-centred Indigenization and Empowerment Act whose effect has been pending since 2021, the platinum sector finds itself operating in an uncertain environment. The Bill intends to declare certain minerals strategic in Zimbabwe.<sup>233</sup> Section 5A(2)(b) of the Bill lists platinum as a strategic mineral. The “exploration, *ownership*, exploitation, beneficiation, marketing and development”<sup>234</sup> of platinum will be subject to “unique conditions” that may be provided under the Mines and Mineral Act.<sup>235</sup> Interestingly, ownership of strategic minerals is as critical under the proposed Bill as it is for indigenization purposes.<sup>236</sup> Clearly, the state has special interests in having a stake in the platinum sector. Both the Mines and Minerals Amendment Bill awaiting enactment and the pending implementation of the Indigenization Act threatens the security of tenure for current platinum mining right holders. It is not only the uncertainty that worries the investors but the failure of the State to make a decision and stay consistent with the decision.

As discussed above, foreign investors are not only deterred by the contents of a statute. It is crucial to not only focus on the end product of law making in analysing its potential to deter FDI. The uncertainty of the process of making the indigenization mining law may be a deterrent in itself. Overall consistency in the processes of making mining laws is crucial in attracting foreign investment.<sup>237</sup> The Indigenization Act was first applied to all business sectors in 2008,<sup>238</sup> five years later the President of Zimbabwe issued an Indigenization Policy Statement that contradicted the Act.<sup>239</sup> Five years after the Policy Statement the State amended the Act to apply to platinum and diamonds only in 2018<sup>240</sup> and now to any mineral that the Minister of Industry and Commerce may choose.<sup>241</sup>

It is uncertain what form future amendments will take. It appears the State is oscillating from one extreme end of indigenization to another each time there is an amendment. This is accompanied by unplanned implementation and project revaluation costs for existing platinum mining companies and potential investors respectively.<sup>242</sup> For instance, Mimosa Mine a company partially owned by Impala

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<sup>232</sup> M Dhlwayo “The Mines and Minerals Amendment Bill: Its Promises and Pitfalls” (2016) *Zimbabwe Environmental Law Association*.

<sup>233</sup> Section 5A(2)(b) of the Mines and Mineral Bill no 2 of 2015.

<sup>234</sup> Emphasis by the author.

<sup>235</sup> Section 5A(2)(b).

<sup>236</sup> Section 5A(2)(b) read together with section 3(1) of the Indigenization Act.

<sup>237</sup> GJ Devaney, “Katharina Diel-Gligor, Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration” (2018) 1447-1452.

<sup>238</sup> Section 3(1) of the Indigenization Act 2018 amendments.

<sup>239</sup> “Presidential Statement to clarify the government’s position on the Indigenization and Economic Empowerment policy” 2013 *Veritas Zimbabwe*.

<sup>240</sup> Section 3(1) of the Indigenization Act as amended in 2018.

<sup>241</sup> Section 3(1).

Platinum had concluded its indigenization compliance plans by 2013 only to have the indigenization completely lifted in 2021.<sup>243</sup> Similarly, Zimplats another subsidiary of Impala Platinum was involved in extensive legal, economic, and government consultations on indigenisation in which it lost half of its mineral rights.<sup>244</sup> Such processes are necessitated each time the legislation is amended and require resources. Therefore, the costly nature of the processes is tantamount to causing capital flight and impeding FDI as the processes are associated with financial and mineral security of tenure risk factors.

## 10. Conclusion

This chapter sought to establish the impact of the Indigenization Act on FDI and whether indigenization is nationalisation. The chapter established that the current framework of indigenisation is partial resource nationalisation as it requires the transfer of up to 51 percent of foreign owned businesses to SOEs. The resources nationalisation has the potential to impede FDI due to the way it is implemented to the extent of involving the participation of the Zimbabwe National Defence Forces. Findings from the discussion indicate that the current indigenisation framework presents a huge capital flight risk for the platinum sector.

The uncertainty presented by indigenization on ownership, financing and control of foreign owned businesses may impede FDI. It is unclear from the statute whether the Government of Zimbabwe intends to acquire 'free rain equity' from foreign investors to participate in platinum mining ventures. The SOEs have also historically failed to uphold the fiduciary responsibilities they owed to their partners in previous joint ventures. The loyalty of the SOEs to foreign investors is not guaranteed yet the two are required by law to enter into joint venture mining projects. Further, empowerment policies in the country have historically been manipulated by the political elite hence indigenization is deemed to be simply an engineered get-rich-quickly policy designed by and for politician-cum-businessmen. The pending effect of section 3(1) can also cause impede well before the Minister has put it into effect. However, the genuine need for the indigenization to empower indigenous citizens, redress colonial injustices and promote local content cannot be disputed. Therefore, chapter 4 will explore the possible recommendations for policy review.

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<sup>243</sup> "Mimosa Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>244</sup> "South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering & Mining Journal*.

# Chapter 4: Conceptualising a Pragmatic Indigenization and Economic Empowerment Legal Framework.

## 1. Introduction

Chapters 2 and 3 discussed the impact of the current regime of the Indigenization and Economic Empowerment (IEE) Policy on Foreign Direct Investment (FDI). It was noted that the indigenization presents a huge risk for capital flight in the platinum sector even before its implementation. Indigenization shortfalls highlighted in previous chapters include, first, the ambiguity associated with how the State intends to acquire its equity.<sup>1</sup> Secondly, the chapters showed an imbalance of interests between the State and Indigenous Zimbabweans as policy beneficiaries.<sup>2</sup> Thirdly, the perception that indigenization is an engineered get-rich-quick policy for the political elite.<sup>3</sup> Finally, there emerged an unbalanced risk-sharing structure between foreign investors and State-Owned Enterprises.<sup>4</sup> Further, the discussion revealed how investor perception of the Zimbabwean mining industry is also influenced by the continuous changes in the indigenization regimes, which undermines its consistency and continuity.<sup>5</sup> It is evident that the interests of the State, host communities, foreign investors, and the indigenous people at large are not afforded the same attention by the regulatory framework.

In this chapter, the research discusses how the indigenization legal framework can be advanced pragmatically to address the shortfalls highlighted in previous chapters. The chapter explores the question whether indigenization emphasising state participation in Zimbabwe can benefit indigenous Zimbabweans better than one that seeks to empower indigenous people directly. By doing so, the chapter introduces Indigenous People's Participation as an alternative. The chapter discusses the possible changes that can be made to improve the outcomes of indigenization in Zimbabwe while maintaining foreign investor confidence in the mining sector. The discussion follows an overview of the indigenization and economic empowerment of indigenous people in various jurisdictions to highlight the outstanding best practices. Among these jurisdictions is Botswana, South Africa, and Nigeria.

To understand the effect of Zimbabwe's indigenization on FDI, a brief comparative analysis of state participation equity demands from foreign investors across Africa's most mineral-endowed countries is adopted. The chapter provides recommendations for a foreign investor-friendly indigenization legal

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<sup>1</sup> Section 4 of Chapter 2 of this dissertation.

<sup>2</sup> Section 3.

<sup>3</sup> Section 9.

<sup>4</sup> Section 7.

<sup>5</sup> Section 5.

framework. Suggested measures highlight the need for easy accreditation of Cooperate Social Responsibility under Indigenisation, depoliticising the policy, addressing policy ambiguity, adopting Community Development Agreements (CDAs)<sup>6</sup> and Model Mining Development Agreements (MMDAs) to complement the mining codes, safeguarding the interests of indigenous entrepreneurs, and affording foreign investors flexibility in satisfying the indigenization quota.

## 2. Indigenous people's participation.

This section discusses the concept of indigenous people's participation through indigenisation and how it may be incorporated into the legislation. The previous chapter<sup>7</sup> concluded that the indigenization framework falls short of the tenets required to foster empowerment of indigenous Zimbabweans based on the definition of empowerment provided by both the Indigenization Act<sup>8</sup> and by the World Bank.<sup>9</sup> A pragmatic indigenization framework empowers indigenes by addressing the social and institutional inequalities preventing disadvantaged indigenous Zimbabweans from accessing and influencing socioeconomic interventions.<sup>10</sup> Guaranteed indigenous people's participation in economic activities of the country and interventions that have an influence on their lives is therefore critical in formulating a pragmatic indigenization framework.<sup>11</sup> Such economic activities constitute local content requirements. The ability of indigenous citizens to influence interventions can be achieved through proper consultation and limiting ministerial discretion.<sup>12</sup>

In this section, indigenous people's participation refers to deliberate involvement of indigenous Zimbabweans in efforts addressing the social and institutional inequalities (historical or otherwise) preventing them from accessing, participating, and influencing socioeconomic interventions including but not limited to guaranteed equity participation and local content promotion.<sup>13</sup> Indigenous people's participation in indigenization through equity is already provided by section 3(1) however, it is not guaranteed. Further, local content promotion is loosely provided for in regulation 12 of the Indigenization and Economic Empowerment (General) Regulations of 2010. Section 3(1)(f) of the Indigenization Act which sought to incorporate local content laws in indigenisation was repealed in 2018. Consequently, the current iteration of the Indigenisation Act is silent on local content promotion. Although regulation 12

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<sup>6</sup> KD Bruckner, "Community development agreements in mining projects" (2015) *Denv. J. Int'l L. & Pol'y*, 44, 413.

<sup>7</sup> Section 3 of Chapter 3 of this dissertation.

<sup>8</sup> Section 2 of the Indigenization Act.

<sup>9</sup> World Bank (2000/1) *Oxford University Press*.

<sup>10</sup> World Bank (2000/1) *Oxford University Press*.

<sup>11</sup> World Bank (2000/1) *Oxford University Press*.

<sup>12</sup> See, RJ Owen & D Kemp "Free prior and informed consent', social complexity and the mining industry: Establishing a knowledge base" (2014) *Resources Policy* 41 91-100.

