



ILLICIT FINANCIAL FLOWS IN ZAMBIA'S INTEGRATED ECONOMY:

Analysing the effects of illegal tax practices in the extractives industry on value addition

by

Mwaba Chileya Mulenga (MLNMWA002)

Submitted to **The University of Cape Town**

in fulfilment of the requirements for the degree LLM in the Law of Mineral and Petroleum Extraction and Use

Faculty of Law, University of Cape Town

Date of submission: 2nd February 2022

Supervisor: Professor Afton Titus

Co-supervisor: Mr. Kennedy Chege

Department of Private Law, University of Cape Town



The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the footnoting convention for citation and referencing. Each contribution to, and quotation in, this opinion from the work(s) of other people has been attributed and has been cited and referenced.
3. This opinion is my own work.
4. I have not allowed and will not allow anyone to copy my work with the intention of passing it off as his or her own work.

Signature:

Signed by candidate

ILLICIT FINANCIAL FLOWS IN ZAMBIA'S INTEGRATED ECONOMY:

ANALYSING THE EFFECTS OF ILLEGAL TAXATION PRACTICES IN THE EXTRACTIVES INDUSTRY ON VALUE
ADDITION

by

Mwaba Chileya Mulenga (MLNMWA002)

Word Count: 25,144 words

This paper was written under the auspices of the DST/NRF SARCHI Research Chair: Mineral Law in Africa. The views and opinions expressed here are the author's own and should not be attributed to the DST/NRF SARCHI Research Chair: Mineral Law in Africa or the University of Cape Town.

ABSTRACT

Mining is an important sector of Zambia's economy. Using the Constitution, legislative measures, and other policy pronouncements, efforts are being made by the Zambian government to maximise opportunities for diversification and value addition from mining to other sectors of the economy. Opportunities have been identified mainly in the form of employment creation, skills development, increased production using local goods and services, and integration into the mining value chain. Traditionally, Zambia's mining industry has been dominated by foreign multinational companies since the early 1900s. Therefore, multinational companies as major capital investors are key actors that anchor other service providers in the mining value chain. Their involvement therefore largely contributes to, and in some instances detracts from, the success of these measures to maximise value addition.

This research explores the interaction of these companies and other local Zambian businesses in the light of the country's goals for industrialisation and diversification in an integrated multi-sector economy. By analysing the overall legal and economic context in which multinational companies operate, this research demonstrates that illegal tax practices by multinational companies have discernible adverse effects on revenue where funds are syphoned out of the economy illicitly. Also, this research evaluates the multi-dimensional effects of these practices and emphasises that value addition efforts throughout the mining value chain are particularly adversely impacted. The research identifies and critiques inadequacies in the law that fail to address the resultant challenges for local businesses such as lost opportunities for funding and capacity.

ABBREVIATIONS

AMV 2030	Africa Mining Vision
ALP	Arm's Length Principle
ASM	Artisanal and Small – Scale Mining
BEPS	Base Erosion and Profit Shifting
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IFFs	Illicit Financial Flows
ITA	Income Tax Act Chapter 323 of the Laws of Zambia
MCM	Mopani Copper Mines
MINES ACT 2015	Mines and Mineral Development Act No. 11 of 2015
MMDA	Ministry of Mines and Mineral Development
MNCs	Multinational Corporations
OECD	Organisation for Economic Co-operation and Development
OEM	Original Equipment Manufacturer
TCRs	Thin Capitalisation Rules
UNCTAD	United Nations Conference on Trade and Development
UNIP	United National Independence Party
UK DTA	Double Taxation Agreement between Zambia and the United Kingdom
US\$	United States Dollars
VAT	Value Added Tax
ZCCM	Zambia Consolidated Copper Mines

ZRA	Zambia Revenue Authority
7 NDP	Seventh National Development Plan

Contents

ABSTRACT.....	iii
ABBREVIATIONS.....	iv
Chapter 1: Introduction.....	8
1. Introduction.....	8
2. Contextual background.....	9
3. Research Aims.....	13
3.1 Premise and hypothesis.....	13
3.2 Research questions.....	13
3.3 Research method and methodology.....	14
4. Thesis Structure.....	14
Chapter Two: The Economics of Mining in Zambia’s Integrated Multi-Sectoral Economy.....	16
1. Introduction.....	16
2. The importance of mining in a resource-rich economy.....	16
3. The Concept of Value Addition in the Extractives Sector.....	19
3.1. Intra-economic Linkages: An Overview of the mining value chain.....	19
3.2. Generations of attitudes towards value addition and linkages in the Zambian economy.....	22
4. Policy paradigm to integrate the minerals extractives sector within Zambia’s strategies to create a linkage economy.....	26
5. Conclusion.....	28
Chapter Three: Illegal Tax Practices by Multinationals in The Mineral Resources Extractives Industry.....	29
1. Introduction.....	29
2. The global economic presence of MNCs.....	30
3. The role of MNCs in bilateral tax treaties.....	31
3.1 Manipulation of the revenue tax base using bilateral tax treaties.....	32
4. Anti-avoidance rules.....	35
4.1 Transfer pricing rules.....	35
4.2. Taxation of intangible assets and transfer pricing.....	38
4.3. Thin capitalisation Rules.....	39
5. Conclusion.....	41
Chapter Four: Effects of Abusive Tax Practices on Value Addition in The Zambian Economy.....	42
1. Introduction.....	42
2. Thin capitalisation and limitations to financing options in the small-scale mining sector.....	42
3. Transfer pricing and mineral ore beneficiation.....	45
4. Operating a permanent establishment and the skills gap in local companies.....	47
5. Trade mis-invoicing and local supplier capacity.....	49
5.1 The link between global trade, revenue generation, and market competition.....	49
5.2 Decline in quality of goods produced by local businesses due to trade mis-invoicing.....	51
6. Conclusion.....	52
Chapter Five: Conclusion & Recommendations For Legal Reform.....	54
1. Introduction.....	54
2. Research themes and emphasis of the Research.....	54
3. Findings of the research.....	55
4. Recommendations for legal reform.....	57
4.1. Establishing a regulatory framework to align substantive treaty provisions and domestic law considerations.....	57
4.2. Establishing specific legislation to regulate local content.....	58
4.3. Enhancing transparency and consistency in production reporting to promote local mineral beneficiation.....	58
4.4. Align fiscal incentives and policies to encourage the growth of local businesses’ supply capacity.....	58
5. Conclusion.....	59
Bibliography.....	60
Primary sources.....	60
Cases.....	60
Legislation.....	60
Treaties and Agreements.....	60
Policies and reports.....	60

Literature.....	61
Books.....	61
Theses.....	61
Journal Articles.....	62
Special Papers.....	64
Electronic.....	64
Newspapers.....	68

CHAPTER 1: INTRODUCTION

1. Introduction

There is growing recognition that the mineral resources extractives industry can stimulate the development of related non-extractive industries such as manufacturing and infrastructure development.¹ However, this discourse is marked by peripheral conversation critiquing extractives-based development strategies as triggering inflation, causing deviation of resources, and encouraging “rent-seeking behaviour”.² Some writers have also argued that for the majority of African countries, mineral resources are a “curse”, given that these States have been unsuccessful in using the income derived from mineral resources to drive sustainable economic growth and industrial development.³

Zambia is currently classified as heavily reliant on mineral resources, based on the International Council of Mining and Metal’s Mining Contribution Index (“MCI”).⁴ The political narrative of development is centred around promoting the general development of a mining industry that is integrated into the domestic economy.⁵ Likewise, the holistic approach for development stated in the African Mining Vision emphasises value addition from mineral resources.⁶ Value addition refers to the process of modifying raw materials of mineral resources and increasing the economic value of the resource.⁷ Given that the integration of the mining sector is key to optimising value addition, this dissertation assesses the nexus between lost opportunities through illegal tax practices in the sector and the development of peripheral sectors in a linkage economy.

¹ Glada Lahn and Paul Stevens, ‘The curse of the one-Size fits all: Re-evaluating what we know about extractives and economic development’ *United Nations University World Institute for Development Economics Research* 2017

² In the mineral resources extractives sector, “rent-seeking” refers to the trend by countries in seeking to tax all activities which bear on rents, to ensure that the tax base accurately reflects all rents in the exploitation of mineral resources. See Robin Boradway and Michael Keen ‘Theoretical perspectives on resource-tax design’ in Philip Daniel, Michael Keen and Charles McPherson (ed) *The Taxation of Petroleum & Minerals: Principles, Problems and Practice* (2010) 31; Glada Lahn and Paul Stevens, ‘The curse of the one-Size fits all: Re-evaluating what we know about extractives and economic development’ *United Nations University World Institute for Development Economics Research* 2017 (Lahn and Stevens 2017).

³ The “Resource Curse” theory is the general term used to refer to the theories put forward to understand why countries with mineral resources typically have low rates of economic growth. See Natural Resources Governance Institute, *Political parties and natural resource governance: A practical guide for developing resource policy positions* (2018) 1; Lahn and Stevens 2017; Eli G. Burton ‘Reverse the Curse: Creating a Framework to mitigate the resource curse and promote human rights in mineral extraction industries in Africa’ *Emory International Law Review* 28 (2014) 425-473.

⁴ ICMM ‘Role of mining in National Economies: Mining Contribution Index (MCI) 5th Edition 2020’ available at www.icmm.com/website/publications/pdfs/social-performance/2020/research_mci-5.pdf, accessed on May 3, 2021.

⁵ Recent ministerial statements released in May 2021, and in the Budgetary Address of October 2021 demonstrate the Government’s optimism to rebound the mining industry as a beacon of economic recovery.

⁶ Uongozi Institute ‘Enhancing Value Addition in the extractive sector in Africa: Why is it important and how can it be achieved?’ available at <https://media.africaportal.org/documents/Enhancing-Value-Addition-in-the-Extractive-Sector-Africa.pdf> accessed on 19 December 2021.

⁷ Ibid at 3.



2. Contextual background

Efforts to find mechanisms that minimise the poor development often associated with the mineral resources extractives industries have intensified.⁸ Historically, it was observed that the extractives sector tends to operate within enclaves, separated from the rest of the economy.⁹ Consequently, development led by the mineral resources extractives industry was restrictively viewed in terms of upstream activities such as taxes and royalties paid by Multinational Corporations (“MNCs”) on exports.¹⁰ At present, the consensus among international bodies and governments is that proper management and governance of mineral resources can positively influence broad-based development in mineral dependent economies.¹¹ For instance, the African Mining Vision diverts the emphasis from fiscal linkages and exports as a way to promote growth, and instead advocates for broad economic and social linkages that promote industrialisation.¹²

MNCs play a critical role in the economy in terms of their capital contribution using foreign investment, the transfer of skills and technology, as well as the overall impact of a competitive environment created in host countries.¹³ However, because MNCs possess substantive capital, resources, and expertise, they sometimes hold a stronger hand over national governments, which are typically poorly governed.¹⁴ Consequently, a State’s ability to regulate extractives-based development is to a largely influenced by its institutional capacity to monitor MNC’s compliance with domestic laws.¹⁵

One of the challenges that concern countries whose economies are reliant on the mineral resources extractives sector is the loss of revenue through illicit financial flows (“IFF”). IFFs refers to “money that is illegally earned, transferred or utilised contrary to the law in its origins, movement or use”.¹⁶ The extent to which IFFs impact the economy of developing countries is illuminated in the economic analysis of the net flow of capital between developed and developing countries. This analysis reveals that whilst developing countries utilise US\$456 billion on debt reseriving, the revenue they lose in illicit capital

⁸ Bastida states that there are numerous countries in which the mineral resources sector is a significant component of the economy in Ana Elizabeth Bastida ‘From extractive to transformative industries: paths for linkages and diversification of resource-driven development’ *Mineral Economics* Vol 27 (2014) 73-87 (Bastida 2014).

⁹ Michael W Hansen ‘From enclave to linkage economies? A review of the literature on linkages between extractive multinational corporations and local industry in Africa’ *Danish Institute for International Studies Working Paper* 2014:02.

¹⁰ Austin Dziwornu Ablo ‘The micromechanisms of power in local content requirements and their constraints on Ghanaian SMEs in the oil and gas sector’ *Norwegian Journal of Geography* (2017) 67 available at <http://dx.doi.org/10.1080/00291951.2017.1299213> (Ablo, 2017).

¹¹ Africa Progress Panel (2013) ‘Equity in Extractives: Stewarding Africa’s Natural Resources for All’ available at: http://www.africaprogresspanel.org/wpcontent/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf accessed on 14 May 2021.

¹² Bastida (2014) 75 note 6.

¹³ United Nations Conference on Trade and Development “Creating Local Linkages by Empowering Indigenous Entrepreneurs” (2011) African Oil and Gas Services Sector Survey, vol. 1, Nigeria.

¹⁴ Some MNCs such as Chevron, ExxonMobil and Shell reportedly operate a significant proportion of the profits of the mineral resources extractives industry in various African developing countries. Cynthia A Williams, “Civil Society Initiatives and ‘Soft Law’ in the Oil and Gas Industry.” (2004) 36 *New York University Journal of International Law and Politics* 457–502; Brian Roach, ‘Corporate Power in a Global Economy’ (2007) *Global Development and Environment Institute. Medford, MA: Tufts University.* <http://sttpml.org/wp-content/uploads/2014/06/Corporate%5fPower%5fin%5fa%5fGlobal%5fEconomy.pdf>; Beth Stevens, ‘The Amorality of Profit: Transnational Corporations and Human Rights’ (2004) 20 *Berkeley Journal of International Law* 45–90.

¹⁵ Ablo (2017) 69 note 10.

¹⁶ Global Financial Integrity, ‘Illicit Financial Flows’ available at [Illicit Financial Flows \(gfintegrity.org\)](http://www.gfintegrity.org) accessed on 7 May 2021.

flows is much higher – calculated at approximately US\$619 billion.¹⁷ The result is that developing countries lose more capital in funds illegally syphoned out of their countries than the cumulative amount these countries spend on debt reseriving.¹⁸ Much of this lost revenue could otherwise be expended on other developmental projects.¹⁹ Thus, initiatives impacting on development, such as the 2030 Agenda for Sustainable Development, include specific targets to truncate the value of incoming and outgoing IFFs.²⁰

International and regional organisations such as the United Nations Conference for Trade and Development (“UNCTAD”), the Organisation for Economic Co-operation and Development (“OECD”), and Actionaid also advocate for better governance and stronger institutional capacity to combat the various forms of IFFs.²¹ The African Union Assembly in its Declaration on Illicit financial flows reiterated the shared vision of member states to address the impact of IFF on the mobilisation of domestic resources to finance the continent’s development goals.²² Figures in these reports are estimates of revenue lost, and they are important because they show the multi-dimensional nature of a problem that is difficult to contextualise in exact numbers. The use of estimates is attributable to the indeterminate data available that does not account for intangibles such as proceeds of corruption and bribery.²³

IFFs within the mineral resources extractives sector can be categorised in two forms, namely, the legal component of financial flows, which denotes legally reported outflows from the country from which it originates, and the illegal component of financial flows denoting outflows that are rarely recorded in the country in which it originates.²⁴ The illegal component comprising “corruption, petty bribes, embezzlement and profits from abusing rules” transpires on a lesser scale and goes unreported.²⁵ Conversely, tax evasion and tax avoidance practices contingent on legally disclosed information are figuratively speaking “recorded”, and comprise the legal component of IFF in the sector.²⁶ Different institutions have

¹⁷ Kristina Fröberg and Attiya Waris *Bringing the Billions Back – How Africa and Europe Can End Illicit Capital Flight*. A Global Studies Report (2011) 11; United Nations Conference for Trade and Development ‘Tackling Illicit Financial Flows for Sustainable Development’ available at *Tackling Illicit Financial Flows for Sustainable Development in Africa (unctad.org)* accessed on 2 July 2021.

¹⁸ *Ibid.*

¹⁹ United Nations Conference for Trade and Development ‘Tackling Illicit Financial Flows for Sustainable Development’ available at *Tackling Illicit Financial Flows for Sustainable Development in Africa (unctad.org)* accessed on 2 July 2021.

²⁰ Goal 16 of the United Nations 2030 Agenda for Sustainable Development is to “significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime” available at *21252030 Agenda for Sustainable Development web.pdf (un.org)* accessed on 2 July 2021.