<sup>13</sup> Modified from the definition of empowerment provided by the World Bank and the definition of indigenization provided by section 2 of the Indigenization Act.

provides for local content promotion, it is unclear whether it is still binding as the regulations are yet to be aligned with the amended Indigenisation Act. Aligning the regulations with the Indigenization Act may result in the complete removal of local content requirements from the legislation as the primary provision in the Indigenization Act was also removed. The following section discusses why local content requirements should be an important component of indigenisation and how they can be promoted.

## **2.1 Local content promotion**

Three policy focus areas can be identified from the discussion of the Indigenization Act and its iterations in previous chapters of this dissertation; state participation,<sup>14</sup> local content promotion,<sup>15</sup> and the economic empowerment of indigenous Zimbabweans.<sup>16</sup> However, the emphasis on local content promotion has deteriorated with every set of amendments to the Indigenization Act. The 2018 and 2021 amendments completely removed local content from the objectives of the Indigenization Act leaving the objectives of the legislation primarily focused on transfer controlling interests of businesses owned by foreign investors. This section discusses the likely impact of the shift from local content promotion to indigenization championing state participation.

Local content promotion refers to certain conditions imposed on foreign investors in exchange for access to minerals.<sup>17</sup> The conditions often include procuring inputs locally, hiring and training the local workforce, and building infrastructure to become integrated with the local economy.<sup>18</sup> Apart from the repealed section 3(1)(f) which mandated all private and state-owned business to procure 51 percent of their goods from indigenous companies, local content requirements are provided in regulation 12 of the Indigenization and Economic Empowerment (General) Regulations.<sup>19</sup> The regulations were made by the Minister as was provided by section 21 to support the then section 3(1)(f) which was repealed in 2018. Consequently, the current Indigenization Act has no mention of any preferential treatment of indigenous Zimbabweans in hiring or procurement. This research argues that an IEE policy that leverages local content is less likely to cause capital flight compared to one that stresses the emphasis on State Participation. This is further demonstrated in the discussion below.

Zimbabwe is not alone in the quest for empowering historically disadvantaged citizens. Nigeria for instance enacted the Oil and Gas Local Content Act<sup>20</sup> to promote the participation of its citizens in the

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<sup>14</sup> Section 3(1) of the Indigenization Act.

<sup>15</sup> Regulation 12 of the Indigenization and Economic Empowerment (General) Regulations.

<sup>16</sup> Section 3(1) of the Indigenization Act.

<sup>17</sup> G Djeynaba & JB Jacquet, "Local content policies in West Africa's mining sector: Assessment and roadmap to success" (2022) *The Extractive Industries and Society* 9.

<sup>18</sup> Africa UNDP "Primary Commodity Booms and Busts Emerging Lessons from Sub-Saharan Africa" (2016).

<sup>19</sup> of 2010.

<sup>20</sup> of 2010.

extractive sector. A new Bill was proposed in 2020 to repeal the Oil and Gas Local Content Act with the Nigerian Content Development and Enforcement Bill to promote indigenous participation in all key sectors of the economy including mining and energy.<sup>21</sup> Similarly, the South African Broad-Based Black Economic Empowerment (BBBEE) Act<sup>22</sup> plays a significant role in promoting the participation of historically disadvantaged South Africans in mining.<sup>23</sup> Botswana's Citizen Economic Empowerment Policy enables "indigenous citizens... to own, manage and control resources, and... to generate income and wealth through a sustainable, resilient and diversified economy."<sup>24</sup> Indigenization efforts in Botswana are argued to have had no impact on Foreign Direct Investment within the country.<sup>25</sup> Analysis of economic data from the country indicates that FDI inflow increased by 0.04 per cent of Gross Domestic Product (GDP) regardless of the indigenization efforts.<sup>26</sup> Contrarily, indigenization efforts in Zimbabwe are argued to have had a significant negative impact on FDI.<sup>27</sup> For instance, capital flight increased by 0.4 per cent after the enactment of the Indigenization Act.<sup>28</sup>

The major distinction between Zimbabwe's indigenization and that of other countries is that Zimbabwe's primary focus is on asset transfer<sup>29</sup> whereas other jurisdictions emphasise the preferential treatment of citizens in procurement, tendering, hiring, and licensing.<sup>30</sup> Preferential treatment of indigenous people is achieved through local content promotion.<sup>31</sup> Malaysia is commended for its preferential treatment policy that resulted in an increase in FDI regardless of the economic empowerment efforts.<sup>32</sup> The New Economic Policy (NEP) of 1970 aimed at increasing the economic share of Malays from 2.4 per cent to 30 per cent by 1990.<sup>33</sup> Regardless of these efforts, FDI grew by 4 per cent during the

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<sup>21</sup> Chiwunze (2014) *Polity*.

<sup>22</sup> of 2003.

<sup>23</sup> L Shai, C Molefinyana, & G Quinot, "Public Procurement in the context of broad-based black economic empowerment (BBBEE) in South Africa—Lessons Learned for sustainable public procurement" (2019) *Sustainability* 11.24 7164.

<sup>24</sup> "The Citizen Economic Empowerment (CEE) Policy" Government paper No. 1 of 2012, Government of Botswana, <http://bbbee.typepad.com>.

<sup>25</sup> The research recognises that the model is not without flaws as seen in the ongoing (February 2023) renegotiation attempts between DeBeers and the Government of Botswana. See also, G Chiwunze, "Economic empowerment and foreign direct investment: The cases of Botswana, South Africa and Zimbabwe" (2014) *Polity*.

<sup>26</sup> Chiwunze (2014) *Polity*.

<sup>27</sup> AT Munzara, "The consequences of implementing the indigenization and economic empowerment policy framework on the banking sector in Zimbabwe" (2015) *Journal of Business and Management*, 17 55-57.

<sup>28</sup> Chiwunze (2014) *Polity*.

<sup>29</sup> Which can be viewed as appropriation of assets.

<sup>30</sup> Chiwunze (2014) *Polity*.

<sup>31</sup> L Johnson, "Space for local content policies and strategies" (2016).

<sup>32</sup> J Menon, "Macroeconomic management amid ethnic diversity: Fifty years of Malaysian experience" (2008) *Asian Development Bank Institute Discussion Paper 102*,

<sup>33</sup> Menon (2008) *Asian Development Bank Institute Discussion Paper 102*; The New Economic Policy (NEP) of 1970.

period.<sup>34</sup> This is attributed to the fact that the policy focused more on preferential treatment of Malays and not assets transfer.<sup>35</sup> Hence, local content based indigenization is argued to minimise deterring FDI.

Local content rewards indigenous people with preferential treatment without necessarily causing asset transfer from foreign investors.<sup>36</sup> Notwithstanding its shortfalls, the Nigerian local content policy has also been hailed across the continent for its successes toward the country's indigenization goals.<sup>37</sup> This can be attributed to the fact that the policy focuses on preferential treatment in the short term and asset transfer as a gradual and long-term goal.<sup>38</sup> The Local Content Act (LCA) provides that indigenous Nigerians should be given first preference in licensing,<sup>39</sup> contracting,<sup>40</sup> procurement,<sup>41</sup> and hiring.<sup>42</sup> The LCA also recognises the inherent geological and geographical inconsistencies that may warrant the need to remove preferential treatment of indigenes and incentivise FDI instead.<sup>43</sup> For instance, local content requirements for geologically complex and geographically inaccessible deposits are more lenient compared to that in less complicated areas.<sup>44</sup> Although the policy was designed for the petroleum sector, the Zimbabwean mining sector can benefit significantly from adopting a similar framework.

Several parameters can be identified from the LCA as critical for the success of indigenization.<sup>45</sup> The parameters include equity ownership, credit or capital, skills transfer, preferential procurement, enterprise development, management, corporate social investment, market access and employment equity.<sup>46</sup> As such, the success of the indigenization is a function of how well these areas are covered by the legislation. The Indigenization Act places much emphasis on equity transfer or participation with little or no mention of the other parameters.<sup>47</sup> Such a policy benefits the political elite mostly and has been critiqued for the lack of a broad-based approach.<sup>48</sup> The next sections discuss policy areas that can be reviewed to develop a holistic indigenization framework.

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<sup>34</sup> Chiwunze (2014) *Polity*.

<sup>35</sup> Chiwunze (2014) *Polity*.

<sup>36</sup> Nwapi (2015) *Law and Development Review* 8.

<sup>37</sup> Wabote (2022) *Africa Energy Week Conference*.

<sup>38</sup> Wabote (2022) *Africa Energy Week Conference*.

<sup>39</sup> Section 3(1) of the Oil and Gas Local Content Act of 2010 (Hereinafter LCA).

<sup>40</sup> Section 3(2) of the LCA.

<sup>41</sup> Section 10, 24, 25 and 61 of the LCA.

<sup>42</sup> Section 10 and 61 of the LCA.

<sup>43</sup> Schedule of the LCA.

<sup>44</sup> Schedule of the LCA.

<sup>45</sup> Parameters identified from analysing South Africa's BBBEE and Nigeria's Local Content Policy.

<sup>46</sup> Luiz (2007) *International Business & Economics Research Journal* 6 12.

<sup>47</sup> Section 3 of the Indigenization Act.

<sup>48</sup> Luiz (2007) *International Business & Economics Research Journal* 6 12.