²¹ The mandate of the OECD for instance, is to collaborate with governments and policymakers and citizens in crafting solutions to various challenges such as international tax evasion. ‘Illicit financial flows from developing countries: measuring OECD responses’ *Illicit_Financial_Flows_from_Developing_Countries.pdf (oecd.org)* accessed on 29 May 2021; United Nations Conference on Trade and Development ‘Tackling Illicit Financial Flows for Sustainable Development in Africa’ *Tackling Illicit Financial Flows for Sustainable Development in Africa (unctad.org)* accessed on 30 May 2021.

²² Assembly Special Declaration on Illicit Financial Flows, available at *29831-doc-assembly_declaration_on_illicit_financial_flow_-_english.pdf (au.int)* accessed on 30 May, 2021.

²³ For instance, the “Panama papers” report highlight the problems facing governments globally, in recouping revenue lost through IFF because records and data must first be pulled from multiple sources, and most tax authorities do not have the institutional capacity to do this. See ICIJ, ‘Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption’ available at *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption - ICIJ* accessed on 30 May 2021.

²⁴ Sophie Lemaitre, ‘Illicit Financial Flows within the extractive industries sector: a glance at how legal requirements can be manipulated and diverted’ *Crime Law & Social Change* (2017) 71, 107 – 128 (Lemaitre 2017).

²⁵ *Ibid* at 108.

²⁶ See Roman Grynberg & Fwasa Singogo *African Gold: Production, Trade, and Economic Development* (2021) 444.

attempted over the years to quantify the exact extent of IFFs in the mineral resources extractives sector, with limited success.²⁷ This research will analyse the legal component of IFFs which manifests in tax avoidance, tax evasion, and other abusive tax practices, and their resultant effect on value addition in the mineral resources extractives sector.

More critical arguments over extractives-based development theory also cast a dim light on the part played by MNCs in exacerbating the problem of IFFs.²⁸ MNCs in the mineral resources extractives industry have a complex ownership structure that is “layered”, thus enabling the MNC to operate in several jurisdictions using multiple subsidiaries and holding companies.²⁹ This complex structure also allows MNCs to abuse the gaps and mismatches in legislation which vary across different jurisdictions, costing countries colossal sums in lost revenue every year through illegal practices within the group structure.³⁰ The African Union’s high-level panel on Illicit Financial Flows in its report to the assembly also highlighted the role played by MNCs in IFFs. One of the major findings in the report was that a predominant portion of IFFs from the African continent is perpetuated by commercial activities of MNCs such as transfer mispricing, avoiding tax, and abusing tax incentives and double-taxation agreements.³¹ Revenue derived from MNCs is primarily eroded from the revenue base through these commercial activities.³² As this research analyses the legal challenges of upstream taxation, the study focuses on the illicit flow of funds in the mineral extractives industry, through illegal tax activities by MNCs.

In a recent decision of the Supreme Court of Zambia in the case of *Mopani Copper Mines Plc v Zambia Revenue Authority*, the Zambia Revenue Authority successfully recovered a significant amount of money in unpaid taxes for the years 2006/2007 and 2007/2008, after years of prolonged litigation.³³ The origins of the litigation in the case are traceable to an audit carried out by the Zambia Revenue Authority of Glencore International AG and its transactions with its subsidiary Mopani Copper Mines, where the revenue authority found that several transactions violated the ‘Arms-Length Standard’.³⁴ The Court remarked in its judgment that this judgment “highlights the inadequacy of institutional capacity to deal effectively

²⁷ United Nations Economic Commission for Africa ‘Illicit Financial Flows Issues Paper’ available at *Assembly AU 17 (XXIV) _E.pdf* (africa-union.org); GFI Washington, J Spanjers and D Kar ‘Illicit Financial Flows from Developing Countries: 2003-2012’; AU/ECA Conference of Ministers of Finance, Planning and Economic Development ‘Track it! Stop it! Get it!: Report of the High Level Panel on Illicit Financial Flows from Africa’.

²⁸ Research on the power imbalance between developing countries and MNCs shows a significant imbalance in favour of MNCs in the mineral resources extractives industry because of the over-reliance of governments on these MNCs for revenue generation and job creation. See Tracy Cohen Cohen, ‘Rethinking (Reluctant) Capture: South African Telecommunications and the Impact of Regulation’ (2003) 47 *Journal of African Law* 65–87; Thomas Baunsgaard, ‘A Primer on Mineral Taxation’ *IMF Working Paper WP/01/139*. <https://www.imf.org/external/pubs/ft/wp/2001/wp01139.pdf>; Farok Contractor, ‘Tax Avoidance by Multinational Companies: Methods, Policies, and Ethics’ (2016) 1 *Rutgers Business Review* 27–43.

²⁹ African Progress Panel, ‘Equity in Extractives: Stewarding Africa’s Natural Resources for All’ available at <http://www.africaprogresspanel.org/2013-africa-progress-report-fact-of-the-day-series/> accessed on 30 May 2021.

³⁰ Evaristus Oshionebo ‘Corporations and Nations: Power Imbalance in the Extractive Sector’ (2018) 77 *American Journal of Economics & Sociology* 430.

³¹ Corruption Watch ‘Mbeki: Illicit Financial Flows crippling the Continent’ available at *Mbeki: illicit financial flows crippling the continent - Corruption Watch* accessed on 30 May 2021; United Nations Conference for Trade and Development ‘Tackling Illicit Financial Flows for Sustainable Development’ available at *Tackling Illicit Financial Flows for Sustainable Development in Africa (unctad.org)* accessed on 2 July 2021.

³² United Nations Economic Commission for Africa ‘Illicit Financial Flows: Issues Paper’ available at *Assembly AU 17 (XXIV) _E.pdf* (africa-union.org) accessed on 3 July 2021.

³³ *Mopani Copper Mines Plc v Zambia Revenue Authority Appeal No. 24 of 2017*.

³⁴ This is measured in accordance with the ‘Arms-Length Conditions’ which are defined in Section 97A of the Income Tax Act as “conditions or no conditions which would have been made or imposed if persons were not associated with each other”.

with multinational corporations”.³⁵ This case, which is dealt with in detail in this study, demonstrates the complex tax structures utilised and abused by MNCs in the mineral resources extractives industry to evade tax and externalise funds out of Zambia. It also highlights the archetypical problem of IFFs in the sector, which undermines governmental objectives of extractives-led development.

Zambia currently has in place the National Vision 2030 (“Vision 2030”) – a policy designed to guide the country’s plans to become a prosperous middle-income nation by 2030.³⁶ This goal is driven by the aspiration that Zambians should live in a “strong and dynamic middle-income industrial nation” with a self-sustaining economy.³⁷ The Vision 2030 does not contain a direct reference to the nexus between the mineral resources extractives sector and other sectors in terms of creating value addition. However, the emphasis on self-sustenance recurs throughout Vision 2030, particularly in terms of the need to increase value addition through linkages created using inputs between sectors.³⁸

Other legislative policies also reflect the government’s commitment to optimise value addition from the mineral resources extractives sector within the broader economy. In Article 2 of the Constitution, the government has committed itself to creating an environment that encourages economic empowerment of citizens, to advance sustainable economic growth and social development.³⁹ The Mines and Minerals Development Act No. 11 of 2015 (hereinafter called “the Mines Act 2015”) incorporates a sense of shared responsibility for all Zambian citizens in the mineral development process. In this regard, Section 4 of the Mines Act 2015 provides that citizens shall have equitable access to mineral resources and benefits from mineral resources.⁴⁰ Additionally, the Mines Act 2015 mandates the holder of a mining right to give preference to the maximum extent possible to materials and goods manufactured in Zambia and to give preference to citizens of Zambia in employment considerations.⁴¹ Recently, the government has also restated its commitment to the development of a regulatory framework to combat IFF in the mineral resources extractives industry and develop the technical capacities of local businesses.⁴² For instance, recent amendments to the Income Tax (Transfer Pricing) Regulations have introduced a country-by-country reporting requirement for resident parent companies within the MNC to disclose certain information to the tax authorities.⁴³

³⁵ Mopani v ZRA 2020, 2.

³⁶ Ministry of National Development and Planning ‘The National Vision 2030: A prosperous middle-income nation by 2030’ available at https://www.mndp.gov.zm/wp-content/uploads/filebase/vision_2030/Vision-2030.pdf accessed on 28 November 2021.

³⁷ This is one of the objectives in the National Vision 2030.

³⁸ A key target of the Science and Technology sector for instance is to strengthen linkages between productive sectors and research institutions in the economy by 2030 and to promote the development of enterprise using outputs from science and technology activities by 2030.

³⁹ Article 10 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016).

⁴⁰ Section 4 of the Mines and Minerals Development Act No.11 of 2015 (“Mines Act 2015”).

⁴¹ Section 20 of the Mines Act 2015.

⁴² Ministry of Mines and Minerals Development ‘Regulatory Impact Assessment: Proposed Local Content Regulations for the Mining Sector’ available at <http://www.businesslicenses.gov.zm/uploads/documents/RIA%20REPORT%20FOR%20LOCAL%20%20CONTENT%20REGULATIONS.pdf> accessed on 28 November 2021.

⁴³ The Income Tax (Transfer Pricing) Regulations have been amended to provide a structure of a country-by-country report – with a standard reporting template of the information to be disclosed.

However, the economic context of the mineral resources extractives industry plays an important role in the effectiveness of these policies.⁴⁴ Considering the massive transnational influence and power of MNCs that incentivise IFFs, this creates opportunities to exploit and abuse legislation in a manner that negatively affects the creation of value addition in the broader economy from the mineral resources extractives industry. Therefore, this research evaluates Zambia's tax regulatory framework to understand how gaps in the law are abused and how this hinders value addition efforts in the mineral resources extractives industry.

3. Research Aims

This research aims to examine the gaps and inconsistencies in the upstream tax legal framework linked to IFFs in Zambia's mining industry and their causal effect on the creation of value addition. The study assesses the different laws and regulations regulating transfer pricing, and the taxation of MNCs in the mineral resources extractives industry. In understanding the interplay between MNCs and the broader economy, this research assesses the extent to which the practices of MNCs adversely impact the creation of value addition. Consequently, the research makes recommendations for legal reform.

3.1 Premise and hypothesis

Revenue generated from the mineral resources extractives sector can facilitate the government's ability to provide for its citizens and to develop other sectors of the economy within the context of an integrated/linked economy. In Zambia's Mineral Resources Development Policy, the potential of the sector as a central feature of the national economy is emphasised.⁴⁵ In recent years, the contribution of the sector as a percentage of the country's Gross Domestic Product ("GDP") has increased steadily.⁴⁶ The government has therefore committed to developing linkages between the mining sector and other value-adding processing industries, to create an enabling environment for the creation of value addition. However, due to IFFs in the sector, the government loses colossal sums of revenue and crucial opportunities for industrialisation, diversification, and skills transfer. The country is affected expressly because there is a real loss in revenue, and latently because value addition from the mineral extractives sector is not optimised.

3.2 Research questions

The core question to be answered by this research is 'how illegal tax practices of MNCs in the mineral resources extractives industry affect value addition efforts in an integrated linkage economy?'

This main question of the study is answered through these sub-questions:

1. How does the mineral resources extractives industry operate in the Zambian integrated linkage economy?

⁴⁴ Isabelle Ramdoo 'Local Content Policies in mineral-rich countries' available at <https://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-193-Local-Content-Policies-Mineral-Rich-Countries-2016.pdf> accessed on 7 July 2021.

⁴⁵ Zambia Mineral Resources Policy (2013) 9.

⁴⁶ International Council on Mining and Metals (2021) note 4.

2. What are the legal gaps and inconsistencies in the upstream taxation framework of MNCs in the mineral resources extractives industry, and what resultant regulatory issues/challenges stem from these gaps?
3. How do these illegal tax practices affect policies to increase value addition from the mineral resources sector?

3.3 Research method and methodology

This research utilises a doctrinal research methodology in conjunction with an inter-disciplinary approach, with an emphasis on law and economics. The study encompasses the analysis of primary sources such as government reports and policies, legislation, and case law, as well as secondary sources such as journal articles, textbooks and other online sources.

4. Thesis Structure

This dissertation is structured into five chapters as follows.

Chapter One - gives a brief overview of the research by outlining the significance of the mineral resources extractives industry in Zambia's overall economic outlook. Mining constitutes a significant portion of the economy, and the regulatory framework is structured to integrate it within a multi-sectoral diversified economy. The chapter further introduces the various actors and stakeholders in the industry, focusing particularly on MNCs and how their practices impact the mineral value chain. In the concluding section, this chapter outlines the research questions in this dissertation and the overall research framework.

Chapter Two - expands the conversation on mining as a sector of Zambia's economy and focuses on value addition efforts in the mineral resources extractives industry. The Chapter locates the different service industries and input sectors that are linked to the mineral resources sector and further assesses how value addition is created through these links. The Chapter also highlights the link between maximising value addition and extractives – led development.

Chapter Three - outlines the role of MNCs in the mineral extractives industry. This chapter analyses the tax practices of MNCs and illuminates how these companies manipulate and misuse the upstream legal taxation structure. The chapter also highlights the loopholes in Zambia's upstream legal taxation structure that enable MNCs to carry out these activities.

Chapter Four - analyses how illegal tax practices of MNCs affect value addition in the mineral resources extractives sector. It shows specifically value addition from the mineral resources extractives sector is adversely affected by reduced opportunities to access finance and capital for small-scale mining businesses, decreasing levels of local beneficiation, and the failure to enhance local production capacity.

Chapter Five - concludes the study. It gives an overview of the context of the research and outlines the general themes discussed in this dissertation. The chapter also summarises the key findings of the dissertation. Drawing on these findings, the Chapter then proposes various opportunities for legal reform to address the challenges caused by the effects of illegal tax practices of MNCs on value addition efforts identified in the research.

CHAPTER TWO: THE ECONOMICS OF MINING IN ZAMBIA'S INTEGRATED MULTI-SECTORAL ECONOMY

1. Introduction

The aspiration to grow into a flourishing middle-income country by 2030 is at the heart of the government's numerous policy interventions for sustainable development.⁴⁷ Zambia's macroeconomic environment is underpinned by the pillars of diversification outlined in the National Development Plan ("Seventh NDP 2017 - 2021").⁴⁸ The focus of the Seventh NDP is directing how the various sectors of the economy interact through linkages.⁴⁹ This chapter dissects the concept of inter-linked development and assesses the interaction of the resource extractives sector with other sectors. Further, the chapter contributes to the existing literature on local content from a 'linkage building' perspective.

At the outset, section two of the chapter expounds on the significance of the extractives sector in an economy by analysing the export base theory and the concept of 'enclaves' created in the extractives sector. Section three of the chapter discusses value addition in an economy, focusing on the role of the extractives sector in adding value to an economy. The section also traces the evolution of policies and attitudes towards value addition of the extractives sector in the Zambian context. Finally, the chapter ends with an outline of the framework for linkage creation and integrated multi-sectoral development in Zambia's economy.

2. The importance of mining in a resource-rich economy

During the post-independence period for many African resource-rich countries, the World Bank marketed foreign investment in these economies using the 'Strategy for African Mining' ("Mining Strategy") to promote private sector-led operations.⁵⁰ At the time, many of these countries were experiencing crises following global economic challenges.⁵¹ The Mining Strategy was underpinned by the fact that African countries themselves did not have the necessary capacity to carry out large-scale mining operations, and needed to align their environments with conditions to incentivise foreign investment.⁵² The Mining Strategy also concluded that governments had to resuscitate their respective mining sectors by focusing on maximising tax benefits, as opposed to other economic or political objectives such as enhancing

⁴⁷ National Vision 2030 "A prosperous middle-income nation by 2030" available at https://www.mndp.gov.zm/wp-content/uploads/filebase/vision_2030/Vision-2030.pdf accessed on 6 October 2021.

⁴⁸ '2020 Budget Address by Honourable Dr. Bwalya K.E Ng'andu' available at https://www.parliament.gov.zm/sites/default/files/images/publication_docs/2021_National_Budget_Speech.pdf accessed on 6 October 2021.

⁴⁹ 'The Seventh National Development Plan: Conceptual framework' available at <https://www.mndp.gov.zm/wp-content/uploads/2018/05/7NDP.pdf> accessed on 7 October 2021.

⁵⁰ H. Besada and P. Martin 'Mining codes in Africa: emergence of a 'fourth' generation? (2014) 28:2 *Cambridge Review of International Affairs* 263-282.

⁵¹ Evelyn Dietsche 'Diversifying mineral economies: conceptualizing the debate on building linkages' (2014) 27 *Mineral Economics* 89-102.

⁵² 'Strategy for African Mining' available at <https://documents1.worldbank.org/curated/en/722101468204567891/pdf/multi-page.pdf> accessed on 7 October 2021.

employment.⁵³ Resultingly, an agenda for action was proposed, which recommended an exports-based economic policy driven by private investment regulated and promoted by the government.⁵⁴

Ten years after its release, approximately thirty African countries adopted the Mining Strategy.⁵⁵ In implementing this Mining Strategy, emphasis was placed on achieving export-led growth.⁵⁶ Consequently, these governments adopted policies to bolster the fiscal framework using tax relief or exemptions, accelerated capital expenditure, depreciation allowances, and other tax incentives for investors.⁵⁷ These efforts were made to create a conducive environment for investors to derive significant export earnings which would be retained in the country through taxes. Countries were therefore directed to ensure that they implemented a stable macro-economic and trade policy, a sound market-based foreign exchange regime, and fair tax systems.⁵⁸ The trade policy was underpinned by restriction-free rights to export minerals and drastic reductions in trade import restrictions.⁵⁹ The reasoning informing the trade policy was that economic benefits could best be maximised in terms of revenues from taxes and foreign exchange revenue from exports.⁶⁰ Therefore, initial policy changes and legislative reforms were tailored with this end goal – to optimise mineral exploration through private investment, and mineral development through tax administration and trade exports.

Export base theory as a traditional theory of economics explains the presumed effect of development expected from these policies. The theory espouses that the local economy of every country can be separated into two components; basic and non-basic, expressed in economic terms as $E_T = E_B + E_{NB}$.⁶¹ The basic sector expressed as (E_N) comprises the export sector, and accounts for trade in goods and services with other markets. The non-basic sector denoted by (E_{NB}), accounts for trade in goods and services within the territorial boundaries of a country's internal market.⁶² This theory also holds that the development of the economy is predominantly based on the success of the basic sector and that the characteristics of industries in the basic sector must be monitored.⁶³ Economic activities or the basic activities in a country are therefore mostly export-based, and growth is measured on a regional and/or international level with other trade markets.

⁵³ Besada and Martin (2014) note 50.

⁵⁴ Besada and Martin (2014) note 50.

⁵⁵ H. B. Campbell *Mining in Africa: Regulation and Development* (The Nordic Africa Institute & Pluto Press, 2009)

⁵⁶ Fitsum S. Weldegiorgis, Evelyn Dietchse and Daniel M. Franks 'Building mining's economic linkages: A critical review of local content policy theory' (2021) 74 *Resources Policy*.

⁵⁷ Ibid at 75.

⁵⁸ Besada and Martin (2014) note 50.

⁵⁹ Ibid.

⁶⁰ African Union 'Minerals and Africa's Development: An overview of the report of the International Study Group on Africa's Mineral Regimes' available at [14499-wd-overview_of_the_isg_report.pdf \(au.int\)](#) accessed on 19 January 2022.

⁶¹ The Shaffer Star: Markets, Export Base Theory <https://aae.wisc.edu/ced/wp-content/uploads/sites/8/2013/06/Shaffer-star-markets-export-base.pdf> available at 8 October 2021.

⁶² The equation then is expressed as follows: $E_T = E_B + E_{NB}$. This means that the total economic growth of an economy is measured in terms of the exports and non-exports over a given period. Export activities are constitutive of the economic base of the basic activities in an economy. See Walter Isard *Methods of Regional Analysis* (1960); Charles M Tiebout *The Community Economic Base Study* (1962); Gerard Sirkin 'The theory of the Regional Economic Base' (1959) *The Review of Economics and Statistics* 426-29.

⁶³ Douglas C. North *The Economic growth of the United States 1790-1860* (1961) 1.

Applying this theory to the economic environment in which various resource-rich countries implemented the Mining Strategy, ideologies that confined mining-led economic growth to revenue from exports were adopted. Resultingly, the contribution of mining to the economy was viewed in terms of how much investors could make to export and trade on the global market.⁶⁴ Using the export-based theory, it is arguable that because mineral development was viewed in terms of strengthening trade advantage and generation of revenue from exports, the contribution of the sector to the broader economy was confined to this extent. The danger, however, is that policies implemented in line with the Mining Strategy were limiting, because they reflected that foreign investment was only needed to finance an export-dominated mineral resources sector.⁶⁵

Consequently, these policies fed into the narrative that projects in the extractives industry operate in an enclave, to the extent that the supply chain is restrictive, pre-determined, and does not support a diverse range of economic activities.⁶⁶ Arguments in support of this view assert that most forms of foreign direct investment (“FDI”) are driven by natural resource seeking, and not efficiency.⁶⁷ This means that FDI is more drawn to extraction, and not production, thus, these extractive sector projects only make a minimal contribution to overall economic growth.⁶⁸ For instance, in 2008, Zambia exported US\$ 3 million worth of copper, but only recorded a mere 8 per cent increase in Gross Domestic Product in taxes imposed on the export of these minerals.⁶⁹

However, the mineral extractives sector ultimately utilises inputs from other economic sectors whose components,⁷⁰ can be located within the extractives industry using linkages. Currently, aspirations to improve the extractives industry have evolved to include linkages to other sectors – representing a shift from a mineral export-driven economy to an industrial linkage economy built using linkages.⁷¹ The diagram reproduced below illustrates an ideal linkage economy in which economic growth from the extractives sector is spilled over into other sectors of the economy. As will be explored later in this chapter, the depth of these linkages is an important factor in extractives-led development.

⁶⁴ African Union (2021) note 60.

⁶⁵ Ibid.

⁶⁶ See M.W Hansen *From enclave to linkage economies? A review of the literature on linkages between Extractive Multinational Corporations and Local Industry in Africa* (DIIS Working paper, 2014); A.O Hirschman *The Strategy of Economic Development* (1958); H. W Singer ‘The distribution of gains between investing and borrowing countries’ (1950) 40:2 *American Economics Review* 473-485.

⁶⁷ Hansen (2014) 3.

⁶⁸ Ibid.

⁶⁹ Fitsum S Weldegiorgis, Evelyn Dietsche and Daniel M. Franks ‘Building mining’s economic linkages: A critical review of local content policy theory’ (2021) 74 *Resources Policy*.

⁷⁰ Silvana Tordo, Michael Warner, Osmel Manzano and Yahya Anouti *Local Content Policies in the Oil and Gas Sector* (World Bank Group 2013).

⁷¹ See Evelyn Dietsche *New Industrial Policy and Extractive Industries* (WIDER Working Paper 2017); R. Bloch and G Owusu *Linkages in Ghana’s gold mining industry: Challenging the Enclave Thesis* (2012) 37: 4 *Resources Policy* 324-442; L. Buur, O. Therkildsen and O. Hansen *Extractive Natural Resource Development: Governance, Linkages and Aid* (2013); A. Caramento ‘Cultivating Backward Linkages to Zambia’s Copper Mines: Debating the Design of and Obstacles to Local Content’ (2020) 7:2 *Extractive Industry Society* 310-320.

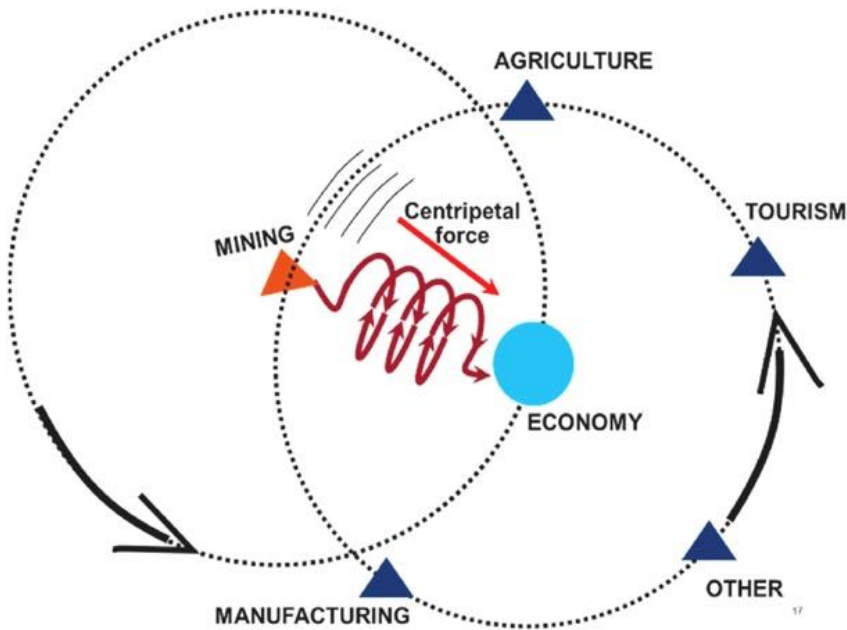


Figure 1⁷²

Figure 1 above is a representation of how the mining industry is connected to other sectors of the economy, to the extent that the sector uses inputs from other sectors. This connection entails a transfer of economic benefits from one sector to another. These benefits then flow throughout the economy as outputs from the various sectors such as agriculture, tourism, and manufacturing. It is necessary to understand how the different actors in the extractives resources sector contribute to the process of enhancing value addition, and the next section expands on how value addition is created in the sector.

3. The Concept of Value Addition in the Extractives Sector

3.1. Intra-economic Linkages: An Overview of the mining value chain

On a macro-level, the extractives sector as a component of the economy contributes value to other sectors through linkages.⁷³ Previously between the 1980s and 1990s following the World Bank Strategic Plan, many African countries viewed these economic benefits in terms of export earnings and tax revenues.⁷⁴ Evidence and academic research show that in modern economies, the extractives sector can be connected to other supply sectors in various ways such as technology and skills transfer, and other downstream activities processing extracted minerals.⁷⁵ The use of inputs such as

⁷² Fitsum S. Weldegiorgis, Evelyn Dietsche and Daniel M. Franks 'Building mining's economic linkages: A critical review of local content policy theory' (2021) 74 *Resources Policy* 9.

⁷³ See figure 1 in Section 2 above.

⁷⁴ The hypothesis of foreign investment and the exports-based theory is discussed in the preceding section.

⁷⁵ See CCSI *Linkages to the Resource Sector: the Role of Companies, Government and International Development Cooperation* (Columbia Center on Sustainable Investment, 2016); Isabelle Ramdoo *Local Content Policies in Mineral-Rich Countries: An Overview* (2016); R Darling *Beyond Taxation: How Countries Can Benefit from the Extractive Industries Through Local Content* (Revenue Watch Institute, 2011); S Tordo, Y Anouti *Local Content Policies in the Oil and Gas Sector: Case Studies* (The World Bank, 2013); Jesse

labour, technology, transport, and other essential services supplied through the agriculture sector and the health sector to the extractives industry represents value addition.⁷⁶ For instance, employees in a mining community will inevitably purchase food and utilise health facilities, creating more jobs for the suppliers of such goods and services. Similarly, the use of technology from a local company creates benefits for this company (assuming the local company creates its own technology) as it adds to the knowledge base and facilitates skills development and value creation. In essence, value addition entails the full integration of local businesses in the mining value chain and the effective participation of these businesses along the value chain.⁷⁷

Figure 2 – generic mining value chain adopted by the Ministry of Commerce, Trade, and Industry in Zambia⁷⁸

Salah Ovidia 'Local Content and Natural Resource Governance: The cases of Angola and Nigeria' (2014) 1 *The Extractives Industry and Society* 137-146.

⁷⁶ The concept of value addition refers to deriving substantial benefits from mineral beneficiation activities that build up other industries. For instance, bauxite is used to create refined aluminium, and so the value of bauxite is lower than aluminium. In a simple sense, an integrated aluminium industry which directly links extraction and trading creates new skills, and promotes further investment and employment. See A.N Adedeji, S.F Sidique and A.A Rahman 'The role of local content policy in local value creation in Nigeria's Oil Industry: a structural equation modeling (SEM) approach (2016) 49 *Resources Policy* 61-73.

⁷⁷ Uongozi Institute 'Enhancing Value Addition in the Extractive Sector in Africa: Why is it Important and How can it be achieved?' available at <https://media.africaportal.org/documents/Enhancing-Value-Addition-in-the-Extractive-Sector-Africa.pdf> accessed on 18 October 2021.

⁷⁸ AGS 'Needs and challenges in the Zambian (small scale) mining sector' available at <https://agsprogramme.org/app/uploads/2021/05/Needs-and-Challenges-in-the-Zambian-Mining-Supply-Chains-report.pdf> accessed on 26 November 2021.

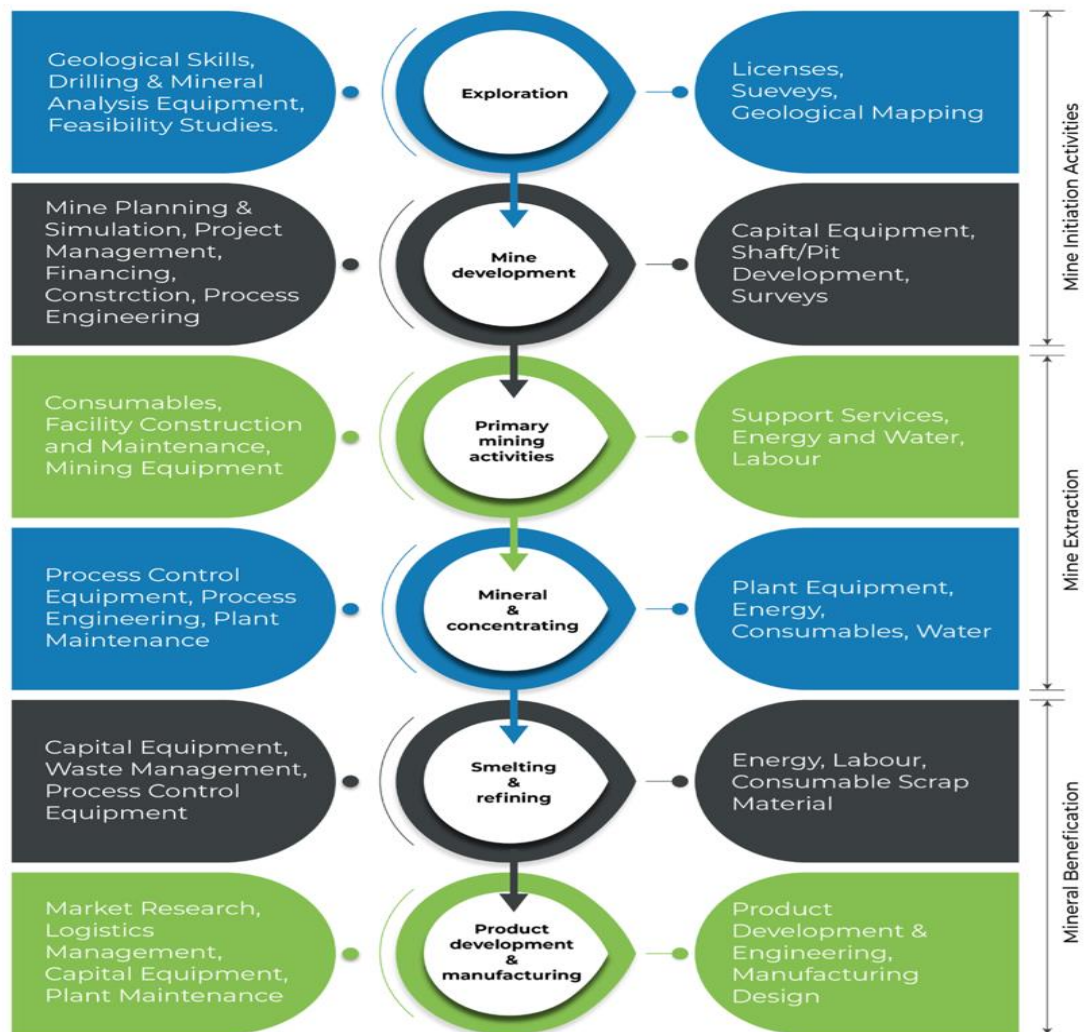


Figure 2 above is an illustrative diagram outlining the different actors and processes involved in the mining value chain in Zambia. It shows that the mining value chain is split over three distinct stages – initiation, extraction, and beneficiation. Initiation involves the administrative aspect of licensing, planning, and surveying the mining area. The actual mining is done during the extraction stage whereby the mineral resource is extracted from the earth. The usable component of the mineral resource is separated from the non-metallic component during the beneficiation stage. During beneficiation, the mineral resource is chemically refined and transformed to give it value in the form of a more finished product.