## **2.2 Accreditation of corporate social investment**

Section 2.1 of this chapter identifies corporate social investments (CSI) as an important component of a pragmatic indigenisation legal framework. CSI refers to the contribution of companies to the social development of communities in form of cash, services, products, staff time and more.<sup>49</sup> It is synonymous with corporate social responsibility (CSR), which refers to an organisation's overarching strategy for uplifting the social, environmental and economic well-being of host communities they operate in.<sup>50</sup> Literature equally supports incorporation of CSI in indigenisation.<sup>51</sup> However, it should be accompanied by clear legislation governing CSI to facilitate easy accreditation of foreign investor's CSI efforts.<sup>52</sup>

Howard submits that without adequate regulatory and accountability measures for CSI, it is unlikely that the intended empowerment and transformation will be achieved.<sup>53</sup> Instead, the disparity between what indigenous people receive and what they expect will only widen.<sup>54</sup> The regulatory and accountability measures suggested by Howard can be provided in the form of a robust local content policy and allowing foreign investors to use the CSI initiatives for indigenization accreditation.<sup>55</sup> In the absence of clear mechanism for which CSI is accredited towards indigenization, CSI becomes an extra cost over and above the cost of satisfying the requirements of indigenisation. Further, by failing to provide clear rules for accreditation of CSI, the legislation results in ministerial discretionary powers in handling CSI. Discretionary powers introduce uncertainty in the administration of mineral rights that may impede FDI.

Therefore, indigenization legislation should provide clear rules for accreditation of CSI and relieve the Minister from exercising discretion on the matter. Modern mining legislation strives to limit ministerial discretion as it introduces uncertainty. For example, the South African mining sector<sup>56</sup> through the Broad Based-Black Economic Empowerment policy requires all mining rights holders to contribute towards mine community development by developing and implementing Social and Labour Plans with the

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<sup>49</sup> TP Ndhlovu, "Corporate social responsibility and corporate social investment: The South African case" (2011) *Journal of African business*, 12(1), 72-92.

<sup>50</sup> Ndhlovu (2011) *Journal of African business*, 12(1), 72-92.

<sup>51</sup> T Alessandri, SS Black, and EJ William "Black economic empowerment transactions in South Africa: Understanding when corporate social responsibility may create or destroy value" (2011) *Long Range Planning* 44.4 229-249.; C Tatjana "Corporate social responsibility (CSR) and black economic empowerment (BEE) in South Africa: A case study of German transnational corporations" (2011).

<sup>52</sup> J Howard "Half-hearted regulation: Corporate social responsibility in the mining industry" (2014) *South African Law Journal* 131 11-27.

<sup>53</sup> Howard (2014) *South African Law Journal* 131 11-27.

<sup>54</sup> Howard (2014) *South African Law Journal* 131 11-27.

<sup>55</sup> Howard (2014) *South African Law Journal* 131 11-27.

<sup>56</sup> CC Corrigan, "Deriving social benefits from mining through regulation: lessons learned in South Africa" (2019) *The Extractive Industries and Society* 6 940-947.

relevant local governments, the affected communities, and other stakeholders to be approved by the Department of Mineral Resources.<sup>57</sup>

However, Zimbabwe is yet to adopt Community Development Agreements (CDAs) as will be discussed next section of this Chapter.<sup>58</sup> Further, foreign investors CSI plans can be approved by the Minister without consulting anyone including the host communities meant to benefit from the CSI. There are clear rules outlining the minimum legal standards for which the Minister may approve the CSI plans. The plans should simply satisfy the Minister who then exercises her discretion. The lack clear rules renders the accreditation difficult and may hinder mining companies from pursuing CSI. Mining companies engaging CSI may accrue dual costs without commensurate rewards as they fail to allocate their CSI towards indigenization accreditation. For example, although Impala Platinum's Mimosa Mine was committed to extensive CSI,<sup>59</sup> its 2013 Indigenization Plan for accreditation purposes did not account for the efforts.<sup>60</sup> Instead, 20 per cent was distributed equally between Community and Employee Share Ownership Trusts and the remaining 31 per cent was allocated to the IEE fund.<sup>61</sup> Consequently, Mimosa missed the opportunity to accredit its CSI towards indigenization. This extra cost may impede FDI, and a pragmatic indigenization legal framework should strive to provide clear rules for accreditation of CSI if it is allowable in the legislation. The following section discusses CDAs as an integral component of a pragmatic indigenization legal framework with clear rules for accrediting CSI.

### **2.3 Preferential treatment of host communities.**

Host communities can be afforded preferential treatment through the establishment of Community Development Agreements (CDAs). However, the Indigenization Act is silent on issues pertaining to the creation of CDAs in Zimbabwe. CDAs are agreements between mining companies and host communities which serve to guarantee that mineral wealth benefits are shared with the local people and that the negative impacts are minimized.<sup>62</sup> They typically contain provisions on the companies' commitment to infrastructure, health, education, environment, livelihoods, and governance.<sup>63</sup> Typical clauses provide for

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<sup>57</sup> Clause 2.5 of the Broad Based-Black Economic Empowerment Charter for the South African Mining Industry GN 1002 in GG 41934 of 27 September 2018.

<sup>58</sup> The research acknowledges that the Government of Zimbabwe published a new Mines and Minerals Bill in February 2023. It is only hoped that the public consultation process will lead to a more comprehensive Act.

<sup>59</sup> "Mimosa Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>60</sup> "Mimosa Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>61</sup> "Mimosa Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

<sup>62</sup> See, World Bank (2012) *Mining community development agreements: source book*. <http://documents.worldbank.org/curated/en/522211468329663554/Mining-community-development-agreements-source-book>

<sup>63</sup> World Bank (2012) *Mining community development agreements: source book*.

inclusive and transparent stakeholder engagement, accountability and evaluation mechanisms, roles and responsibilities and dispute resolution.<sup>64</sup> Several model CDAs have been advanced by the World Bank.<sup>65</sup>

Apart from the Community Share Ownership Trust (CSOTs), which according to s 3(1) is not guaranteed to the host communities, the CDA can play a significant role in paying specific attention to the communities affected by the mining operations.<sup>66</sup> Both CSOTs and CDAs recognise the broadness of the term “local” in local content which may not afford host communities the preferential treatment they deserve. The term ‘local’ in ‘local content’ can easily be applied in a centralist approach to indigenization.<sup>67</sup> For example, in determining target beneficiaries, the Indigenization Act first considers Indigenous Zimbabwean nationals at large and little consideration is given to the actual host communities in proximity to the mine.<sup>68</sup> Hence the benefits can wholly be captured by outsiders. A pragmatic indigenization legal framework should ensure the preferential treatment of host communities as their means of livelihood are seldom left undamaged by mining activities.<sup>69</sup>

CDAs and CSOTs provide a bottom-up approach that recognizes and guarantees the host communities a reasonable share of the resource rents. Several jurisdictions across the African continent have adopted CDAs.<sup>70</sup> Further, modern Model Mining Development Agreements (MMDAs)<sup>71</sup> provide typical clauses for drafting such CDAs. For instance, the International Institute for Sustainable Development MMDA of 2012 in section 22 requires the mining company to enter into “consultation and negotiations with communities impacted by the project, and to develop and implement one or more Community Development Agreements... [promoting] sustainable development, [enhancing] the general welfare and quality of life of the local community and [respecting] the rights, customs, traditions, and religion of affected persons.”<sup>72</sup> Therefore, a pragmatic indigenization legal framework must incorporate and ensure clear rules for the accreditation of CDAs with minimum or no ministerial discretion. The importance of empowering local communities cannot be overstated in growing the extractive sector and promoting indigenisation. The Africa Mining Vision contents that “unless the community where the mine

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<sup>64</sup> World Bank (2012) *Mining community development agreements: source book*.

<sup>65</sup> JM Otto (2010) *Community development agreement: Model regulations and example guidelines*. World Bank.

<sup>66</sup> World Bank (2012) *Mining community development agreements: source book*.

<sup>67</sup> Nwapi (2015) *Law and Development Review* 8.

<sup>68</sup> Section 2(1) and 3(1) of the Indigenization Act.

<sup>69</sup> Nwapi (2015) *Law and Development Review* 8.

<sup>70</sup> Nwapi (2015) *Law and Development Review* 8.

<sup>71</sup> World Bank (2012) *Mining community development agreements: source book*.

<sup>72</sup> Section 22 of the International Institute for Sustainable Development Model Mining Development Agreement of 2012.

is located benefits..., [mining] will remain an enclave.”<sup>73</sup> Similarly, host communities can also be afforded preferential treatment in accessing capital from the Indigenization Fund as discussed in the next section.

## **2.4 Reservation of less capital-intensive mining projects for indigenous Zimbabweans.**

Reserving less capital-intensive mining sectors of minimum metallurgical complexity for indigenous people’s participation is a common practice in many jurisdictions and vital for developing a pragmatic indigenization legal framework.<sup>74</sup> Such mining sectors often include quarrying, limestone, alluvial, and clay mining.<sup>75</sup> For instance, Botswana reserves the exploitation of industrial minerals for its citizens<sup>76</sup> and Nigeria issues quarry licenses to its citizens only.<sup>77</sup> However, these sectors are not reserved for indigenous people in Zimbabwe. The law should give preferential treatment to indigenous Zimbabweans for relatively low-cost mining projects and service provision businesses within the industry while providing incentives for Foreign Direct Investors to explore and develop complex platinum ore deposits. The indigenization laws should reflect the geological and metallurgical variations that exist from one ore body to another.

Indigenization is not to be achieved at all costs.<sup>78</sup> It should be advanced objectively. By reserving low-cost mining projects for indigenous Zimbabweans while promoting injection of foreign capital in high-cost complex mining projects, the legal framework will ensure an indigenization not simply focused on distributive efforts.<sup>79</sup> Distributive efforts emphasise the proportion of indigenous ownership in mining businesses. It is based on distributing value and not expanding or creating more value.<sup>80</sup> A proper understanding of the country’s value proposition based on the inherent features of its mineral reserve base should guide the timelines and objectives set by the law to ensure both value creation and distribution.<sup>81</sup> Evaluating the success of indigenization based on the proportion of indigenous ownership alone can be misleading. It should also aim to create wealth. The goal should be attaining both the growth of the platinum sector in Zimbabwe and an increase in indigenous people’s participation.

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<sup>73</sup> Africa Mining Vision (2017) *Africa Mining Vision*.

<sup>74</sup> See for example section 53 of the BMMA.

<sup>75</sup> Section 53 of the BMMA s53; section 54 of the Nigerian Mines and Minerals Act (Herein NMMA).

<sup>76</sup> Mines and Minerals Act of 1999 article 53.2.

<sup>77</sup> Section 54 of the NMMA.

<sup>78</sup> Wabote (2022) *Africa Energy Week Conference*.

<sup>79</sup> L Padgham & L Cavedon, “Negotiating flexible agreements by combining distributive and integrative negotiation” (2007) *Intelligent Decision Technologies*, 1(1-2), 33-47.

<sup>80</sup> Padgham & Cavedon (2007) *Intelligent Decision Technologies*, 1(1-2), 33-47.

<sup>81</sup> Wabote (2022) *Africa Energy Week Conference*.

The Indigenization Act does not provide for any such reservation. As seen in previous chapters, attempts have been made to reserve the platinum and diamond sectors through the 2018 amendments to the Indigenization Act.<sup>82</sup> However, the platinum group metals are of high metallurgical complexity to process and beyond the capital capacity of most indigenous people.<sup>83</sup> Therefore, the attempt was exclusionary and only beneficial to the political elite with requisite capital potential. Indigenous Zimbabweans can be afforded preferential treatment in issuing mining licenses for quarrying and other easily accessible minerals. Further, the Ministry of Mines should consider creating special mining rights such as Small-Scale Mining Licenses reserved for Indigenous Zimbabweans only as in other African jurisdictions. Such a license will guarantee that mining projects of a particular scale and scope are only issued to Indigenous Zimbabweans.

### 3. Clarity on a long-term approach to Indigenization

The Government of Zimbabwe should recognise that extractive sector indigenization is a long-term policy and that local content implementation “is not a sprint; it is a marathon”.<sup>84</sup> The current legislation gives the impression that any mineral in Zimbabwe can be put under indigenization overnight without any meaningful public and industry consultations.<sup>85</sup> Consequently, investors perceive Zimbabwe’s indigenization as “partisan, temperamental, exclusionary, hurried, and short-term”.<sup>86</sup> There is a significant lack of industry consultation and public input evidenced by the extent of discretion afforded to the Minister of Industry and Commerce in declaring minerals that should be subject to section 3(1) of the Indigenization Act.<sup>87</sup>

Although Zimbabwe’s indigenization started decades before the passing of the Indigenization Act in 2007, the lack of continuity is evident. Indigenization efforts can be tracked from the work of the Small Enterprises Development Corporation (SEDCO), which was established in 1983 to assist black-owned Small to Medium Enterprises (SMEs).<sup>88</sup> SEDCO was established by the Small Enterprises Development Corporation Act of 1983.<sup>89</sup> Nyamunda Argues that the SEDCO Act<sup>90</sup> was not structured to

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<sup>82</sup> Section 2 of Chapter 1 and Section 2 of Chapter 2 of this dissertation.

<sup>83</sup> C Jirang & L Zhang, "Metallurgical recovery of metals from electronic waste: A review." (2008) *Journal of hazardous materials* 158 228-256.

<sup>84</sup> Wabote (2022) *Africa Energy Week Conference*.

<sup>85</sup> Section 3(1) of the Indigenization Act.

<sup>86</sup> G Zhou & H Zvoushe, "Public Policy Making in Zimbabwe: A Three Decade Perspective" (2012) *International Journal of Humanities and Social Science* 2 8.

<sup>87</sup> Section 3(1) of the Indigenization Act.

<sup>88</sup> Nyamunda (2016) *Historia* 41-62.

<sup>89</sup> Section 1 of the Small Enterprises Development Corporation Act of 1983.

<sup>90</sup> Of 1983.

enable the radical empowerment of Indigenous Zimbabweans at large.<sup>91</sup> SEDCO was also critically underfunded to facilitate such a transformation.<sup>92</sup> This was followed by the radical redistributive efforts of the Affirmative Action Group (AAG)<sup>93</sup> and the Indigenous Business Development Centre (IBDC)<sup>94</sup> from 1990 to 2000. During this period, the first Indigenization Minister was appointed. However, the work of the AAG and the IBDC was heavily politicised.<sup>95</sup> As such, they created a political elite at the expense of the larger indigenous people.<sup>96</sup> The bulk of the beneficiaries as noted by Nyamunda, who have become successful businesspeople of today, largely benefited because of their political alliance.<sup>97</sup>

Of equal importance is the lack of a long-term approach and ambiguity traceable from the inception of the SEDCO Act to the current Indigenization Act. The ambiguity in the SEDCO Act was evidenced by the parliamentary debate it sparked before its passing.<sup>98</sup> First, the deliberations failed to reconcile the capitalistic fundamentals of the bill with the socialistic rhetoric that was attached to it.<sup>99</sup> Secondly, the deliberations failed to divorce the bill from use as a mere device for political patronage and political elitism.<sup>100</sup> Regardless of failing to address this ambiguity, the bill was passed in 1983.<sup>101</sup> The current framework continues to exhibit these weaknesses. As such, addressing these shortcomings is fundamental for developing a pragmatic indigenization legal framework. To provide policy clarity, the state may consider introducing Model Mining Agreements (MMAs) to draw a clear distinction between indigenization and state participation.

### ***3.1 Integrating the Model Mining Agreement to facilitate state participation.***

This section seeks to establish how the state may adopt MMAs to separate state participation from the empowerment of indigenous Zimbabweans through indigenization. MMAs are legal templates for use in negotiations between host States and the foreign mining companies.<sup>102</sup> They are useful instruments which may be used by the state to negotiate in good faith for equity participation in foreign mining companies.<sup>103</sup>

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<sup>91</sup> Nyamunda (2016) *Historia* 41-62.

<sup>92</sup> Nyamunda (2016) *Historia* 41-62.

<sup>93</sup> Nyamunda (2016) *Historia* 41-62.

<sup>94</sup> (1983) 7 *Zimbabwe Parliamentary Debates* 167.

<sup>95</sup> Saunders & Nyamunda *Facets of Power* 40-.

<sup>96</sup> Saunders & Nyamunda *Facets of Power* 40-.

<sup>97</sup> Nyamunda (2016) *Historia* 41-62.

<sup>98</sup> Mugure (2017).

<sup>99</sup> (1983) 7 *Zimbabwe Parliamentary Debates*.

<sup>100</sup> (1983) 7 *Zimbabwe Parliamentary Debates*.

<sup>101</sup> Saunders & Nyamunda *Facets of Power* 40-.

<sup>102</sup> PSG Leon, "International best practice and resource nationalism: the International Bar Association's model mine development agreement" (2011) *Journal of the Southern African Institute of Mining and Metallurgy* 111.7 517-524.

<sup>103</sup> Leon (2011) *Journal of the Southern African Institute of Mining and Metallurgy* 111.7 517-524.

They are often put into effect through provisions in the primary mining legislation mandating the state to enter into negotiations with foreign investors to facilitate state participation among other issues.<sup>104</sup> Several templates have been developed including the International Bar Association Model Mining Development Agreement whose formulation followed rigorous consultation and scrutiny of various longstanding agreements.<sup>105</sup> The MMDA is intended for jurisdictions “where 'mature' mining codes are not in place,” or the mining legislation requires creation of contractual agreement between the state and investors.<sup>106</sup> In such cases, the MMA compliments to the legislation.<sup>107</sup> Mature mining codes refers to regulatory frameworks based on international best practices with balanced interests of all mining stakeholders.<sup>108</sup>

Zimbabwe’s lack of mature mining codes evidenced by the archaic Mines and Minerals Act of 1963 whose amendment has been highlighted as an urgent concern since 2013 is reasonable ground for adopting MMA’s. The Australian Energy and Resources Law Association has also contributed 50 model mining agreements.<sup>109</sup> The Organisation for Economic Co-operation and Development (OECD) Guiding Principles for Durable Extractive Contracts also provides a model to assist States to structure their on-going relationship with mining investors without impeding FDI.<sup>110</sup> While these templates may be well suited for other jurisdictions than others,<sup>111</sup> they are intended to provide a flexible, generic, and modular starting point for the parties to tailor their own agreements. Host States may use the templates to develop their own model mining agreements domesticated for application within their jurisdictions.

The value of equity reserved for the state will remain a concern for investors whether the State uses MMAs or the current indigenization legislation to foster state participation. An overview of the historical background of the indigenization efforts in Zimbabwe indicates that from 1980 to 2007 indigenisation prescribed no minimum indigenous people’s equity ownership in foreign-owned mining businesses.<sup>112</sup> The sudden shift from the absence of a minimum indigenization quota to 51 per cent shook the extractive sector world over.<sup>113</sup> While most critics do not contest the need for mandatory equity participation of indigenous people in mining businesses, their biggest concern is the hefty value of equity

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<sup>104</sup> Leon (2011) *Journal of the Southern African Institute of Mining and Metallurgy* 111.7 517-524.

<sup>105</sup> See, IBA, “Model Mining Development Agreement (MMDA), a project of the Mining Law Committee of the International Bar Association” (2011) <https://www.mmdaproject.org/> [Accessed 27/09/2023].

<sup>106</sup> IBA Model Mining Development Agreement (2011).

<sup>107</sup> IBA Model Mining Development Agreement (2011).

<sup>108</sup> Leon (2011) *Journal of the Southern African Institute of Mining and Metallurgy* 111.7 517-524.

<sup>109</sup> J Grace and R Bassett "The AMPLA model minerals royalty agreements: securing a fair deal" (2015) *Journal of Energy & Natural Resources Law* 33.1 34-58.

<sup>110</sup> OECD "Principles for exploration and extraction rights: 'Guiding Principles for Durable Extractive Contracts'" (2020) *Australian Resources and Energy Law Journal* 39.2 1-6.

<sup>111</sup> For instance, the AMPLA templates are well suited for Australian jurisdictions.

<sup>112</sup> Saunders & Nyamunda *Facets of Power* 40-.