Within the mining value chain, there are different types of linkages between the extractives sector and other economic sectors.⁷⁹ This research is confined to fiscal linkages, consumption linkages, production linkages, and horizontal linkages which cover the life cycle of an extractives project from initiation to beneficiation.⁸⁰ Fiscal linkages represent the revenue generated from the extractives sector through taxes and mineral royalties.⁸¹ Consumption linkages are represented in terms of income created in the extractives sector utilised to purchase outputs from other sectors.⁸²

Production linkages comprise downstream and upstream activities in the mineral extractives sector. Down-stream (forward) linkages are created in the production and beneficiation stage – enhancing the manufacturing sector.⁸³ The local processing of minerals within the country of extraction generates more revenue through the trade of higher-value products, as opposed to low-grade unrefined products.⁸⁴ In contrast upstream (backward) linkages relate to locally sourced goods and services utilised as inputs to the sector.⁸⁵ Horizontal linkages incorporate the capacity of the sector to develop other sectors or services.⁸⁶ This is achieved through skills and technology transfer as well as capacity building and the development of infrastructure.

In the development process, linkages perform multiple functions such as creating a competitive advantage, enhancing risk-sharing capabilities, and promoting economic diversification.⁸⁷ For instance, given the operational presence of multinational corporations (“MNCs”) in different countries, subcontracting local businesses is one of the main ways through which skills and technology are transferred. Potentially, these and more benefits from the extractives sector could be utilised to develop other industries in the broader economy. The next section discusses the evolution of governmental attitudes and policies on linkages and value addition in the Zambian extractives industry.

3.2. Generations of attitudes towards value addition and linkages in the Zambian economy

Before British involvement in Zambia (formerly known as Northern Rhodesia under British Colonial rule), mining activities were widespread in the Copperbelt province and were mostly conducted on a small scale using rudimentary techniques

⁷⁹ See Masuma Farooki and Raphael Kaplinsky *Promoting diversification in resource-rich economies* (University of Cape Town, Making the Most of Commodities, 2011); Bastida and Lipschutz *Minerals Taxation and Sustainable Development* (2012 CEPMLP Mining Seminar); Albert Hirschman *Essays in Trespassing: Economics to Politics and Beyond* (1981); Oliver Schwank *Linkages in South African Economic Development: Industrialisation without Diversification?* (2018).

⁸⁰ Ana Elizabeth Bastida ‘From Extractive to Transformative Industries: Paths for Linkages and Diversification for Resource-Driven Development’ (2014) 27 *Mineral Economics* 73-87.

⁸¹ Bastida (2014) 74.

⁸² Bastida (2014) 74.

⁸³ African Progress Panel (2013) note 28.

⁸⁴ United Nations Economic Commission for Africa (UNECA) ‘Minerals and Africa’s development - International Study Group for the Review of African Mining Regimes’ available at <https://repository.uneca.org/handle/10855/21569> accessed on 18 October 2021.

⁸⁵ *Ibid.*

⁸⁶ Oshionebo (2018) note 30.

⁸⁷ J Humphrey & H Schmidt ‘Governance in Global Value Chains’ (2001) 32 *IDS Bulletin* 19-29.

and simple processing methods.⁸⁸ The native settlers used these minerals to make ingots for trade, and other basic farming tools and weapons.⁸⁹ Evidence showing that these small-scale activities were widespread demonstrates that mining was regarded as a useful activity, which constituted the base for other commercial activities. Additionally, history shows that traditional rulers supervised the mining operations in their kingdoms, and their subjects were exploited for their labour.⁹⁰ Traditional rulers reasoned that they could generate revenue using taxes and trade in these minerals with other kingdoms. Similarly, this reasoning was adopted in the Mining Strategy that was recommended by the World Bank in the 1990s.

Post-1924, when Zambia was declared a protectorate of Britain, extensive exploration activities were undertaken by prospecting companies utilising concessions.⁹¹ The pre-colonial history of a traditional mining sector was altered in many Zambian societies.⁹² There was an increase in investments, driven by transnational companies in America and South Africa.⁹³ During this time, the concession holders invested heavily in equipment and technology to transform their mining operations.⁹⁴ This political economy of mining on a large scale using technology shaped the main idea of extractives-based development in Zambia. Consequently, mass employment in areas away from mining communities was not prioritised.⁹⁵ At the time, concession holders were only involved with the administration of the colonial government, and it is also probable that the terms of their investment were largely dictated by the need to maximise profits from the prevailing high prices of copper. Little information is available to demonstrate specific considerations of economic growth that influenced the colonial administration's considerations in granting a concession.

At the time Zambia gained independence in 1964, it inherited an established mining economy built on large-scale copper mining and production.⁹⁶ Towns in which copper was extracted were transformed into urban communities with massive infrastructure development such as roads, hospitals, and schools, whilst non-mining towns were deficient in basic infrastructure and had visibly poor economic growth.⁹⁷ In efforts to transform this situation, the "Copperbelt industrial complex" policy was adopted and implemented by the Zambian government.⁹⁸ Through this policy, the government acquired a 51 percent portion of the country's main copper-producing companies. These two companies were nationalised and merged to form the Zambia Consolidated Copper Mines (ZCCM).⁹⁹ The government also adopted a policy of

⁸⁸ J. Sikamo, A. Mwanza and C. Mweemba 'Copper mining in Zambia – history and future' (2016) 116:6 *Journal of the Southern African Institute of Mining and Metallurgy*.

⁸⁹ Ibid.

⁹⁰ Miles Larmer At the crossroads: Mining and Political Change on the Kantanganese-Zambian Copperbelt (Oxford Handbooks Online, 2016).

⁹¹ D Limpitlaw 'Nationalization and Mining: Lessons from Zambia' (2011) 111 *The Journal of the Southern African Institute of Mining and Metallurgy* 737-739.

⁹² Larmer (2016) note 89.

⁹³ Larmer (2016) note 89.

⁹⁴ Alastair Fraser 'Introduction: Boom and Bust on the Zambian Copperbelt' in Alastair Fraser and Miles Larmer (eds) *Zambia, Mining and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (2010) 1-30.

⁹⁵ Limpitlaw (2011) 738.

⁹⁶ Alastair (2010) note 93.

⁹⁷ Themba Chirwa and Nicholas Odhiambo 'Macroeconomic Policy Reform and Economic Growth in Zambia' (2016) 35:2 *EuroEconomica*.

⁹⁸ Alastair (2010) note 93.

⁹⁹ Fraser Lungu 'The Historical Role of Copper Mining in the Zambian Economy and Society' available at https://sarpn.org/documents/d0002403/3-Zambia_copper-mines_Lungu_Fraser.pdf accessed on 16 October 2021.

humanism underpinned by a sequence of five-year National Development Plans that modelled development based on the anticipated profits from the ZCCM.¹⁰⁰ For instance, the Master Agreement for nationalisation signed by the government and the two mining companies expressly stated that the newly formed ZCCM would be run on a commercial basis to optimise copper production and profits.¹⁰¹ The outcome was that the government had confined the developmental agenda to profit-making first, and development later.

This policy shaped the State's expectations of the mining industry. Before the country gained independence in 1964, privately-owned mining companies developed the surrounding towns from which copper was extracted – by building hospitals, roads, and schools, as well as recreational centres. At independence, the mining industry was largely capital-intensive and could not support further employment generation.¹⁰² The philosophy of humanism was adopted to allow more Zambians to participate in the economy, and thus foreign-owned companies were confined to operate in certain towns.¹⁰³ Human capital development was a major component of humanism, and profits from mining were utilised to improve the education system and to boost productivity in the agricultural sector.¹⁰⁴

The government also adopted a policy of 'Zambianization' to recruit more Zambians in technical and management positions in the mining industry.¹⁰⁵ Studies indicate that there was an increase in the number of Zambians employed in the industry, but the top management positions were still mostly occupied by non-Zambians.¹⁰⁶ To illustrate, the company structure of Nchanga Consolidated Copper Mines (one of the two major copper-producing companies in which the government claimed a major stake at independence) is apposite. Every division of the company had a general manager and other managers directly ranking second to the general manager.¹⁰⁷ All general managers and those second in rank were non-Zambians, and Zambians did not make technical-production decisions in these nationalised companies.¹⁰⁸ Resultingly, the nationalised companies were still dependent on foreign expertise to structure productivity and efficiency in the major copper mines. This situation was reminiscent of the pre-independence FDI decisions that valued extraction and profits from exports over local production and beneficiation.

Additionally, through these nationalised mines, the government controlled all forms of investment in the mining sector and hoped to draw other foreign companies to invest in the sector as a majority shareholder.¹⁰⁹ The governments' strategy was to encourage foreign companies to invest in new processing plants to increase production and diversification in other minerals, whilst these companies accepted lower profit margins.¹¹⁰ With a target of increasing the country's share of the

¹⁰⁰ R M Auty 'Mismanaged Mineral Dependence' (1991) 17:3 *Resources Policy* 170-183.

¹⁰¹ Ronald T. Libby and Michael E. Woakes Nationalization and the Displacement of Development Policy in Zambia (1980) 23:1 *African Studies Review* 33-50.

¹⁰² Kenneth Kaunda *Humanism in Zambia* (1974).

¹⁰³ *Ibid* at 21.

¹⁰⁴ Libby and Woakes (1980) note 100.

¹⁰⁵ Kenneth Kaunda *Address to the UNIP National Council* (1968).

¹⁰⁶ Libby and Woakes (1980) note 100.

¹⁰⁷ *Ibid* at 41.

¹⁰⁸ *Ibid* at 40.

¹⁰⁹ *Mindeco Guidelines for Future Zambian Mining Policy – Investment, Legislation and Participation* (1972)

¹¹⁰ Republic of Zambia *Second National Development Plan* (1971) 23.

global copper market and maintaining high levels of supplies at competitive prices,¹¹¹ the government as the main investor had to invest more to achieve these production goals.

Closely linked to this thinking, was the governments' philosophy to support Zambian citizens by creating mining communities and developing social infrastructure to especially improve the lives of people in mining towns.¹¹² The government aimed to create self-sustaining communities by subsidising the cost of living.¹¹³ In essence, this policy was mostly focused on creating fiscal linkages, and utilising export earnings revenue to support the livelihood of Zambian citizens. The policy relied on the favourable prices of copper, which at the time averaged between US\$5, 653 per metric ton in a country producing 750,000 tonnes on average per year.¹¹⁴ However, the success of the policies was short-lived when copper prices fell drastically and the share of production on the world market declined from 12.1 per cent in 1969 to approximately 8.1 per cent in 1977. Consequently, government revenue from the mining sector diminished from 71 percent in 1965 to 13 percent in 1975 – which led to a fiscal deficit, increased public expenditure, and a sharp decline in economic growth.¹¹⁵

This critical situation worsened until 1991 when a new government was elected. In agreement with the International Monetary Fund ('IMF'), the new government privatised the mining sector to transition from a strictly controlled economy to a liberated market economy that could compete globally.¹¹⁶ Under the United National Independence Party ("UNIP") government, the State as the main investor focused on controlling mineral diversification and the forms of foreign investment in the mining sector. This responsibility as the main investor gave the government a heavy financial responsibility to support the industry with minimal private investor support. However, selling and transferring control of the enterprises that were run by the State to private owners through the process of privatisation¹¹⁷ lessened the financial burden on the government to shelter the industry from losses. During the privatisation process, the attitude of the government towards generating further economic benefits from minerals was propelled by the need to first attract secure private investment in the mining sector. In line with the export base theory discussed in the second section of this Chapter, it is arguable that the potential for linkages beyond tax revenue, employment creation, and export income was not widely explored by the government even during the re-privatisation process of the mines. The next section of the chapter explains how the present policy framework is tailored towards optimising different opportunities for value addition.

¹¹¹ Republic of Zambia *First National Development Plan* (1966) at 31.

¹¹² Kenneth Kaunda *Address to the UNIP National Council held at Matero Hall* (1969).

¹¹³ *Ibid.*

¹¹⁴ Muna Ndulo and M. Sakala *Stabilization Policies in Zambia: 1976-1985 Working Paper No. 13* (World Employment Programme Research, 1987).

¹¹⁵ *Ibid.*

¹¹⁶ The transition to a free-market economy is widely documented in the literature. See B.A Bull, M Jerve and E Sigvaldsen *The World Bank's and IMF's use of Conditionality to Encourage Privatization and Liberalization: Current issues and practices* (Oslo Conditionality Conference, 2006); Rights and Accountability in Development 'Privatisation in Zambia: What it means for the majority' available at <https://www.raid-uk.org/sites/default/files/zambia-factsheets.pdf> accessed on 17 October 2021;

¹¹⁷ Ndulo and Sakala (1987) note 114.

4. Policy paradigm to integrate the minerals extractives sector within Zambia's strategies to create a linkage economy

The Constitution and supporting legislation outline the legal framework of the country's main objectives for extractives-based development. The Constitution obliges the government to create an economic environment that encourages "individual initiative and self-reliance".¹¹⁸ The government is also mandated to promote citizens' economic empowerment and to assist citizens to contribute to sustainable economic growth.¹¹⁹ Also, the primary mining legislation provides that citizens are also guaranteed equitable access to mineral resources, and the chance to benefit from the development of mineral resources.¹²⁰

The National Long-term Vision 2030: A prosperous Middle-income Nation by 2030 ("Vision 2030") outlines Zambia's key objectives of economic diversification and key sector links. Emphasis is placed on creating a self-sustaining economy, with steady social and cultural systems that encourage human capital development.¹²¹ Additionally, the government aims to create "strong and cohesive industrial linkages" in the various economic sectors.¹²² The Vision 2030 document also identifies steps to be taken in creating the enabling environment for economic diversification. Particularly, the government commits to enhance regulation and supervisory oversight in the mining sector and to create a fair market system along the supply chain for certain minerals.¹²³

The Mineral Resources Development Policy 2013 ("Minerals Policy") aligns with the Vision 2030 and emphasises that the mining sector is not meant to operate in an enclave.¹²⁴ Mineral Policy is defined as: "the sum of government decisions and actions that influence the mineral system, and how the system itself affects the economy and society in general".¹²⁵ In the Zambian context, this definition entails that the Minerals Policy guides the steps taken by the government regarding the minerals extractives sector. The Minerals Policy highlights the government's aims to develop a strong extractives sector with a clear connection to the domestic economy – in the sense that it encourages local entrepreneurship, creates employment opportunities, and supports value addition.¹²⁶ Particularly, the government has also committed to promoting different forms of mineral exploration and ensuring that the benefits of mining are spread across the country.¹²⁷ At the time of its introduction, the Minerals Policy provided that the mining legislation would be amended to encourage mineral

¹¹⁸ Article 9(1) of the Constitution of Zambia.

¹¹⁹ Article 9(2) of the Constitution of Zambia.

¹²⁰ Section 4(1) of the Mines and Minerals Development Act No. 11 of 2015 ("Mines Act 2015").

¹²¹ The National Long-Term Vision 2030 available at https://www.mndp.gov.zm/wp-content/uploads/filebase/vision_2030/Vision-2030.pdf accessed on 19 October 2021.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Mineral Resources Policy 2013.

available at <http://www.azmec.co.zm/downloads/acts/2013%20Mineral%20Resources%20Development%20Policy%20Zambia.pdf> accessed on 19 October 2021.

¹²⁵ Hudson Mtegha *Towards a Minerals Policy for the Southern African Development Community (SADC)* (Unpublished PhD thesis, 2005)

¹²⁶ Ibid at 6.