<sup>113</sup> Matyszak (2011) Kubatana 03-10.

reserved for the state.<sup>114</sup> Whether demanding 51 per cent equity participation from foreign investors is a pragmatic decision by the Zimbabwean government is difficult to answer. However, a comparative analysis of minimum equity rate demanded by the countries' regional competitors may provide useful insight. 80 per cent of Africa's platinum is produced in South Africa and 20 per cent in Zimbabwe.<sup>115</sup> South Africa requires at least 30 per cent equity participation from black people.<sup>116</sup> This places the country's platinum sector at a competitive advantage over Zimbabwe in attracting FDI. Table 1 below is an indication of how a 51 per cent equity participation in Zimbabwe will render Zimbabwe the least favourable based on minimum equity participation for indigenous people or the State.<sup>117</sup>

Table 1: Comparing Zimbabwe's 51 percent indigenization Quota with most mineral-endowed African countries.<sup>118</sup>

Ranking <sup>119</sup>	Country	Major Minerals	Minimum Indigenous Equity
10	Zimbabwe <sup>120</sup>	Platinum, chrome, gold, coal, and diamonds	51% - pending.
9	Gabon <sup>121</sup>	Manganese, Iron, Uranium, and Gold	-
8	DRC <sup>122</sup>	Gold, diamonds, cobalt, and high-grade copper.	10% - for incorporation purposes only.
7	Ghana <sup>123</sup>	Gold, iron, limestone, and columbite-tantalite.	10% - for incorporation purposes only.
6	Egypt	Gold, copper, silver, zinc, platinum	Information not found
5	Libya <sup>124</sup>	Clay, cement, salt, and limestone	Information not found.
4	Angola <sup>125</sup>	Diamonds, oil, and gold	0%
3	Algeria	Unexplored mining potential, hydrocarbons	0%
2	Nigeria	Gold, tantalite, bitumen, iron ore, and uranium	ASM reserved for Nigerian citizens
1	South Africa <sup>126</sup>	gold, coal, diamonds, iron ore, and chromium.	30%
n/a	Botswana <sup>127</sup>	Diamond	Up to 15% for other minerals and optional. Negotiable for diamond.

<sup>114</sup> Matyszak (2011) Kubatana 03-10.

<sup>115</sup> V Fernandez, "Some facts on the platinum-group elements." (2017): *International Review of Financial Analysis* 52 333-347.

<sup>116</sup> Clause 2.1.3 of the Mining Charter.

<sup>117</sup> *The Economist Intelligence Unit* (2022).

<sup>118</sup> Table created by Author using sources indicated.

<sup>119</sup> *The Economist Intelligence Unit* (2022).

<sup>120</sup> Section 3(1) of the Indigenization Act.

<sup>121</sup> "Mining in Africa: the benefit of elevated prices amid inflationary pressures. A regional outlook on the landscape" (2022) *The Economist Intelligence Unit*.

<sup>122</sup> "Mining Laws and Regulations of the Democratic Republic of Congo" (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/mining-laws-and-regulations/congo-d-r>.

<sup>123</sup> "Mining Laws and Regulations Ghana" (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/mining-laws-and-regulations/ghana>.

<sup>124</sup> "Mining in Africa: the benefit of elevated prices amid inflationary pressures. A regional outlook on the landscape" (2022) *The Economist Intelligence Unit*.

<sup>125</sup> "Mining Laws and Regulations of Angola" (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/angola>.

<sup>126</sup> Clause 2.1.3 of the Mining Charter.

<sup>127</sup> Section 40 of the BMMA.

The first ten countries in the table were ranked as the top 10 most mineral-endowed countries in Africa; hence they provide reasonable competition with Zimbabwe as an FDI destination from 2023 onwards.<sup>128</sup> It is, therefore, imperative for the government of Zimbabwe to review its position accordingly to ensure regional competitiveness. Botswana has one of the longest and most mature track records in mining sector state participation dating back to 1967.<sup>129</sup> However, Botswana's approach involves sound stakeholder consultation based on mutually agreed terms for equity participation between foreign investors, indigenous entrepreneurs, and the State.<sup>130</sup> The Botswana Mines and Minerals Act (BMMA) of 1997 provides that the government has the option of acquiring up to 15 per cent working interest participation in all mining licenses other than diamond licenses.<sup>131</sup> Further, state participation in diamond mining is entered into through mutually agreed terms.<sup>132</sup> No minimum equity participation is set for diamond mining which indicates the government's willingness to negotiate in good faith.<sup>133</sup> Section 51 of the BMMA provides that diamond mining licenses "shall initiate a negotiating process, in good faith, between Government and the applicant covering all technical, financial and commercial aspects of the proposed project including Government participation."<sup>134</sup> The provisions of the BMMA give Botswana a competitive advantage over Zimbabwe.

Regardless of the absence of explicit legislative means awarding the Government of Botswana a fixed indigenization quota, the State boasts a 50 per cent equity participation in Debswana a diamond mining company within the country.<sup>135</sup> This is an indication that it is possible to foster successful indigenisation, state participation, or local content policies based on competitive bargaining in good faith through the MMA. It is therefore submitted that the government of Zimbabwe should consider adopting a Model Mining Agreement<sup>136</sup> for the extraction of certain minerals. MMAs can be used to complement the Mining Code instead of adopting statutory clauses that undermine investor confidence.<sup>137</sup> As seen in the

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<sup>128</sup> "Mining in Africa: the benefit of elevated prices amid inflationary pressures. A regional outlook on the landscape" (2022) *The Economist Intelligence Unit*.

<sup>129</sup> Section 40 of the Botswana Mines and Minerals Act of 1966 Herein (BMMA).

<sup>130</sup> JN Wilcox, "Mining regulation and development in Botswana: the case study of the Debswana mining joint venture" (2015).

<sup>131</sup> Section 40 of the BMMA.

<sup>132</sup> Section 51.

<sup>133</sup> Section 40.

<sup>134</sup> Section 51.

<sup>135</sup> J Loubser "Botswana's success story is built on disciplining transnational capital" (2021) *Africa at LSE*.

<sup>136</sup> H Mann, *Model Mining Development Agreement: Transparency Template*. International Institute for Sustainable Development (2012). See also, M Frilet & K Haddow, "Guiding principles for durable mining agreements in large mining projects" (2013) *Journal of Energy & Natural Resources Law*, 31 467-475.

<sup>137</sup> H Mann "IISD Handbook on Mining Contract Negotiations for Developing Countries" (2015) *International Institute for Sustainable Development*.

BMMA, the use of MMAs indicates the State's willingness to engage in distributive bargaining and negotiations with foreign investors.

### **3.2 Elitism vs indigenisation: depoliticising indigenisation.**

As discussed in Chapter 3,<sup>138</sup> it is evident that the political elite continue to exclude the people at large while creating opportunities for themselves using the indigenization socialistic rhetoric.<sup>139</sup> A pragmatic indigenization legal framework should strive to curb politicisation of indigenization. For instance, the expulsion of small-scale miners and local companies from Chiadzwa from 2006 to 2009 presents a classic case of how the indigenous people at large were excluded from the mining sector while the political elite benefited.<sup>140</sup> From 2009 onwards only SOEs and their foreign partners were allowed to operate on the deposits.<sup>141</sup> "Even before regularisation, foreign white investors such as Alan Banks were given uninhibited access to the diamonds fields...[yet] after 2009 local artisanal miners were shot on sight whenever they attempted to gain access for the purposes of mining."<sup>142</sup> An indigenization based on state participation further cripples indigenous Zimbabweans access to mining benefits by affording the state preferential treatment. An already empowered minority, often having allegiance with the political elite are left to partner with parastatals while the majority of indigenous Zimbabweans are impoverished.

Further, several politicians including ministers are alleged to have amassed much wealth from the diamonds while contributing a meagre portion to state revenues and failing to uplift the host communities in the diamond-rich Chiadzwa area.<sup>143</sup> SOE-championed diamond mining has led to heavily contested relocations of the host communities whose material circumstances it was supposed to uplift.<sup>144</sup> Consequently, indigenisation championing state participation in Zimbabwe has failed to uplift the people of Zimbabwe but simply perpetuates the creation of a political elite. This research argues that indigenous people's participation as defined in this thesis<sup>145</sup> is critical for ensuring that mineral wealth and business

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<sup>138</sup> Section 9 of Chapter 2 of this dissertation.

<sup>139</sup> Section 9.

<sup>140</sup> T Nyamunda, "Free for All? Artisanal Diamond Mining and Economic Redistribution on the Edges of the State", in R Saunders & T Nyamunda, *Facets of Power: Politics, Profits and People in the Making of Zimbabwe's Blood Diamonds* Weaver Press Harare (2016).

<sup>141</sup> Saunders & Nyamunda *Facets of Power* (2016).

<sup>142</sup> T Nyamunda, "The State and Black Business Development: The Small Enterprises Development Corporation and The Politics of Indigenization and Economic Empowerment in Zimbabwe" (2016) *Historia* 41 62 citing A Martin "Reap What You Sow: Corruption and Greed in Marange's Diamond Fields" in Saunders and Nyamunda *Facets of Power* (2016) 40.

<sup>143</sup> Saunders & Nyamunda *Facets of Power* 40-.

<sup>144</sup> Nyamunda (2016) *Historia* 41.

<sup>145</sup> Indigenous people's participation refers to deliberate involvement of indigenous Zimbabweans in efforts addressing the social and institutional inequalities (historical or otherwise) preventing them from accessing, participating, and influencing socioeconomic interventions including but not limited to guaranteed equity participation and local content promotion.

opportunities are distributed fairly among Zimbabweans. A pragmatic indigenisation legal framework should guarantee the participation of indigenous Zimbabweans. To curb the elitism associated with indigenization, the legal framework should strive to explicitly pinpoint the target beneficiaries of the policy. A broader approach to indigenization that emphasis on local content promotion apart from equity participation of indigenous Zimbabweans is necessary.

## **4. Conclusion**

In this chapter, the research explored how the legal framework for indigenization can be advanced pragmatically to address the shortfalls highlighted in previous chapters. The current framework is underdeveloped, unclear and without certainty. Political elitism was identified as a major drawback behind the failure of indigenization based on state participation to uplift the livelihoods of indigenous Zimbabweans. Until the policy is fully developed and holistic, it can always be used for political patronage in every election cycle by the political elite.

The chapter proposes the incorporation of guaranteed indigenous people's participation in indigenization to ensure fair distribution of the mineral wealth, a tenet that is fundamental for a pragmatic indigenization legal framework. Indigenous people's participation entails the promotion of local content through indigenization. Findings from the chapter indicate that although local content requirements were removed from the legislation, they are fundamental for affording indigenous people preferential treatment in licensing, management, hiring and procurement. The findings established that countries whose indigenization emphasise on local content more than equity transfer are likely to experience no capital flight.

# Chapter 5: Conclusion and Recommendations

## 1. Introduction

The need for redressing the historical economic imbalances in the extractives sector is necessary<sup>1</sup> but needs to be approached delicately.<sup>2</sup> It requires all stakeholders to be on board.<sup>3</sup> The Minister of Industry and Economic Development should not exercise absolute discretion in deciding which mineral sectors are subjected to indigenisation.<sup>4</sup> It is the role of the State to bring together foreign investors and indigenous people to work toward a sustainable and inclusive mining industry.<sup>5</sup> Consultation and inclusivity are the fundamental ingredients for guaranteeing that the interests of all stakeholders are equally represented.<sup>6</sup> In the absence of such an environment, all parties operate in fear and distrust of the other.<sup>7</sup> Indigenous people withdraw their social license to operate<sup>8</sup> and foreign investors walk away. All stakeholders stand to lose in the absence of a holistic indigenization and economic empowerment framework.<sup>9</sup>

Chapter one outlined the research background, aims and justification. The chapter highlighted the concept of indigenization 'through the back door' as introduced in Zimbabwe's mining sector by the 2021 amendments to the legislation.<sup>10</sup> Chapter two discussed the legislative framework governing indigenization efforts in Zimbabwe's extractive sector.<sup>11</sup> The chapter demonstrated how indigenous Zimbabweans were substituted as primary beneficiaries of indigenization by parastatals and how the government of Zimbabwe seeks to advance state participation in the extraction of selected minerals regardless of whether they extracted by foreign or indigenous investors.<sup>12</sup> Drawing from Chapter two, Chapter three further exposed the extent of the imbalance between the interests of foreign investors,

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<sup>1</sup> T Van Wyk, "Redressing the past, doing justice in the present: Necessary paradoxes" (2019) *HTS: Theological Studies* 75.4 1-9.

<sup>2</sup> L Ginevra, "Intruders in a Balancing Act: Black Economic Empowerment, Transitional Justice and Investment Arbitration Tribunals" (2021) *International Journal of Transitional Justice* 15.1 7-25.

<sup>3</sup> E Chitsove, *Are indigenization measures compensable? a case study of measures taken under the indigenization and economic empowerment laws of Zimbabwe* PhD Thesis University of Pretoria (2014).

<sup>4</sup> Section 3(1) of the Indigenization Act.

<sup>5</sup> V Litvinenko "Assessment of the role of the state in the management of mineral resources" 2023 *Journal of Mining Institute*

<sup>6</sup> K Heese, "Black economic empowerment in South Africa: a case study of non-inclusive stakeholder engagement" (2003) *Journal of Corporate Citizenship* 12 93-101.

<sup>7</sup> Heese (2003) *Journal of Corporate Citizenship* 93-101.

<sup>8</sup> See section 6 of Chapter 2 of this dissertation.

<sup>9</sup> Booker (2012) *Journal of Contemporary African Studies* 67-82.

<sup>10</sup> Section 1 of Chapter 2 of this dissertation.

<sup>11</sup> Section 2.

<sup>12</sup> Section 3.

indigenous Zimbabweans, and the State.<sup>13</sup> It exposed the exclusion of indigenous Zimbabweans at large in the legal framework and the failure of the legislation to empower indigenous Zimbabweans based on the tenets of empowerment provided by the World Bank and the objectives of indigenization. It also discussed the probable failure of State-Owned Enterprises (SOEs) to uphold their fiduciary responsibilities in joint ventures with foreign investors.<sup>14</sup> Chapter three and four established that state participation-based indigenization in Zimbabwe has failed to uplift the livelihoods of indigenous Zimbabweans.<sup>15</sup> This chapter briefly summarises major findings from the research and provides overall recommendations in addition to those outlined in Chapter four.

## 2. Recommendations

Indigenization and Economic Empowerment efforts should not be selective based on the type of mineral. It should simply target empowering indigenous people and should not be confused with state participation. The bundling of indigenization and State Participation in s 3(1) of the IEE Act complicates the implementation of the indigenization. It prompts the State to apply indigenization selectively targeting selected minerals in which the state has certain interests. Such minerals can be perceived to be strategic minerals for which the State has political, security or other special interests in.

Section 3(1) affords the Minister discretionary powers to declare such minerals. However, the process of declaring strategic minerals should be rigorous and cyclic.<sup>16</sup> Strategic minerals lists are not intended as a permanent designation for such minerals.<sup>17</sup> The declaration should be subject to dynamic updating to represent the most recent trends in mineral supply, demand, and State objectives.<sup>18</sup> Therefore, as correctly stated by Fortier, the director of the United State Geological Survey National Minerals Information Centre, "the mineral criticality or strategic worth is not static, but changes over time".<sup>19</sup> The recent Mines and Minerals Bill<sup>20</sup> recognises this inherent characteristic of strategic minerals. Consequently, the law of strategic minerals is equally prone to changes. Minerals may be declared strategic today, but they will always be subject to withdrawal from that designation at any time.

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<sup>13</sup> Section 2.

<sup>14</sup> Section 3.

<sup>15</sup> Section 2 of chapter 4 of this dissertation.

<sup>16</sup> J Burton "US Geological Survey releases 2022 list of critical minerals" (2022) *United States Geological Survey*.

<sup>17</sup> Burton (2022) *United States Geological Survey*.

<sup>18</sup> Burton (2022) *United States Geological Survey*.

<sup>19</sup> Burton (2022) *United States Geological Survey*.

<sup>20</sup> Of 2023.

This can justify the inconsistencies, delays and pendulation in implementing State Participation in the platinum and diamonds sectors seen in Chapter two leading to uncertainty.<sup>21</sup>

However, the Indigenization and Economic Empowerment of indigenous people cannot be delayed or inconsistent as it pertains to the redress of historical injustices. Delaying the redress would be unjust.<sup>22</sup> Rather, it should be long-term and progressive.<sup>23</sup> The definition of Indigenous Zimbabweans as provided by s 2(1) of the Indigenization Act makes it clear that the Indigenization Act seeks to foster restorative justice. The Indigenization Act provides that an indigenous Zimbabwean is “any person who, before the 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person.”<sup>24</sup> While the State may choose to forego its right to state participation simply because it has several other tax and nontax tools already capturing its share from resource rents, indigenous people do not have such privileges.<sup>25</sup> State Participation is optional and a choice of the State. Redressing economic injustices and empowering historically disadvantaged people through indigenization is a matter of justice and should not be delayed unreasonably.<sup>26</sup> It is therefore recommended that the State should separate indigenization efforts from State Participation.

For this purpose, the research proposes introducing the term ‘indigenous people’s participation’<sup>27</sup> in mining sector legislation. It is clear from this research that while foreign investor participation in mining is even incentivised and research and regulatory frameworks for State Participation continue to be advanced, little has been done to create an enabling environment for indigenous people’s participation. Often the public is treated as a recipient of mining development in need of consultation at best and not as a potential contributor. Indigenous people’s participation should entail the involvement of indigenous Zimbabweans at large as equity contributors and beneficiaries of mining development. By recognising indigenous people’s participation as equal to state participation and foreign direct investor participation, the public is afforded a voice in negotiating and executing mining contracts and businesses.

Organised groups and individuals including but not limited to Community Share Ownership Schemes, Employee Share Ownership Trusts and indigenous entrepreneurs as individuals or joint ventures should be awarded an opportunity to operate mining businesses through indigenous people’s

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<sup>21</sup> Section 2 of Chapter 2 of this dissertation.

<sup>22</sup> See for example, P Finkelman, "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed'" (1992) *Iowa L. Rev.* 78 89.

<sup>23</sup> Finkelman (1992) *Iowa L. Rev.* 89.

<sup>24</sup> Section 2(1) of the Indigenization Act.

<sup>25</sup> State participation is a nontax tool among a pool of tax and nontax tools used by States to capture a reasonable share from the resource rents. See, Luhende *Towards a legal framework for preventing tax revenue leakage*.

<sup>26</sup> Finkelman (1992) *Iowa L. Rev.* 89.

<sup>27</sup> As an equivalence of state participation.

participation in mining. The proposed Indigenous people's participation affords the host governments the opportunity to move beyond distributive and restorative justice efforts toward more progressive broad-based initiatives centred on wealth creation than asset transfer.<sup>28</sup> Unlike indigenization and economic empowerment, which may be confused with nationalisation,<sup>29</sup> indigenous people's participation is clear on who is the beneficiary from the term itself. It empowers indigenous people and limits the extent of political abuse as a mere political rhetoric.

Indigenization should focus on empowering indigenous people only rather than State entities. Should the State seek to foster state participation, it should do so using a clause in the mining laws necessitating its participation in the extraction of strategic minerals. Participation should be facilitated by a Model Mining Development Agreement ratified by parliament to be binding.<sup>30</sup> The separation will not only help in developing a holistic and pragmatic indigenization legal framework but will provide clarity and transparency for investors. The current framework is state participation disguised as indigenization and economic empowerment. It has failed to uplift indigenous Zimbabweans and the ambiguity and lack of reconciliation between the title of the statute, its objects and the rest of the provisions are a source of uncertainty which impedes FDI.<sup>31</sup> The distinction will not only benefit the indigenous Zimbabweans but also gives foreign investors the much-needed clarity in investment valuation.