¹²⁷ Mineral Resources Policy (2013) at 7.

processing and local beneficiation by mining rights holders.¹²⁸ The Minerals Policy also stipulates that the government will collaborate with associations to encourage both large-scale prospecting and mining and small-scale mining.¹²⁹ In relation to the integration of the extractives sector in the broader economy, the government has committed to promoting “linkages between mining and agriculture, mining and tourism, and mining for the value-adding processing industries”.¹³⁰ Sensitising the public on opportunities to create these linkages is also listed as a priority for the government.¹³¹

The Seventh NDP sets out the implementation plan for the Vision 2030. Recognising that development is interlinked between the different economic sectors, the Seventh NDP sets out a coordinated approach to diversification.¹³² Specifically, the Seventh NDP emphasises an approach to enhance value addition to mineral products, and to enhance the capacity of other local businesses to participate in the mineral value chain.¹³³ It also prioritises regulatory support to promote the contribution of economic growth from the extractives sector to other economic sectors.¹³⁴ Developing technology capacity, promoting access to finance, and strengthening the extractives value chain are also stated as specific development strategies for diversification.¹³⁵

At a regional level, Zambia is a party to the African Union (“AU”) whose constitutive States subscribed to the Africa Mining Vision (“AMV”) as a blueprint for mineral development.¹³⁶ The AMV reiterates that mineral resource-based investments are important in creating economic and social linkages¹³⁷, and is a departure from the World Bank’s 1992 Strategy for African Mining, which mainly emphasises fiscal linkages through tax and foreign exchange.¹³⁸ However, the success of the objectives contained in the AMV is not automatic, and emphasis has been placed on the need to integrate the AMV at the country level through “Country Mining Visions” (CMV).¹³⁹ Zambia does not have a published CMV, and the key objectives of the AMV are not aligned in domestic legislation.

Considering the legislation and policies identified above, the Zambian government has adopted strategies to implement the four types of linkages identified in this research (production, fiscal, consumption, and horizontal). By promoting industrialisation and enhancing domestic procurement, the expectation is that production linkages will be created between the extractives sector and other sectors. Production linkages are also implemented through local content requirements. Specifically, the Mines and Minerals Development Act mandates the participation of citizens in mineral development

¹²⁸ Mineral Resources Policy (2013) at 8.

¹²⁹ Mineral Resources Policy (2013) at 9.

¹³⁰ Mineral Resources Policy at 10.

¹³¹ *Ibid.*

¹³² The Seventh National Development Plan available at <https://www.mndp.gov.zm/wp-content/uploads/2018/05/7NDP.pdf> accessed on 19 October 2021.

¹³³ The Seventh National Development Plan at 69.

¹³⁴ The Seventh National Development Plan at 70.

¹³⁵ *Ibid.*

¹³⁶ AMV – Africa Mining Vision available at <https://au.int/en/ti/amv/about> accessed on 19 October 2021.

¹³⁷ Africa Mining Vision 2009’ available at <https://repository.uneca.org/bitstream/handle/10855/23743/b11839910.pdf?sequence=1&isAllowed=y> accessed on 20 October 2021.

¹³⁸ Uongozi Institute (2021) note 6.

¹³⁹ Uongozi Institute (2021) note 6.

through increased employment creation, and increased procurement opportunities.¹⁴⁰ Additionally, the government also envisages the creation of fiscal linkages through strategies to diversify the export of non-traditional minerals like gold and gemstones that are contained in the Minerals Policy. By sensitising and connecting citizens that are engaged in other businesses such as agriculture to opportunities for growth in the extractives sector, the government also implements the creation of horizontal linkages.

5. Conclusion

Since pre-colonisation, the extractives industry has played an important role in Zambia's economy. This chapter revealed that the different ideas of policymakers in the years after independence in 1964 framed the context of extractives-based development. In certain economic contexts, government policies that focused on attracting foreign investment restrictively perceived opportunities for extractives-based development in terms of employment benefits, taxes, and export revenues. However, new opportunities to create value addition through linkages between the extractives sector and other sectors have been recognised. Creating a conducive environment to foster these links is at the core of the various developmental outcomes to integrate the extractives sector within a multi-sectoral coordinated economy. The need to create this environment raises the issue of how the different stakeholders in the sector coordinate their involvement in the process. The next chapter analyses the role and impact of MNCs as key stakeholders in the process of creating value addition in Zambia's mining value chain.

¹⁴⁰ Section 22 of the Mines Act 2015.

CHAPTER THREE: ILLEGAL TAX PRACTICES BY MULTINATIONALS IN THE MINERAL RESOURCES EXTRACTIVES INDUSTRY

1. Introduction

The previous chapter discussed the significance of the mineral resources extractives industry in an integrated linkage economy. Drawing on the existing policy framework for mineral development, chapter two showed that there are different actors whose coordinated efforts are key in integrating the mineral resources sector with other sectors in the economy. This chapter expands on the significance and the role of Multinational Companies (“MNCs”) as key actors in the industry. MNCs dominate the twenty-first-century mineral resources development network.¹⁴¹ This dominance is attributed to the incongruity between the location of mineral resources and their final market.¹⁴² By the estimations of the United Nations Conference on Trade and Development (“UNCTAD”), cross-border transactions within MNCs constitute one-third of world exports.¹⁴³ Not only does this show the contribution to national economies made by MNCs, but it also highlights the magnitude of the potential harm they can cause. Such harm is typically manifested in the widespread problem known as resource revenue leakage.¹⁴⁴

This chapter unravels the potential abusive tax practices of MNCs, by identifying the structures in the existing legal framework that are manipulated for this purpose. By illustrating the many ways MNCs establish a global economic presence, the chapter sets the scene to illuminate the importance of transnational trade in many modern economies.

The next section of this chapter shows how MNCs are affected by the cross-application of laws in different jurisdictions. By analysing the legal gaps in the application of bilateral tax treaties, section three of the chapter appraises both the value of tax treaties and the incentives for illicit financial flows (“IFFs”) contained in their legal structure. Section four of the

¹⁴¹ Jane Korinek *The Mining Global Value Chain* (OECD Trade Policy Papers, 2020) available at <https://www.oecd-ilibrary.org/docserver/2827283e-en.pdf?expires=1637041452&id=id&accname=guest&checksum=54C21F1846978A2FCB55CD900AF61133> accessed on 15 November 2021.

¹⁴² Philip Daniel *et al* ‘Introduction and overview’ in Philip Daniel *et al* (eds) *International Taxation and the Extractive Industries* (2017) 1.

¹⁴³ Lorraine Eden ‘The Arm’s Length Standard: Making it work in a 21st-century World of Multinationals and Nation States’ in Thomas Pogge & Krishen Mehta (ed) *Global Tax Fairness* (2016) 153-173; Philip Daniel *et al* (eds) in *International Taxation and the Extractive Industries* state that in particular resource-rich countries such as Ghana, Liberia, Peru and Trinidad and Tobago, activity by MNCs makes up the bulk of fiscal receipts from private business activity in the extractives sector.

¹⁴⁴ Luhende explains that in an ideal situation where the tax policy, the tax laws and tax administration are coherent, this makes it possible for the government to predict the likely tax revenues from the extractives industry based on estimated revenues, rates of production and profits. Thus, the prevalence of certain factors which impede this ability, results in the loss of tax revenues. See Boniphace Luhende *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).

chapter then discusses the concept of anti-avoidance and explains how anti-avoidance rules can be abused to reduce the tax liability of MNCs. It covers an analysis of the concept of transfer pricing, and its importance in revenue collection. The section also discusses corporate reorganisation and revenue derived from the ownership of intangible assets, as well as MNCs' capital structures and rules prohibiting thin capitalisation.

2. The global economic presence of MNCs

The impact of growing MNCs is seen in the increase in outward foreign direct investment (FDI) from the majority of the developing countries in Africa.¹⁴⁵ An estimation of an increase per decade is as follows: from "USD60 billion in 1980 to USD129 billion in 1990, to USD869 billion in 2000, and an excess of USD1 trillion in 2004".¹⁴⁶ These figures and more¹⁴⁷ serve as vindication that there are certain strategies adopted by these MNCs which aid them in achieving this elevated status in the global economy.

For MNCs, an interlinked network is crucial to establishing a presence in any national economy.¹⁴⁸ This network is largely facilitated by globalisation and the rise in trade volume, mergers and acquisitions, joint ventures, and other strategic agreements.¹⁴⁹ For instance, Cemex is considered the largest MNC in Mexico, and by far the most interconnected in several economies across the world.¹⁵⁰ Cemex is the third-largest producer and trader of cement globally. It has been considered the perfect example of an MNC that took advantage of advances in technology to enhance its global presence.¹⁵¹ This global expansion was facilitated using an advanced GeoPositioning Satellite (GPS) to monitor the

¹⁴⁵ Change in global patterns of industrial development has led to new opportunities for investment by MNCs in the developing world and for the change in status from being "passive observers" to now "dragon multinationals". See H.W.C Yeung *The globalization of business firms from emerging economies* (2000). For discourse on the ideology of development and 'developing countries' see also R.E Gordon and J.H Sylvester, *Deconstructing Development*, 22 *Wisconsin International Law Journal* (2004); G. Esteva, "Development", in W.Sachs (ed.) *The Development Dictionary: A guide to knowledge as power* (London & New York: Zed Books, 1992).

¹⁴⁶ United Nations Conference on Trade and Development 'World Investment Report 2004: The shift towards services' available at https://unctad.org/system/files/official-document/wir2004_en.pdf accessed on 30 August 2021.

¹⁴⁷ The International Labour Organisation estimates that the activities of MNCs account for a third of total global output. See generally OECD 'Multinational enterprises in the global economy: heavily debated but hardly measured' available at <https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf> accessed on 3 September 2021; International Labour Organisation 'Statistics on the contribution of multinational enterprises to inclusive and sustainable economic growth, full and productive employment and decent work for all' available at https://www.ilo.org/stat/Publications/WCMS_635202/lang-ja/index.htm accessed on 1 September 2021.

¹⁴⁸ See generally John Matthews 'Dragon multinationals: New Players in 21st century globalization' 23:1 *Asia Pacific journal of management* (2006) 5-27; John Kyove *et al* 'Globalization Impact on Multinational Enterprises' (2021) 2 *World review* 216-230; J.J Duran & F Ubeda 'The investment development path of newly developed countries' (2005) 12 *International Journal of Economics* 123-137; A Amighini *et al* 'Multinational enterprises from emerging economies: what theories suggest, what evidence shows. A Literature review' (2015) 42 *Economics and Politics* 343-370.

¹⁴⁹ See generally World Trade Organisation Press Releases: Global Trade Growth Loses Momentum as Trade Tensions Persist, Press/837 available at https://www.wto.org/english/news_e/pres20_e/pr862_e.htm accessed on 20 August 2021.

¹⁵⁰ Cemex used strategic acquisitions in different stock markets around the world, which enabled it to develop an interconnected global network. See generally John A Matthews 'Dragon Multinationals: New players in 21st century globalization' (2006) 23 *Asia Pacific Journal of Management* 5-27.

¹⁵¹ *Ibid* at 16.

delivery of cement globally – before other established companies were able to do so.¹⁵² Through acquisitions of stocks such as shares in various companies, Cemex was able to expand its economic presence in different countries.

In the extractives industry, the globalisation of MNCs is driven by two primary factors. The first is characterised by push factors such as market restrictions and geopolitics that drive MNCs out of their existing more favourable markets. Secondly, pull factors such as technological innovations and market incentives attract MNCs to a particular market.¹⁵³ These factors are also not chosen and isolated randomly, but it is generally understood that there are underlying business strategies that influence this organisational expansion.

These factors are also considered in light of the unique features of the mineral resources extractives industry. The remainder of this chapter adds to the premise of this research that MNCs have a unique position in the mining value chain that is manipulated to perpetuate the problem of IFFs. Various strategies utilised by MNCs are discussed below.

3. The role of MNCs in bilateral tax treaties

Where comparable taxes are imposed in at least two countries on a single taxpayer in respect of a single subject matter and over a similar assessment period, the resulting situation is double taxation.¹⁵⁴ Double taxation refers to the resulting situation in which a taxpayer's income is taxed in two separate jurisdictions both claiming taxing rights, based on the taxpayer's residence status, citizenship status, or the origins of the income.¹⁵⁵ Though a country can prevent double taxation using legislative or policy measures, governments are inclined to implement bilateral agreements to also promote cross-border foreign investment.¹⁵⁶ Tax treaties also mitigate the effects of tax avoidance and the problem of tax competition by restricting tax avoidance mechanisms.¹⁵⁷ Given this broad range of aims and objectives sought to be achieved by these treaties, several names have been used to describe them.¹⁵⁸ The following section analyses the standard language used in bilateral tax treaties concluded by Zambia and the effectiveness of these treaties in the domestic application context.

¹⁵² Matthews (2006) note 148.

¹⁵³ See Gao Shanguan Economic Globalization: Trends, risks and risk prevention available at https://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf accessed on 4 September 2021; World Economic Forum 'How globalization is changing innovation' available at <https://www.weforum.org/agenda/2018/08/globalisation-has-the-potential-to-nurture-innovation-heres-how/> accessed on 4 September 2021; United Nations Conference on Trade and Development 'Globalization for Development: the international trade perspective' available at https://unctad.org/system/files/official-document/ditc20071_en.pdf accessed on 5 September 2021.

¹⁵⁴ Baistrocchi Eduardo A *Global Analysis of Tax Treaty Disputes* (2017).

¹⁵⁵ *Ibid* at 10.

¹⁵⁶ Economic activity in one country could potentially affect the level of foreign investment in another country. The risk of double taxation of income poses a threat to cross-border investment and so governments seek to protect their respective industries. See P. Egger, M. Larch, M. Pfaffermayr and H. Winner 'The impact of endogenous tax treaties on foreign direct investment: theory and evidence' (2006); 39 *Canadian Journal of Economics* 901-931; R.L Doernberg *International Taxation in a Nutshell* (2004).

¹⁵⁷ Tax competition is the rivalry between different countries in seeking to make their respective countries more attractive than another country for investment purposes. See Philip Daniel et al (2017) note 141.

¹⁵⁸ They have been termed "double taxation agreements", "capital tax treaties" or "treaties covering the taxation of investment and income.

3.1 Manipulation of the revenue tax base using bilateral tax treaties

The direct investment of MNCs contributes to economic development and creates an opportunity for expansion of the revenue base.¹⁵⁹ This is because mineral resources play an important role in various economic sectors.¹⁶⁰ However, whilst there are unique opportunities for revenue collection from MNCs, there are also unique challenges such as cross-jurisdictional profit shifting and potential misuse of the international network.¹⁶¹

Tax treaties harmonise the tax treatment of MNCs internationally.¹⁶² Being part of a globalised network, MNCs are considered the largest beneficiaries, and sometimes benefactors of tax treaties, as their trans-national activities bring them within the jurisdiction of multiple tax authorities. This is because the operation of tax treaties is typically aligned with domestic law considerations of the economy in which the MNC operates.¹⁶³ In Zambia, the law allows the President to enter double taxation agreements (“DTAs”) which are intended to mitigate double taxation and to create a framework for tax authorities to assist each other and cooperate to determine whether an entity is liable for an exemption on this basis.¹⁶⁴

In many developing countries, the United Nations Model Double Taxation Convention between Developed and Developing Countries (“UN Model Convention”) and the Organisation for Economic Co-operation and Development Model Tax Convention on Income and Capital (“OECD Model Convention”) are used as the ideal legal basis for tax treaties.¹⁶⁵ The main difference between the two is that the OECD Model Convention emphasises residence-based taxation, while the UN Model emphasises the principle of source-based taxation. Residence-based taxation is premised on the notion that the income of persons domiciled or ordinarily resident in the country is subject to that specific country’s taxing rights.¹⁶⁶ The definition of a resident is under the tax treaty, or in default, the classification under domestic law. Conversely, source-based taxation gives taxing rights to a country because it provides the opportunity to generate that income.¹⁶⁷ Neither the

¹⁵⁹ United Nations Handbook on Selected Issues for Taxation of Extractives available at *article viewer | United Nations iLibrary (un-ilibrary.org)* accessed on 21 August 2021.

¹⁶⁰ The phenomenon of increasing energy-related needs highlights not only the vast investment potential, but also illustrates the serious challenges facing the economic sector coordinators. Minerals are important particularly in agriculture, construction, transport and infrastructure development, and medicine. The International Energy Agency for instance predicts that the rate of renewable energy supplies will likely surpass the reserves of other conventional fuels. The Agency also predicts that to meet these increasing needs, an approximate amount of USD68 trillion of new investment will be required. See generally International Energy Agency ‘World Energy outlook 2016’ available at *International Energy Outlook 2016 (eia.gov)*, accessed on 24th August 2021.

¹⁶¹ Sebastian Bustos et al ‘Challenges of monitoring tax compliance by multinational firms: evidence from Chile’ available at <https://gabriel-zucman.eu/files/BPVZ2019.pdf> accessed on 21st January 2022.