### 3. Final word

The research findings indicate that the current regime has the potential to cause capital flight due to its failure to separate state participation and the empowerment of indigenous Zimbabweans. The ambiguity creates a lack of objectivity in the legislation and in the resultant policy. The outcome is a policy that fails to empower indigenous citizens but favours state parastatals which can be easily manipulated by the political elite. Section 3 of the Act provides objects that do not relate to the definition of indigenization set in section 2. Read together section 2 and section 3 provide two different sets of objectives for the Act. Section 2 seeks to empower indigenous people while section 3 seeks to empower SOEs.

The research proposes introducing the indigenous people's participation as an equal to state participation for adoption into mining legislation. Further to the proposed separation of indigenous people's participation from state participation, the research proposes the adoption of a model mining

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<sup>28</sup> Asset transfer in this case refers to the appropriation of investors assets as was the case during the Land Reform Program. Note that the indigenization efforts in Zimbabwe have been largely described as asset transfer focussed.

<sup>29</sup> Section 2 of Chapter 2 of this dissertation.

<sup>30</sup> H Mann, *Model Mining Development Agreement: Transparency Template*. International Institute for Sustainable Development (2012). See also, M Frilet & K Haddow, "Guiding principles for durable mining agreements in large mining projects" (2013) *Journal of Energy & Natural Resources Law*, 31 467-475.

<sup>31</sup> Section 2, 3, 7 and the title of the Indigenization Act.

agreement and a statutory clause in the Mines and Minerals Act empowering the Minister to initiate a negotiating process, in good faith, between the SOEs and the foreign investors seeking to explore or extract strategic minerals to facilitate state participation in the project.

## Bibliography

### Secondary Sources

#### Books

C McPherson 9 *State participation in the natural resource sectors: evolution, issues and outlook The Taxation of Petroleum and Minerals* (2010).

C Nakhle 4 *Petroleum fiscal regimes: evolution and challenges. The Taxation of Petroleum and Minerals Routledge* (2010).

E Cross *The cost of Zimbabwe's continuing farm invasions* (2009).

E Tekere *A lifetime of struggle* SAPES Books (2007).

L Squire *Project evaluation in theory and practice handbook of development economics* (1989)

R Sandbrook *The politics of Africa's economic stagnation* (1985) Cambridge.

R Saunders & T Nyamunda, *Facets of Power: Politics, Profits and People in the Making of Zimbabwe's Blood Diamonds* Weaver Press Harare (2016).

#### Journal Articles

A Badri, S. Nadeau & A. Gbodossou. "A mining project is a field of risks: A systematic and preliminary portrait of mining risks" (2012) *International journal of safety and security engineering* 2 145-166.

A Chikumbu, "Would easing the black empowerment drive in Zimbabwe boost international investment in the country?" (2017) *UNRISD Working Paper*.

A Dziwornu, "Local content and participation in Ghana's oil and gas industry: Can enterprise development make a difference?" (2015) *The Extractive Industries and Society* 2 2 320-327.

A Makochekanwa, "An empirical investigation of capital flight from Zimbabwe" (2007) *University of Pretoria*.

A Martin "Reap What You Sow: Corruption and Greed in Marange's Diamond Fields" (2016) *Facets of Power: Politics, Profits and People in the Making of Zimbabwe's Blood Diamonds*.

AAH Noyes, "New Zimbabwe Assessing Continuity and Change After Mugabe" (2020) *Rand Arroyo Center Santa Monica Ca Santa Monica*.

AT Legend, "An Overview of the State of Electoral Justice in Zimbabwe" (2019) *African Renaissance* 16 1744-2532

AT Munzara, "The consequences of implementing the indigenization and economic empowerment policy framework on the banking sector in Zimbabwe" (2015) *Journal of Business and Management*, 17 55-57.

- B Mugure "Foreign investment, black economic empowerment and militarised patronage politics in Zimbabwe" (2012) *Journal of Contemporary African Studies Routledge* 67-82.
- C Jirang & L Zhang, "Metallurgical recovery of metals from electronic waste: A review." (2008) *Journal of hazardous materials* 158 228-256.
- C Manyeruke, S Hamauswa & L Mhandara, "The effects of climate change and variability on food security in Zimbabwe: A socio-economic and political analysis" *International Journal of humanities and social science*, 3 270-286.
- C Nwapi, "Defining the 'Local' in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries" (2015) *Law and development review* 187–216.
- C Ogbuagu "The Nigerian indigenization policy: Nationalism or pragmatism?" (1983) *African Affairs* 241-266.
- C Schultz, "The Marikana massacre and the unstable geographies of capital: spatialising financialisation" (2020) *Politikon* 47.1 42-61.
- CC Corrigan, "Deriving social benefits from mining through regulation: lessons learned in South Africa" (2019) *The Extractive Industries and Society* 6 940-947.
- CJ Richardson "The loss of property rights and the collapse of Zimbabwe." (2005) *Cato J.* 25 541.
- D Matyszak, "Everything you ever wanted to know (and then some) about Zimbabwe's indigenization and economic empowerment legislation but (quite rightly) were too afraid to ask." (2010) *Kubatana* 03-10.
- D Melanie, J Schirmer & F Vanclay, "Community engagement and social licence to operate" (2014) *Impact assessment and project appraisal* 32.3 188-197.
- D Mwazvita, R J Wasserman & T Dalu "A Call to Halt Destructive, Illegal Mining in Zimbabwe" (2017) *South African journal of science* 113.
- E Pendleton & Robinson A, "Employee stock ownership, involvement, and productivity: An interaction-based approach." (2010) *ILR Review* 64 3–29.
- G Chiwunze, "Economic empowerment and foreign direct investment: The cases of Botswana, South Africa and Zimbabwe" (2014) *Polity*.
- G Djeynaba & JB Jacquet, "Local content policies in West Africa's mining sector: Assessment and roadmap to success" (2022) *The Extractive Industries and Society* 9.

G Plaxedes & S Boopen, "The Effect of Mining Foreign Direct Investment Inflow on the Economic Growth of Zimbabwe" (2020) *Journal of economic structures* 9 1–17.

G Verhoef, "Economic empowerment and performance: strategies towards indigenisation/black economic empowerment and the performance of such enterprises in Nigeria and South Africa, since the early 1970s to 2002" (2004) *Journal for Contemporary History* 29 92-118.

G Zhou & A Madhekeni, "Systems, processes and challenges of public revenue collection in Zimbabwe" (2013) *University of Western Cape*.

HN Thomas, "Land reform in Zimbabwe" (2003) *Third World Quarterly* 24 691-712.

J Howard, "Half-hearted regulation: Corporate social responsibility in the mining industry" (2014) *South African Law Journal* 131 11-27.

J Loubser, "Botswana's success story is built on disciplining transnational capital" (2021) *Africa at LSE*.

J Luiz & G Roberto, "The indigenization of business ownership in an emerging market: Doing business in South Africa" (2007) *International Business & Economics Research Journal (IBER)* 6 12.

J Naldrett & AH Wilson, "Horizontal and vertical variations in noble-metal distribution in the Great Dyke of Zimbabwe: A model for the origin of the PGE mineralization by fractional segregation of sulfide" (1990) *Chemical Geology* 88 279-300.

J Otto, C Andrews, F Cawood, M Doggett, P Guj, F Stermole, J Stermole, & John Tilton, "Mining royalties A global study of their impact on investors, government, and civil society" (2006) *Washington DC, World Bank*.

J Tariq & S Idris "Impact of employee ownership on an organizational productivity: A mediating role of psychological ownership." (2018) *Academy of Accounting and Financial Studies Journal* 22.2 1-12.

JR Owen & D Kemp, "Social Licence and Mining: A Critical Perspective" (2013) *Resources policy* 38.1 29–35.

JR Owen, D Kemp & L Marais, "The cost of mining benefits: Localising the resource curse hypothesis" (2021) *Resources Policy* 74.

K Amy, "New solutions to an age-old problem: innovative strategies for managing pension and longevity risk." (2021) *North American Actuarial Journal* 25 sup 1 7-24.

K Heese, "Black economic empowerment in South Africa: a case study of non-inclusive stakeholder engagement" (2003) *Journal of Corporate Citizenship* 12 93-101.

K Ravi & A Sharma, "Corporate social responsibility: A corporate strategy for new business opportunities" (2011) *Journal of international business ethics* 4.1 10.

KD Bruckner, "Community development agreements in mining projects" (2015) *Denv. J. Int'l L. & Pol'y*, 44, 413.

L Ginevra, "Intruders in a Balancing Act: Black Economic Empowerment, Transitional Justice and Investment Arbitration Tribunals" (2021) *International Journal of Transitional Justice* 15.1 7-25.

L Johnson, "Space for local content policies and strategies" (2016) *Columbia Center on Sustainable Investment Staff Publications*.

L Mitchell, RA O'Connell & I Ramsey, "Employee share ownership: A review of the literature" (2017) *Employee Share Ownership Project: Melbourne Law School, The University of Melbourne, Australia*.

L Shai, C Molefinyana, & G Quinot, "Public Procurement in the context of broad-based black economic empowerment (BBBEE) in South Africa—Lessons Learned for sustainable public procurement" (2019) *Sustainability* 11.24 7164.

L Ting, M Bennon, MJ Garvin & S Wang. "Sharing the big risk: Assessment framework for revenue risk sharing mechanisms in transportation public-private partnerships" (2017) *Journal of Construction Engineering and Management* 143 12.

M Dhiwayo "The Mines and Minerals Amendment Bill: Its Promises and Pitfalls" (2016) *Zimbabwe Environmental Law Association*.

M Frilet & K Haddow, "Guiding principles for durable mining agreements in large mining projects" (2013) *Journal of Energy & Natural Resources Law*, 31 467-475.

M Magidi & PM Hlungwani, "Development or destruction? Impacts of mining on the environment and rural livelihoods at Connemara Mine, Zimbabwe" (2022) *South African Geographical Journal* 1-22.

M Qumba, "Balancing Investor Protection with A State's Regulatory Autonomy in The Amended SADC FIP" (2021) *The Obiter* 652.

Magure Booker, "Foreign investment, black economic empowerment and militarised patronage politics in Zimbabwe" (2012) *Journal of Contemporary African Studies* 30 67-82.

N Mat, Y Cheung & H Scheepers, "Partner selection: criteria for successful collaborative network" (2009) *20th Australian conference on information systems* 2 4.

O George, A Dittmann, D Sarpong, & D Botchie, "Socio-Economic and Environmental Implications of Artisanal and Small-Scale Mining (ASM) on Agriculture and Livelihoods." (2020) *Environmental science & policy* 106 210–220.

OP Maponga & M Chilombo "Domestication of the role of the mining sector in Southern Africa through local content requirements." (2021) *The Extractive Industries and Society* 8 195-210.

P Finkelman, "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of 'Justice Delayed'" (1992) *Iowa L. Rev.* 78 89.

P Ruhanya, "The militarisation of state institutions in Zimbabwe, 2002–2017 The History and Political Transition of Zimbabwe" (2020) *Palgrave Macmillan Cham* 181-204.

R Craig, "The collapse of Zimbabwe in the wake of the 2000-2003 land reforms" (2004). See also R Craig, "The loss of property rights and the collapse of Zimbabwe" (2005) *Cato J.* 25 541

R Sang Ayu, R Anitasari, & R Fidiyani, "Impact of Changes in Mining Regulations on the Concept of Public-Private Partnership in Indonesia" (2022) *Proceedings of the 4th International Conference on Indonesian Legal Studies, ICILS 2021, June 8-9, 2021.*

RL Leslie, "Nationalisation and indigenization in Africa" (1976) *The Journal of Modern African Studies* 14.3 427.

RW Hillman, "Professional partnerships, competition, and the evolution of firm culture: The case of law firms" (2000) *J. Corp. L.* 26 1061.

S Sanga "A Theory of Corporate Joint Ventures" (2018) *California law review* 106 5.

S Wabote, "Pragmatic local content, Africa content and Asset transfer" (2022) *Africa Energy Week Conference.*

SC Nthai, "Host communities and mining projects in South Africa: towards an equitable mineral regulation" (2009) *Obiter* 30.1 120-130.

SC Ogbuagu, "The Nigerian Indigenization Policy: Nationalism or Pragmatism?" (1983) *African Affairs* 241-266

SM Nyamazana, "Foreign direct investment: does it matter? A case for Zimbabwe" (2015) *Research in business and economics journal* 11 34-52.

T Alessandri, SS Black, and EJ William "Black economic empowerment transactions in South Africa: Understanding when corporate social responsibility may create or destroy value" (2011) *Long Range Planning* 44.4 229-249.; C Tatjana "Corporate social responsibility (CSR) and black economic empowerment (BEE) in South Africa: A case study of German transnational corporations" (2011).

T Gathii & TO Ibrinke, "The turn to contractual responsibility in the global extractive industry" (2016) *Business and Human Rights Journal* 1 69-94.

T Mkandawire, "From the national question to the social question" (2009) *Transformation: Critical Perspectives on Southern Africa* 69, 130-160

T Njaya & N Mazuru, "Land Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects" (2010) *Journal of sustainable Development in Africa* 12 164-185.

T Nyamunda, "The State and Black Business Development: The Small Enterprises Development Corporation and The Politics of Indigenization and Economic Empowerment in Zimbabwe" (2016) *Historia* 41 62

T Van Wyk, "Redressing the past, doing justice in the present: Necessary paradoxes" (2019) *HTS: Theological Studies* 75.4 1-9.

Terlikowski, Pawel, Józef Paska, Karol Pawlak, Jakub Kaliński, and Dawid Urbanek, "Modern financial models of nuclear power plants" (2019) *Progress in Nuclear Energy* 110 30-33.

V Atud, "Nationalisation Case Studies: Lessons for South Africa" (2011) *Free Market Foundation* 3.

V Litvinenko "Assessment of the role of the state in the management of mineral resources" (2023) *Journal of Mining Institute*

W Duan, A Khurshid, A Rauf & AC Calin, "Government subsidies' influence on corporate social responsibility of private firms in a competitive environment." (2022) *Journal of Innovation & Knowledge* 7 2.

W Wilton & W Toh, "Entrepreneurship through indigenisation; the sweet and the bitter: the Zimbabwean example" (2011) *World Review of Entrepreneurship, Management and Sustainable Development* 7 272-280.

## **Commentaries, Reports and Guidelines**

"Africa Mining Vision" (2017) *Africa Mining Vision*.

"Mimosa Agrees to Zimbabwe Indigenization Plan" (2013) *Engineering & Mining Journal*.

"South Africa's Zimplats feels heat from Zimbabwe government as takeover looms" (2013) *Engineering & Mining Journal*.

Africa UNDP "Primary Commodity Booms and Busts Emerging Lessons from Sub-Saharan Africa" (2016).

H Mann "IISD Handbook on Mining Contract Negotiations for Developing Countries" (2015) *International Institute for Sustainable Development*.

H Mann, *Model Mining Development Agreement: Transparency Template*. International Institute for Sustainable Development (2012).

I Thomson & R Boutilier, "The social licence to operate. SME mining engineering handbook." (2011) *Colorado Society for Mining, Metallurgy, and Exploration 1779–1796*.

J Burton, "US Geological Survey releases 2022 list of critical minerals" (2022) *United States Geological Survey*.

J Menon, "Macroeconomic management amid ethnic diversity: Fifty years of Malaysian experience" (2008) *Asian Development Bank Institute Discussion Paper 102*,

JL Guasch, "Granting and renegotiating infrastructure concessions: doing it right" (2004) *World Bank Publications*.

W Mike, "The Routledge companion to management buyouts" 2018 *Abingdon and New York Routledge*.

## **Theses**

B Luhende, *Towards a legal framework for preventing tax revenue leakage in the upstream oil and gas industry in Tanzania: an analysis of the concepts, methods and options available in a public trusteeship model of natural resource holding* PhD Thesis University of Cape Town (2017).

E Chitsove, *Are indigenization measures compensable? a case study of measures taken under the indigenization and economic empowerment laws of Zimbabwe* PhD Thesis University of Pretoria (2014).

JN Wilcox *Mining regulation and development in Botswana: the case study of the Debswana mining joint venture* PhD Thesis St Mary's University (2015).

M Ndakaripa, *State, civil society and the politics of economic indigenization in Zimbabwe, 1980 to 2016* PhD thesis University of the Free State (2017).

P Nastja *Balancing the Interests Between TNCs and Host Developing States-The Role of Law* PhD Thesis School of Advanced Study University of London (2017).

W. Roseline *The Zimbabwean indigenization policy: a decolonial perspective on Community Share Ownership Trusts from 2008–2019* PhD Thesis UNISA (2019).

## Internet Sources

“Mining Industry: Indigenization Through the Back Door” *The Zimbabwean* (2021).

E Stoddard “Sibanye-Stillwater’s Froneman speaks out – ‘South Africa is a failed state with no leadership’” *Daily Maverick* 7 March 2022.

EIU “Mining in Africa: the benefit of elevated prices amid inflationary pressures. A regional outlook on the landscape” (2022) *The Economist Intelligence Unit*.

ICLG “Mining Laws and Regulations Ghana” (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/mining-laws-and-regulations/ghana>.

ICLG “Mining Laws and Regulations of Angola” (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/oil-and-gas-laws-and-regulations/angola>.

ICLG “Mining Laws and Regulations of the Democratic Republic of Congo” (2023) *International Comparative Legal Guides* <https://iclg.com/practice-areas/mining-laws-and-regulations/congo-d-r>.

World Bank, “World Development Report: Attacking Poverty” (2000/1) *Oxford University Press* <http://hdl.handle.net/10986/11856>

## Primary Sources

Cases *Minister of Mines and Mining Development & 3 Others v Grandwell Holdings (Private) Limited & 2 Others* (SC 34 of 2018, Civil Appeal SC 165 of 2016) [2018] ZWSC 34.

## Legislation

Zimbabwean

Mines and Minerals Act of 1961.

Small Enterprises Development Corporation Act of 1983.

Indigenization and Economic Empowerment Act of 2007.

Finance Act of 2018.

South African

Broad-Based Black Economic Empowerment Act of 2003.

#### Nigerian

Oil and Gas Local Content Act of 2010.

Mines and Minerals Act of 2007.

#### Botswanan

Mines and Minerals Act of 1966.

### **Government Notices, Regulations, Guidelines and Policy Documents**

#### Zimbabwean

(1983) 7 *Zimbabwe Parliamentary Debates* 167

2013 Presidential Statement to clarify the government's position on the Indigenization and Economic Empowerment policy published by Veritas Zimbabwe.

2016 *Fourth Session 8th Parliament, Parliament of Zimbabwe.*

2016 *Fourth Session- 8th Parliament, Parliament of Zimbabwe.*

2016 Presidential Statement to clarify the Government's position on the Indigenization and Economic Empowerment Act published by Veritas Zimbabwe.

G Gono 2007 Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement.

G Gono 2011 Government of Zimbabwe, Reserve Bank of Zimbabwe Monetary Policy Statement.

indigenization and Economic Empowerment (General) Regulations of 2010.

Mine (Managers and Safety) Regulations of 1999.

Mines and Mineral Bill no 2 of 2015.

Mines and Mineral Bill no 3 of 2023.

#### South African

Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry of 2002.



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