¹⁶² United Nations Handbook on Taxation of Extractive Industries, page 32.

¹⁶³ See generally IBFD Tax Treaties and Domestic Law Vol 2 (2006); Brian J Arnold ‘Overview of Major Issues in the Application of Tax Treaties’ available at *Microsoft Word - Paper 1-A, Overview of Major Issues in the Application of Tax Treaties.docx (un.org)*, accessed on 24th August 2021.

¹⁶⁴ Section 74(1) of the Income Tax Act provides for double taxation agreements and mutual assistance between authorities.

¹⁶⁵ Oladiwura Ayeyemi Eytayo-Oyesode ‘Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform’ (2019) 13 *Law and Development Review*.

¹⁶⁶ See generally Philip Daniel, M Keen, and Charles McPherson *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010); Bastiaan Starink ‘Source versus residence state taxation of cross-border pension payments: Trouble shared is trouble halved’ (2016) 44(1) *Intertax* 6-13; PMRC Policy Analysis ‘Zambia’s Double Taxation Agreements: Towards optimized tax revenue collection’ available at *Policy-Analysis-Double-Taxation-Agreements-.pdf (pmrczambia.com)* accessed on 24th august 2021.

¹⁶⁷ Paul Mullins ‘International Tax Issues’ in Philip Daniel et al *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010) 384.

UN Model nor the OECD Model have specific provisions for rules of application of the treaty, as this is reserved as a matter to be dealt with under domestic law.¹⁶⁸

The various double taxation agreements currently existing between Zambia and other countries¹⁶⁹ follow either the OECD or the UN Model convention of negotiations. A perusal of the wording in the DTA signed between Zambia and the United Kingdom ('the UK DTA') (being the latest in time, it will be used for illustrative purposes¹⁷⁰) shows a merger of provisions from both the OECD and UN Model Conventions. The UK DTA is designed in favour of the residence principle of taxation – meaning that a contracting party reserves taxing rights on a resident.

There are various issues faced in applying tax treaties¹⁷¹, however, a conclusive discussion of these is beyond the scope of this dissertation. In this section, the principal legal issue relating to the application of tax treaties in the domestic law context is discussed. The issue mainly manifests in limitations faced by the tax authority in implementing tax treaties because the treaty itself broadly incorporates substantive law and does not expressly address the specific issues that arise in the application of tax treaties to the extractive industry.

First, because the wording in tax treaties is limited to issues of substantive law, there is a variance in the methods of implementation at national level.¹⁷² This is because the status of tax treaties is a question of law, determined by the relationship of international law vis-à-vis national law.¹⁷³ Thus, where there is inconsistency, domestic law prevails to the extent of the inconsistency. However, in some countries, domestic laws are clear on the hierarchy.¹⁷⁴ In Zambia, Article 1(2) of the Constitution explicitly states that the Constitution is the supreme law of the land, thus international law treaties

¹⁶⁸ Articles 10(2) and Article 11(2) of both the UN Model and OECD Model, dealing with the limitations on the rate of source-country tax on dividends, interest, and royalties, include this statement:

“The competent authorities of the Contracting states shall by mutual agreement settle the mode of application of these limitations”.

¹⁶⁹ International Tax Treaties 'Zambia' available at *International Tax Treaties (internationaltaxtreaty.com)* accessed on 24th August 2021; see also Policy Monitoring and Research Centre 'PMRC Policy Analysis: Zambia's Double Taxation Agreements – Towards optimized tax revenue collection' available at *Policy-Analysis-Double-Taxation-Agreements-.pdf (pmrczambia.com)* accessed on 20 August 2021.

¹⁷⁰ United Kingdom/Zambia Double Taxation Agreement and Protocol (2014).

¹⁷¹ The use of bilateral agreements has led to the characterisation of an “international tax regime” whose primary purposes are to reduce double taxation and to avoid under taxation of transnational entities.

¹⁷² Brian J Arnold 'Overview of Major Issues in the Application of Tax Treaties' available at *Microsoft Word - Paper 1-A, Overview of Major Issues in the Application of Tax Treaties.docx (un.org)* accessed on 30 August 2021.

¹⁷³ Article 26 of the Vienna Convention on the Law of Treaties (VCLT) states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Article 27 of the Vienna Convention also provides that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. However, certain countries have a “treaty override” provision in domestic law, meaning that a country can designate that the domestic law will automatically prevail over the provisions of any treaty. See generally International Monetary Fund 'Tax Policy: Designing and Drafting a Domestic Law to Implement a Tax Treaty' available at *Tax Policy: Designing and Drafting a Domestic Law to Implement a Tax Treaty; by Kiyoshi Nakayama; IMF Technical Notes and Manuals TNM/11/01; April 11, 2011* accessed on 24th August 2021.

¹⁷⁴ For instance, in the United States Constitution, it is if laws and treaties rank similar in hierarchy. Article VI (cl.2) of the US Constitution provides that, “this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”. The US Internal Revenue Code also explicitly states that neither the treaty nor the domestic law shall have preferential status.

are automatically subservient.¹⁷⁵ *Fellow Nanzaluka v Zambia Sugar Plc* provides that international agreements between the Zambian government and other States are not *ipso facto* binding in Zambia.¹⁷⁶ However, as defined by the Ratification of International Agreements Act, tax treaties are classed as “bilateral agreements” and not as international agreements, and they are therefore binding without ratification by parliament.¹⁷⁷ Tax treaties, in their original form at accession, have the force of domestic law without any further legislative intervention.

Article 7 of the UK DTA states that profits of an enterprise from one contracting state can only be taxed in another state if the enterprise has a permanent establishment in either Zambia or the UK.¹⁷⁸ Therefore, MNCs in Zambia’s mineral extractives industry are taxed by the Zambian Revenue Authority (“ZRA”) for their production and use of goods and services if they have a permanent establishment.¹⁷⁹ Article 5 of the UK DTA further states that an entity is regarded as having a permanent establishment within a contracting state if it conducts business for a period longer than six (6) months within that state and is managed at either a “place of management” or at “a mine, quarry or other place of extraction of natural resources”. This entails that the ZRA must determine whether an MNC operating an extractives project is housing a permanent establishment.

Neither the Income Tax Act (“ITA”) nor the UK DTA defines what constitutes “business on a mine” and this requires the revenue authority administering the domestic tax regime to MNCs to have a certain level of knowledge of the bulk and complexity of the mining project.¹⁸⁰ The revenue authority is therefore required to understand at which point a permanent establishment exists at each stage of the MNCs’ mining value chain.¹⁸¹ However, the mineral extractives sector has peculiar characteristics such as the need for certainty during the project and long lead times, and these factors need to be considered in the overall taxation structure administered by the revenue authority to MNCs.¹⁸² Because the tax treaty does not refer to specific domestic tax considerations that influence taxation of the mining sector, the ZRA must coordinate its general domestic requirements with the provisions of the DTA. Also, companies in the mining extractives sector frequently use subcontractors to provide specialist skills for preparatory services in the initial phases of the project.¹⁸³ In the exploration and evaluation stage, the mining company holding the license is the main actor, and they then engage the services of a subcontractor that specialises in preparatory services before the actual exploration.¹⁸⁴ Within the MNC structure, this creates the incentive to use entities within the group as subcontractors, to keep the overall group costs minimal. The ZRA is then tasked with determining whether the subcontractor has a taxable presence in the sense of a

¹⁷⁵ Article 1(2) of the Constitution, Chapter 1 of the Laws of Zambia (as amended by Act No.2 of 2016).

¹⁷⁶ *Zambia Sugar Plc v Fellow Nanzaluka* Appeal No. 81 of 2001.

¹⁷⁷ Section 2 of the Ratification of International Agreements Act No.24 of 2016.

¹⁷⁸ Article 7 of the Double Taxation Agreement between Zambia and the United Kingdom provides for this.

¹⁷⁹ Article 7 of the UK DTA.

¹⁸⁰ Intergovernmental Forum on Mining, Minerals and Sustainable Development ‘Tax Treaties and the Mining Sector: Identifying the issues and coordinating responses’ available at https://www.igfmining.org/wp-content/uploads/2018/08/ISLP-IGF-Dialogue-on-Tax-Treaties-and-the-Mining-Sector_Meeting-Notes.pdf accessed on 22 November 2021

¹⁸¹ United Nations Handbook on Taxation of Extractive Industries (2018) 38.

¹⁸² Lee Burns ‘International – Income Taxation through the Life cycle of an Extractive Industries Project’ (2014) 20:6 *Asia – Pacific Tax Bulletin*.

¹⁸³ *Ibid* at 404.

¹⁸⁴ *Ibid* at 407.

permanent establishment for purposes of taxing income they receive for performing these services.¹⁸⁵ Defining a permanent establishment using the general criteria in Article 5 of the UK DTA results in a situation in which MNCs can avoid creating a significant taxable presence by using the groups' subsidiaries to perform these subcontractor services.

Secondly, the treatment of mining industry-specific taxes such as royalties under the scope of the tax treaty must be aligned with domestic law. Royalties are a form of tax charged on the gross volume of mineral resources produced and represent the equivalent purchase price of minerals extracted.¹⁸⁶ Currently Zambia's mining tax regime does not charge royalties with reference to the income or profits of an entity.¹⁸⁷ However, under the 2022 budget, it is proposed that mineral royalties be treated as a deductible levy in calculating a company's overall taxable income.¹⁸⁸ This will entitle MNCs operating in the industry to claim relief under the application of tax treaties that broadly cover all taxes on income. However, it is arguable that royalties should not be treated in the same way as all ordinary taxes on income, because by nature, royalties are an acknowledgment of the fact that mineral resources are regulated by the State in trust for all Zambians.¹⁸⁹ Therefore, the generality of the tax treaty's language in this instance defeats domestic law objectives of compensating the State for the extraction of mineral resources. This further incentivises MNCs to arrange their tax affairs in a way that could lead to further loss of revenue from the mineral extractives industry.

4. Anti-avoidance rules

Tax treaties usually specify which contracting party can tax income, as it confirms the right of at least one of the treaty States to tax income arising from the activities conducted across the two countries.¹⁹⁰ This has conventionally been the conceptual basis for bilateral tax treaties. However, given the widespread presence and layered network of MNCs, there are different risks that regulators must be aware of. As such, different rules have been developed over and above tax avoidance provisions contained in tax treaties. These rules are considered below.

4.1 Transfer pricing rules

Given the reliance on foreign private investment to develop mineral resources, the administration of transfer pricing rules is essential.¹⁹¹ Transfer pricing refers to prices charged for transfers of goods, services, property or other items of value in transactions between persons that are under common control".¹⁹² The phrase "common control" is not a legal concept and

¹⁸⁵ Section 81 of the Income Tax Act.

¹⁸⁶ Zambia Revenue Authority 'Mineral Royalty' available at <https://www.zra.org.zm/wp-content/uploads/2020/01/Mineral-Royalty.pdf> accessed on 22 November 2021.

¹⁸⁷ Ibid.

¹⁸⁸ Ministry of Finance and National Planning '2022 – 2024 Budget Call Circular: A Manual for preparing the 2022 – 2024 Medium Term Expenditure Framework and the 2022 Budget'.

¹⁸⁹ Section 3 of the Mines and Minerals Development Act states that all rights to minerals vest in the President on behalf of the Republic.

¹⁹⁰ Philip Daniel and Victor Thuronyi 'International tax and Treaty Strategy in Resource-rich developing countries' in Philip Daniel et al (eds) *International Taxation and the Extractive Industries* (2016) 111-133.

¹⁹¹ Stephen E. Shay 'An overview of transfer pricing in extractive industries' in Philip Daniel et al (eds) *International Taxation and the Extractive industries* (2016) 42-79.

¹⁹² Shay (2016) note 191.

is determined on a factual basis.¹⁹³ In the international sphere, persons who are bound by transfer pricing rules are known as “associated persons”, and the transactions between them are categorically referred to as controlled transactions.¹⁹⁴ From this, the rationale for the regulation of transfer pricing becomes clear. There is a shared economic link between associated entities,¹⁹⁵ and transfer pricing tax rules are a measure of this shared interest.

There are several ways in which transfer pricing may be manipulated by MNCs. First, in transactions that are intra-national, transfer pricing may be manipulated where two entities operating in the same country are taxed differently under the same tax system. For instance, one company may be subject to full tax, whereas the other associated company is operating under a tax holiday.¹⁹⁶ In cross-border transactions, the tax rules are notably different. Even where both countries impose taxes on that particular transaction, the objectives of taxation will be different,¹⁹⁷ and this may be manipulated by MNCs. Related entities are usually incorporated in countries that do not tax income, such as Bermuda, the British Virgin Islands, and the Cayman Islands.¹⁹⁸ In other instances, certain jurisdictions have lower income tax rates, such as Ireland, Luxembourg, Mauritius, and Switzerland.¹⁹⁹ This means one of the jurisdictions on the competing end of the transaction will certainly have a higher tax rate than the other. The result of structuring transactions in this way allows MNCs to manipulate the transfer price between higher and lower tax jurisdictions. In a scenario where the parent of the MNC operates in a jurisdiction with a higher rate of tax, and another associated entity operates in another jurisdiction with a lower tax rate, there is an incentive to shift the profit from the higher to the lower by altering the transfer price.²⁰⁰

Secondly, it is customary for MNCs to structure their intragroup transactions through an intermediary company to reduce the overall tax liability of the group. *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* is illustrative of this point.²⁰¹ The case concerned a dispute between the Appellant and the South African Revenue Service (SARS) on an income tax assessment meted out by SARS on what it deemed were impugned transactions that had been devised by the Appellant to avoid tax.²⁰² The South African Supreme Court of Appeal discussed the essence of interposing

¹⁹³ Ibid at 44.

¹⁹⁴ United Nations Handbook on Taxation of Extractive Industries (2018) 74.

¹⁹⁵ Section 2 above discusses the commercial structure of MNCs and the ways in which this structure is used to achieve an economic presence, globally.

¹⁹⁶ Shay (2016) note 191 at 44.

¹⁹⁷ The obvious main objective for most resource-rich countries is to generate revenue and to maximise these resources for economic development. However, every country is at a different stage of development and macro-economic stability, and this would determine the various specific sub-objectives it would set in place. See generally International Council on Mining and Metals ‘The role of mining in national economies’ available at https://www.icmm.com/website/publications/pdfs/social-and-economic-development/romine_1st-edition accessed on 3 September 2021, Ibid at 45.

¹⁹⁸ Shay (2016) note 191 at 45.

¹⁹⁹ KPMG ‘International fight over tax revenue jeopardizes Switzerland’s attractiveness as a location’ available at <https://home.kpmg/ch/en/home/media/press-releases/2021/04/international-fight-over-tax-revenue-jeopardizes-switzerlands-attractiveness-as-a-location.html> accessed on 22 November 2021.

²⁰⁰ MNCs typically shift profits out of countries that charge a higher rate of corporate income tax. See generally Yariv Brauner ‘What is the BEPS?’ (2014) *Florida Tax Review* 55-70; Angela Charlton ‘G-20 to Multinationals: Pay more taxes’ Bloomberg business Week 19 July 2013; Lorraine Eden *Taxing Multinationals: Transfer pricing and corporate income taxation in North America* 1998.

²⁰¹ *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* (923/2017) [2018] ZASCA 153; [2019] 1 All SA 106.

²⁰² *Supra* note 201 paras 4 - 6.

an intermediary company and observed that the test as to whether a transaction has been simulated is a factual and legal one, based on ascertaining the intention of the parties.²⁰³

Curtailling misuse of transfer pricing is one of the key aims of the OECD's base erosion and profit-shifting initiative ("BEPS"). The BEPS initiative identifies transfer pricing as a pressure area that must be identified and addressed.²⁰⁴ Currently, the rule used in calculating the income of an MNC in proportion with its various subsidiaries is the Arm's Length Principle ("ALP").²⁰⁵ To calculate the price at which the income derived on intra-group transactions must be taxed, international best practice states that tax authorities must be able to use a method that generates the most reliable measure of an arm's length result.²⁰⁶

In theory, transfer pricing regulation should work. However, one of the major inefficiencies of the ALP is that it is based on what the comparative value of the transaction is for independent third parties. This ignores the fact that MNC operations are based on integration economics, and the operations within the MNC are likely to be more efficient than those of an independent party.²⁰⁷ As between independent parties in an open market, the benefit of internalisation is absent. Internalisation put simply, is the internal process of substituting the arm's length standard for a related party standard, thereby strengthening the internal market of the MNC group structure.²⁰⁸ The theory is underpinned by the proposition that each entity within the structure exists to create and maximise profit for the group. Thus, seemingly unrelated features of an MNC operation are in fact intricately interconnected. To illustrate, in a typical MNC structure, the goals of the parties are not conflicting because, by design, MNCs are made to dominate the market and control economic activity within the borders of the countries the group operates in, using high levels of research and development.²⁰⁹ Through what is termed operational internalisation and knowledge internalisation, there is a flow of knowledge and intermediate products and services between each organ within the MNC structure.²¹⁰ As a result, the boundaries of each structure within the MNC are carefully stationed at the point at which the advantages of the structure are merely offset by the costs of operating

²⁰³ Supra note 201 paras 78 – 80.

²⁰⁴ OECD BEPS actions available at *BEPS Actions - OECD BEPS* accessed on 8 September 2021.

²⁰⁵ A draft model tax treaty was published by the League of Nations in 1933 which was based on the "independent persons" test. It was included in the draft model tax convention in 1963 and adopted in 1977 and stated:

Where conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those that would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises but, by reason of these conditions, have not accrued, may be included in the profits of that enterprise and taxed accordingly.

²⁰⁶ Lorraine Eden 'Arm's Length Standard' in Thomas Poggee & Krishen Mehta (eds) *Global Tax Fairness* (2016) 160.

²⁰⁷ Ibid at 162.

²⁰⁸ The internalization theory in essence states that within the MNC structure, several businesses are integrated into a single operating system. The theory is based on the fact every firm within the structure would organise its affairs to be efficient for the benefit of the group. See Buckley P.J and M.C Casson *The future of the Multinational Enterprise* (2001); Buckley P.J and M.C Casson 'A theory of cooperation in international business' in F.J Contractor and P. Lorange (eds) *Cooperative Strategies in International Business* 1988.

²⁰⁹ See R.E Caves 'International corporations: The industrial economics of foreign investment' (1971) 38:149 *Economica* 1-27; E.H Chamberlin *The theory of monopolistic competition* (1927); J.H Dunning 'Trade, location of economic activity and the MNEs' in B.Ohlin, P. Hesselborn and P. Wijkman (eds) *The international allocation of economic activity* (1977) 395-418.

²¹⁰ Peter J Buckley and Mark C Casson 'The internalisation theory of the multinational enterprise: A Review of the progress of a research agenda after 30 years' (2009) 40 *Journal of Business Studies* 1567.

within the MNC.²¹¹ Thus MNCs are able to strategically position themselves to operate in and divert resources from different sectors of the economy.

4.2. Taxation of intangible assets and transfer pricing

Companies restructure their organisation for various reasons such as achieving economies of scale or scope, diversifying or expanding lines of business or markets; refining inefficient structures; changing management structures; altering the balance or diversity of shareholder control; and improving their tax affairs.²¹² While companies are permitted a broad range of options to organise their affairs, including their capital structure, there may be legal implications to these transactions that the regulators would try to pre-empt.

There are various forms of corporate reorganisations; however, this discussion is limited to the strategic ownership rights of subsidiary companies. Within the MNC structure, there is often an aspect of strategic management in the decision as to which subsidiaries have ownership and control of the group's strategic assets. Typically, the decision is motivated by the consideration of which entity is better suited to manage the strategic asset, weighed against the consideration of whether the subsidiary is located in a high or low tax jurisdiction.²¹³ The decision to manage an asset entails both economic and legal ownership, meaning that the subsidiary in control of the assets will ordinarily have the right to manage the profit and losses realised from the asset.²¹⁴ This therefore has significant implications for the overall tax liability of the group as a whole.

In practice, a point of concern arises with the ownership and control of these assets. This is because within the group, other subsidiaries may have performed functions, utilised the assets, or assumed risks that contribute to the current value of the asset.²¹⁵ The difficulty then, is that each subsidiary is expected to be compensated in accordance with the ALP. In the Zambian mineral extractives industry, the legal incentive for abusive tax practices in this regard is presented by the lack of a clear framework identifying the inherent risks underlying these complex commercial relationships.

Under the ITA, income is deemed to have originated in Zambia as the source, where the said income is received as a payment in the form of royalties incurred whilst carrying on business in Zambia.²¹⁶ Royalty as defined in Section 2 of the ITA refers to the payments received as consideration for using or for rights to use any intellectual property.²¹⁷ Zambia derives taxing rights on the exploitation of these intangible property rights based on the source principle of taxation.

²¹¹ Buckley and Casson (2009) note 210 at 1565.

²¹² Peter Mullins 'International tax issues for the resources sector' in Philip Daniel et al *The taxation of petroleum and minerals: principles, problems and practice* (2010) 378 to 403.

²¹³ R Griffith, H. Miller & M O'Connell 'Ownership of intellectual property and corporate taxation' (2014) 112 *Journal of Public Economics* 12-23.

²¹⁴ See S Grossman & O Hart 'The costs and benefits of ownership: A theory of lateral and vertical integration' (1986) 94(4) *Journal of Political Economy* 691-719; Y. Barzel *Economic analysis of property rights* 2 ed (1997).

²¹⁵ OECD Transfer Pricing Guidelines for National Enterprises and Tax Administrations available at https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page261 accessed on 8 September 2021.

²¹⁶ Section 18 of the Income Tax Act, Chapter 393 of the Laws of Zambia.

²¹⁷ Section 2 of the Income Tax Act.

Because the transaction is between associated entities, the income derived by the entity in Zambia as well as the costs it incurred, will have to be determined in accordance with the ALP. However, section 97 of the ITA, which provides for anti-tax avoidance using transfer pricing, does not establish a framework for determining the transfer price of intangibles. The result is that because the law does not establish a reference point of comparability, MNCs have the incentive to coordinate and conceal the actual value of transactions on intangible assets to reduce their tax liability. As it has been observed, pricing of the use of intangibles between associated entities in the extractives sector is notoriously problematic.²¹⁸

Specifically, the OECD recognises the specific factors that exacerbate the challenge of determining a transfer price for intangibles. For purposes of this research, two key factors are discussed. First, the fact that these transactions take place within a related group setting necessitates the need for disclosure of all contractual agreements, as well as any other information that may have been utilised to determine the separate rights and obligations between the related entities. The lack of adequate information regarding the full tax structure within which the transaction is carried out creates a bigger incentive for profit-shifting.²¹⁹

Secondly, it is difficult to determine the transfer price on a transaction involving intangibles because the use of assets such as patented technology creating a new method of extraction, may not yield immediate results and returns can be realised at a different time from when the contribution of the technology was given.²²⁰ This is because legal ownership of the asset is not in itself determinative of the right to retain the profits made by the MNC. Rather, returns are typically determined by assessing the value of the actual function performed by the subsidiary as well as the risk assumed.²²¹ Thus, this also creates an incentive for profit shifting by MNCs in the extractives industry using abusive transfer pricing.

4.3. Thin capitalisation Rules

Capital has been described as “the lifeblood of the company” because it represents the funds spent in carrying on the business of the company.²²² In the course of running its business, a company can change its capital structure to provide for debt or equity financing.²²³ Lending is one of the ways in which MNCs can shift their profit between different companies across countries to reduce the overall tax liability of the group. By financing investments using debt in high-tax countries, MNCs can benefit from interest deductions in that jurisdiction, while enjoying the interest received in a low-tax jurisdiction where the loan is issued.²²⁴ Thin capitalisation is the legal term describing the practice of structuring the company’s capital

²¹⁸ Jack Calder ‘Transfer Pricing – special extractive industry issues’ in Philip Daniel et al (eds) *International Taxation of the Extractive Industries* (2017) 79-111.

²¹⁹ OECD Transfer Pricing Guidelines for National Enterprises and Tax Administrations available at https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page261 accessed on 8 September 2021.

²²⁰ *Ibid.*

²²¹ *Ibid* at 262.

²²² As per the speech of Cotton LJ in the case *Guinness v Land Corporation of Ireland* (1882) 22 ChD 349.

²²³ Stephen W. Mayson, Derek French and Christopher Ryan *Mayson, French & Ryan on Company Law* 14 ed (1998) 277-278.

²²⁴ Debt-shifting involves tax planning between entities to effectively reduce the total tax liability of the group. The strategy works in situations where the CIT rate favors both the lending entity and the borrower and can be manipulated to maintain the group’s debt exposure within manageable limits. See M.A Desai et al ‘A multinational perspective on capital structure choice and international capital markets’ (2004) 59:6 *Journal of Finance* 2451-2487.

with artificially created debt financing and not equity.²²⁵ To limit debt shifting, tax authorities put in place thin capitalisation rules (“TCRs”). TCRs generally stipulate a margin for the permissible ratio of debt to equity, and any interest expenses exceeding the ratio will not be deductible from the corporation’s total tax base.²²⁶ MNCs are thereby discouraged from debt-shifting for purposes of reducing tax.

MNCs can strategically arrange their group affairs to reduce their overall tax liability while maintaining manageable limits of debt exposure. TCRs however are not total restrictions on debt-shifting but work as disincentives by ensuring that MNCs are unable to claim interest deductions for amounts that exceed the thin capitalisation margin. Empirical evidence has shown that MNCs are disincentivised from debt-shifting because the TCRs are aimed at the total debt ratio of the group.²²⁷

Recent amendments to the ITA have created the possibility of abusive tax avoidance practices by MNCs using thin capitalisation. There are no specific legal provisions designed to address thin capitalisation *per se*, and previously, mining companies operating in Zambia were permitted a three to one (3:1) debt to equity margin in their capital structure. Section 29, in its amended form, now imposes a limit on deducting interest payable on loans borrowed by any company and/or person, where the loan is utilised in the capital structure of that company.²²⁸ The removal of a permissible debt-to-equity margin has important implications for tax planning because capital structures to minimise thin capitalisation are achieved mainly in two ways. These are, an efficient mix of debt and equity, and the actual treatment of the interest income that is received by the financing entity on the loan repayments.²²⁹ In the current legal setting, removing the minimum debt-to-equity threshold creates an incentive for thin capitalisation, which could go virtually undetected until the entity seeks to claim a deduction on interest for tax purposes. For instance, the group may decide to use a rate of fluctuating interest for the loan repayment, which creates the possibility that at the time of claiming a deduction, the interest rate can be renegotiated and increased for that period only. Thus, legal provisions stipulating an actual framework within which a debt-to-equity ratio must be maintained are likely to be more effective when used in conjunction with allowable interest deduction provisions. As a result, MNCs in the extractives industry externalise funds out of the economy using excessive debt shifting in their capital structure.

²²⁵ Peter Mullins ‘International tax issues for the resources sector’ in Philip Daniel et al *The taxation of petroleum and minerals: principles, problems and practice* (2010) 378 to 403

²²⁶ The thin capitalisation rules often designate what is known as a “safe haven”. The safe haven principle limits the threshold within which a company can be allowed to deduct interest related expenses from its tax base on an intra-organisation loan. See generally A.P Dourado & R de la Feria *Thin capitalisation rules in the context of the CCCTB*. Working Papers 0804, Oxford University Centre for Business Taxation; M.F Ambrosanio and M.S Caroppo ‘Eliminating harmful tax practices in tax havens: Defensive measures by major EU countries and tax haven reforms’ (2005) 53:3 *Canadian Tax Journal* 685; T.A Gresik, D Schindler & G Schjelderup ‘Immobilizing corporate income shifting: Should it be safe to strip in the harbor?’ (2017) 152 *Journal of Public Economics* 68-78.

²²⁷ De Mooij and S Hebous ‘Curbing corporate debt bias: Do limitations to interest deductibility work’ (2018) 96 *Journal of Banking and Finance* 368-378.

²²⁸ Section 29 generally discusses the deductions from total income that are allowable. With reference to thin capitalisation specifically, it establishes that all deductions on total taxable income will be subject to a maximum of 30% of the tax earnings before interest, tax, depreciation, and amortisation.

²²⁹ Christian Chileshe and Henry Chata ‘Thin capitalisation and illicit financial flows in Africa- a case of Zambia’s mining sector’ available at <https://www.researchgate.net/publication/329917273> accessed on 8 September 2021.

5. Conclusion

MNCs in the extractives industry operate in a layered operating structure spanning over different jurisdictions. This means they are subject to different legal rules, and their extractive activities are taxed according to the legal regime in a particular jurisdiction. By exploiting gaps in the procedural application of bilateral tax treaties, MNCs can organise their tax affairs and avoid taxes by not establishing a taxable presence in a contracting State to a treaty. Additionally, MNCs can manipulate the ALP in the tax authorities' valuation of whether a fair value is given and/or received for goods and services within the group structure. Reorganising the capital structure of an MNC also creates an incentive for excessive thin capitalisation, to the extent that the financing of the group is adversely affected by artificially created debt.

CHAPTER FOUR: EFFECTS OF ABUSIVE TAX PRACTICES ON VALUE ADDITION IN THE ZAMBIAN ECONOMY

1. Introduction

The preceding chapter discussed the illegal tax practices by multinational companies (“MNCs”) in the extractives value chain. This chapter expands on this discourse to consider specifically how these practices impact the value and contribution of the extractives sector in Zambia’s integrated multi-sectoral economy. It begins with a discussion of how thin capitalisation in MNCs limits opportunities for access to finance and goes on to explain how transfer pricing regulations do not promote objectives of local mineral beneficiation. This current chapter also highlights how the productive capacity of local businesses is affected by the illegal tax practices of MNCs.

2. Thin capitalisation and limitations to financing options in the small-scale mining sector

Small-scale mining is usually jointly identified with artisanal mining and referred to as artisanal and small-scale mining (“ASM”). The two, however, are distinguishable.²³⁰ Artisanal mining is classified as a form of mining that utilises manual, rudimentary technology, and is undertaken typically in rural areas.²³¹ In contrast, small-scale mining involves licensed, semi-mechanised mining operations using complex techniques which would not ordinarily be employed manually.²³² Small-scale mining, therefore, has an aspect of mechanised mining. The *Zambian Mines and Minerals Development Act (“Mines Act 2015”)* distinguishes the two, by reference to the fact that artisanal mining uses basic technology and is undertaken by citizens, whilst small-scale mining uses more advanced technology over a wider area.²³³

Small-scale mining is recognised as a sub-sector of the *Zambian mining extractives sector*.²³⁴ As with any other sector of the economy, the growth and development of the small-scale mining sector is marked by various challenges. Building capacity, access to finance, and lack of access to affordable technology are the main challenges hindering the development of the small-scale mining sector in Zambia.²³⁵ The recent creation of a ministry dealing with small and

²³⁰ Laura-Anne Wilson *Unshackling South African Artisanal Miners: Considering Burkina Faso’s legislative provisions as a guideline for legalisation and regulation* (Published LLM thesis, University of Cape Town, 2018) 28.

²³¹ S.M Rupprecht ‘Bench mining utilizing manual labour and mechanized equipment – a proposed mining method for artisanal small-scale mining in Central Africa’ (2017) 117 *The Journal of the Southern African Institute of Mining and Metallurgy* 25-30.

²³² *Ibid* at 26.

²³³ Section 2 of the *Mines and Minerals Development Act No. 11 of 2015* contains the definition of both artisanal mining and small-scale mining. Artisanal mining is defined as “an artisan’s mining operation undertaken by a citizen pursuant to a mining licence granted under Part III”. Small-scale mining is defined as “mining over an area covering a minimum of three cadastre units and not exceeding one hundred and twenty cadastre units”.

²³⁴ The *Mineral Resources Development Policy of 2013* states that the Government undertakes to develop the “small-scale mining sub-sector”.

²³⁵ Open Zambia ‘Small-scale miners welcome SME Ministry’ available at *Small-Scale Miners Welcome SME Ministry — Open Zambia* accessed on 24 November 2021.

medium-scale enterprises has therefore been commended as it presents the opportunity to have a ministry that would address these specific challenges.²³⁶ The challenges in the economics and financing of small-scale mining are particularly relevant to this research.

Persons and organisations engaged in small-scale mining typically are not as educated and informed as those engaged in large-scale mining.²³⁷ Because many small-scale miners lack formal education, they in turn have difficulties obtaining technical skills and accessing affordable technology to assist them as they carry on mining operations.²³⁸ Additionally, small-scale miners are unable to contest for competitive funding opportunities because they lack collateral, and financial institutions are wary of sponsoring small-scale miners with no prior credit record, no track record of managing mining operations, and no collateral.²³⁹ In a study conducted in Peru for instance, problems associated with financing options were illuminated in a recent study conducted after legislation to formalise the ASM sector was passed.²⁴⁰ The study found that many small-scale license holders were not able to obtain loans because financial institutions and banks preferred not to get involved with the small-scale mining sector.²⁴¹ Additionally, ASM miners cannot access advanced forms of technology that large-scale MNCs have, and so they are relegated to scavenging on mining sites that are already developed.²⁴²

Understanding the financial flows and supply chains within the small-scale mining sector is key in understanding how thin capitalisation by MNCs affects value addition creation from the extractives sector. MNCs organise their activities in a way that aligns their financial structure with the objective of tax planning.²⁴³ By adjusting their debt-to-equity ratio disproportionately, MNCs can decrease their overall tax liability – deducting excessive sums as loan interest repayments at a higher corporate income tax rate from their total earnings.²⁴⁴ Whereas the direct result of this structure is reduced tax liability based on high-interest deductions, the indiscernible result is that because the MNC operates on low-equity financing, profits in the host state are not directly generated using equity financing. Because the debt-to-equity ratio in an MNC is influenced by the need to limit the group's overall debt exposure, all companies operating within the MNC are automatically subject to group strategy on their internal debt structure.²⁴⁵ In contrast, when a parent company finances a subsidiary company with equity, the parent company will pay higher taxes on income from dividends given out to the parent

²³⁶ Open Zambia (2021) note 235.

²³⁷ Immaculate Javia and Paulina Siop 'Paper on Challenges and Achievements on Small scale mining and Gender' (WAU Small-scale mining training center presentation, 2010).

²³⁸ P.F Ledwaba and N. Mutemeri 'Institutional gaps and challenges in artisanal and small-scale mining in South Africa' (2018) 56 *Resources Policy* 141-148.

²³⁹ Gerardo Martinez, Nicole M. Smith and Aaron Malone 'Formalization is just the beginning: Analysing post-formalization successes and challenges in Peru's small-scale gold mining sector' (2021) 74 *Resources Policy*.

²⁴⁰ Ibid at 2.

²⁴¹ Ibid at 8.

²⁴² Bernd Dreschler 'Small – scale mining and sustainable development within the SADC Region' available at <https://pubs.iied.org/sites/default/files/pdfs/migrate/G00735.pdf>? accessed on 23 November 2021.

²⁴³ This is discussed in Chapter 3 of this research.

²⁴⁴ Intra-company borrowing and debt-shifting is considered in Chapter 3 of this research, which showed that interest deductions can significantly reduce the overall tax liability of MNCs.

²⁴⁵ Ruud de Mooij and Li Liu *At a Cost: The Real Effects of Thin Capitalisation Rules* (IMF Working Paper, 2021).

company.²⁴⁶ This creates a situation in which subsidiaries operate substantially on debt because of the added group incentive to use debt financing as opposed to equity financing.

An assessment of Mopani Copper Mines (“Mopani”), a former subsidiary of a multinational company will be used to illustrate the resulting financial and investment climate that subsidiaries operate in. Mopani is a subsidiary that was previously controlled by an MNC known as Glencore International AG (“Glencore”) that had a majority stake, and the Zambian government’s investment holding vehicle Zambia Consolidated Copper Mines (“ZCCM”).²⁴⁷ Mopani was reportedly operating in debt owed to its subsidiary Glencore for many years, until early 2021 when the Zambian government decided to purchase this majority stake from Glencore.²⁴⁸ A condition of the transaction was that ZCCM would pay back the US\$ 1.5 billion owed to Glencore by Mopani, and Glencore will retain production rights for all copper produced by Mopani until this debt is repaid.²⁴⁹ The implication of the outstanding debt is that for the numerous years that Mopani has been in operation, a significant portion of its profits has been channelled towards debt repayment to its parent company, Glencore. It also implies that for the many years Mopani has been in operation, equity shares have not been offered to people and businesses operating in the small-scale mining sector because Mopani had a high debt-to-equity ratio in its capital structure.

This situation should be considered in light of the fact that the government is committed to creating different avenues for access to finance for small-scale mining companies in the sector. Since 2013, the government has emphasised the creation of an enabling framework within which large-scale mining companies float their shares publicly to encourage small-scale mining companies and other Zambian businesses to own equity stakes in these companies.²⁵⁰ Over the years, many ASM companies and businesses have expressed their discontentment because they have not been able to own equity shares in Mopani.²⁵¹ Current statistics showing the increase in copper production reveal that since privatisation and the creation of Mopani, Zambian - owned businesses in the small-scale mining sector have not been able to scale up production of copper at a similar level as Mopani.²⁵² Thus, even though economists have opined that the decision to take over the debt owed to Glencore is not economically sound, small-scale miners support it as an opportunity to acquire

²⁴⁶ Ruud de Mooij and Li Liu (2021) note 245.

²⁴⁷ Thomas Biesheuvel, Matthew Hill and taonga Clifford Mitimngi ‘Glencore seals Zambia Copper Sale but must wait for the cash’ available at <https://www.bloomberg.com/news/articles/2021-01-19/glencore-agrees-mopani-copper-sale-but-must-wait-for-the-money> accessed on 1 November 2021.

²⁴⁸ Since April 2000, a division of ZCCM was purchased by Glencore International AG and First Quantum Minerals Limited. The two companies formed a new company known as “Mopani Copper Mines”, with Glencore holding 46% in shares, First Quantum holding 44% in shares, and ZCCM holding 10% in shares. See George J. Coakley ‘The Mineral Industry of Zambia’ available at <https://s3-us-west-2.amazonaws.com/prd-wret/assets/palladium/production/mineral-pubs/country/2000/zamyb00.pdf> accessed on 1 November 2021.

²⁴⁹ Glencore ‘Signed contract to sell underlying stake of 73% in Mopani in \$1.5b transaction’ available at <https://www.glencore.com/media-and-insights/news/signed-contract-to-sell-underlying-stake-of-73-in-mopani-in-1.5b-transaction> accessed on 21 November 2021.

²⁵⁰ Mineral Resources Development Policy 2013 at 9.

²⁵¹ Jane Mwansa ‘Small-scale miners back ZCCM-IH quest for greater stake in Mopani’ available at <https://www.times.co.zm/?p=107916> accessed on 1 November 2021.

²⁵² This is an illustration of an adverse consequence of tax avoidance, as these opportunities to avoid taxes give MNCs a competitive advantage over domestic companies.

financing through equity shares and dividends in Mopani.²⁵³ Thus, thin capitalisation limits the creation of value addition from ASM companies and businesses by hindering their opportunities to access funding through equity shares in large-scale MNCs.

3. Transfer pricing and mineral ore beneficiation

The preliminary process of extraction and mining mineral resources is channelled towards the development of other goods and sectors such as manufacturing and energy.²⁵⁴ Through beneficiation, extracted raw materials are treated and processed for enrichment – producing new metals or metal compounds.²⁵⁵ Different mechanisms of beneficiation are employed and these are dependent on the ore type, the mineral composition of the ore, and the grade of the ore.²⁵⁶ Lower grade ores are less costly to process but only generate minimal profits.²⁵⁷ For MNCs conducting mining operations seeking to maximise profit, the threshold of profitability will be determined by considering these different factors as well as the overall market environment.

The Mines Act 2015 regulates the process of mineral beneficiation. As defined in Section 3, beneficiation covers the process of separating valuable minerals from their ores. The value added in mineral exports is derived from the inherent value of the minerals, and thus refined mineral resources present more opportunities for value addition using manufacturing inputs.²⁵⁸ An applicant for a mineral beneficiation license is required to show their compliance with all provisions of the Mines Act and any other relevant written law.²⁵⁹ These provisions on beneficiation were introduced to the Mines Act in 2015, after they were first proposed in the Mineral Resources Policy of 2013, to implement the government's strategy to enhance the contribution of the mining sector to the national economy.²⁶⁰ The Act also stipulates that the holder of a mineral beneficiation licence is obliged to give preference to Zambian materials and products, and to engage contractors owned by Zambian citizens or citizen-owned companies.²⁶¹ This provision obliges MNCs holding mineral beneficiation licenses and conducting mineral beneficiation processes to utilise Zambian goods and services. Local businesses providing these services that are outside the MNC structure are then integrated into the mineral resources value chain.²⁶² This promotes the creation of production linkages between mining and the manufacturing service sector.

²⁵³ Korinek (2020) note 141.

²⁵⁴ H.J Van Zyl, W.G Bam and J. D Steenkamp 'Identifying barriers to growth in mineral value chains' (2020) 120:2 Journal of the Southern African Institute of Mining and Metallurgy available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532020000200009 accessed on 22 November 2021.

²⁵⁵ P. Arun Kumar & R Vengatasalam 'Mineral Beneficiation by Heap Leaching Technique in Mining' (2015) 11 Procedia Earth and Planetary Science 140-148.

²⁵⁶ Claudia Gasparini 'General Principles of Mineral Processing' (1993) 63 available at https://link.springer.com/chapter/10.1007%2F978-3-642-77184-2_6 accessed on 21 November 2021.

²⁵⁷ Ibid.

²⁵⁸ Korinek (2020) note 141.

²⁵⁹ Section 39(1)(d) of the Mines and Minerals Development Act.

²⁶⁰ This is discussed in Section 5 in the preceding Chapter of this research.

²⁶¹ Section 20 of the MMDA.

²⁶² AGS Programme (2021) note 78.

MNCs use their group operational structure to weigh the cost and benefits of complying with these provisions. Transfer pricing is a useful mechanism for MNCs in the extractive industry to transfer goods and services in a cost-effective way within the organisational structure of the MNC.²⁶³ However, considering the objectives of mineral beneficiation, this manipulation of the prices and value of goods and services has a negative impact on the creation of value-added from Zambian goods and services in the process of beneficiation.

An assessment of the case *Mopani Copper Mines v Zambia Revenue Authority* will be used to illustrate the inadequacy of transfer pricing regulations in achieving the objectives of mineral beneficiation. In this case²⁶⁴, the Supreme Court considered the circumstances in which Mopani was alleged to have breached transfer pricing regulations. Section 95 allows the Commissioner-General to redetermine tax liability and make assessments as the Commissioner deems necessary if there is reasonable suspicion that a transfer pricing transaction was primarily concluded to avoid tax.²⁶⁵ In this case, the Commissioner-General invoked the provisions of Section 95 of the Income Tax Act, to determine liability for sales transactions between Mopani and its parent company Glencore International Affiliate Group (GIAG) – which the revenue authority stated were not at arm's length. The Court noted that before the audit report for the relevant tax period was considered by the revenue authority, Mopani had tried to negotiate a settlement agreement with the revenue authority which was accepted. After the audit report was requested for by the revenue authority and prepared by Mopani, the revenue authority later refused to accept this audit report and invoked Section 95 to adjust Mopani's assessed liability using its own report – stating it was not bound by a report prepared by a possibly conflicted party.²⁶⁶ A review of the case does not reveal a reference to other factors considered by the revenue authority relating to the substantive content of the audit report, and the revenue authority's arguments were focused on the reliability and credibility of the author of the report.²⁶⁷

Considering the objectives and strategies to establish production linkages through mineral beneficiation, the parameters within which the revenue authority administers transfer pricing regulations must be questioned. The Court in the Mopani case confirmed that section 95 is couched in general terms to allow the Commissioner wide discretion to take precautionary measures to adjust a party's tax liability. Since 2012, the Zambia revenue authority has been building capacity in its transfer pricing expertise for the mineral resources sector. However, criticism can be raised against the inherent limitation present in the way the discretion is exercised, as seen in the Mopani case. Most African revenue authorities employ a narrow approach to administer the law – focusing only on objective figures and values of sales transactions.²⁶⁸ Metrics confirming volume and purity estimates of exported mineral ores are largely overlooked.²⁶⁹ This may be attributable to the lack of inter-agency coordination between the ministry of mines and mineral development and the Zambia revenue authority – as

²⁶³ The concept of transfer pricing is considered in Chapter 3 of this research.

²⁶⁴ *Mopani Copper Mines Plc v Zambia Revenue Authority* Appeal No. 24 of 2017 ("Mopani Case").

²⁶⁵ Section 95 of the Income Tax Act.

²⁶⁶ *Supra* note 264 paras 9.13 – 9.14.

²⁶⁷ *Supra* note 264 para 9.22.

²⁶⁸ Roman Grynberg and Fwasa K. Singogo 'Taxation and Illicit Financial Flows in the Gold Mining Sector' in Roman Grynberg and Fwasa K. Singogo (eds) *African Gold Production, Trade and Economic Development* (2021) 443 – 469.

²⁶⁹ *Ibid* at 458.

the authority confines its mandate to supervise tax avoidance.²⁷⁰ For instance, it is reported that in 2010 three different government agencies (the bank of Zambia, the ministry of mines and the central statistical office) reported different values of copper produced.²⁷¹ This is also seen in the Mopani case, as the revenue authority did not use its discretion to question and independently verify production and quality of export volumes based on the data provided.

Increasing value added through mineral beneficiation and opportunities for more Zambians to participate in the process is a core objective of mineral development. In the context of a linkage economy, this means that opportunities for value addition must be fully explored and considered by different regulatory authorities. The Mines Act states that the holder of a mineral processing license must comply with the provisions of other laws, and this especially includes transfer pricing regulations. This also creates strong support in favour of the proposition that transfer pricing transactions must be assessed against this background. However, a reading of the different arguments by the revenue authority in the Mopani case does not contain a single reference to the different factors considered by the revenue authority as it administers these regulations. It is unclear whether the quality of the ore exported is assessed, to analyse levels of beneficiation before export. Transfer pricing regulations are broadly administered to achieve the aims of the revenue generation in the Income Tax Act, but not to achieve the aims of mineral beneficiation stated in the Mines Act and the Mineral Resources policy. Consequently, these inadequacies in the regulation of transfer pricing affect value addition creation from the mineral resources sector.

4. Operating a permanent establishment and the skills gap in local companies

Chapter two of this dissertation traced the history of the government's strategies to have more Zambians occupying key managerial positions in mining companies under the second republic.²⁷² This encompassed policy measures to increase local employment and create an environment that encourages a sustainable increase in skills development and capacity.²⁷³ Enhancing technical and operational skills at management level increases a companies' overall productivity, and in mining, it entails the creation of production linkages between large-scale MNCs that transfer skills to small-scale companies in the sector.²⁷⁴ Currently, this objective to maximise employment opportunities and enhance skills transfer is stated in the capacity-building strategies outlined in the Minerals Policy.²⁷⁵ These objectives are translated into legal obligations to support local content, local employment, and capacity procurement for Zambian businesses. Specifically, the Mines Act obliges the holder of a mining right to give preference to materials and products created locally, and contracting companies owned by Zambians.²⁷⁶ The Mines Act also requires that the holder of a mining right should give preference to Zambian

²⁷⁰ Alexandra Redhead 'Transfer Pricing in Zambia' available at https://resourcegovernance.org/sites/default/files/documents/nrgi_zambia_transfer-pricing-study.pdf accessed on 24 November 2021.

²⁷¹ *Ibid* at 9.

²⁷² This was covered in Section 3.2 of Chapter Two which discussed the generations of attitudes towards the creation of value addition.

²⁷³ T. Libby & E. Woakes (1980) note 100.

²⁷⁴ Bastida (2014) 27 *Mineral Economics* 84.

²⁷⁵ Mineral Resources Development Policy (2013) 6.

²⁷⁶ Section 20 (1) of the Mines and Minerals Development Act.

citizens for employment opportunities, and should additionally conduct training programmes for the transfer of technical and managerial skills to Zambians.²⁷⁷ These provisions highlight the government’s strategies to build capacity of Zambian citizens and businesses in the mining value chain.

The main obstacle to implementing these requirements is that MNCs operating in the sector do not have a sufficient skills development programme that is extended to locally – owned Zambian businesses.²⁷⁸ This prevents local companies from actively increasing their economies of scale to compete with large–scale MNCs as they do not have skilled professionals that can improve their productivity and quality of services. Statistics also show that supervisors and line managers prefer to resolve problems, rather than teach subordinates the necessary skills to operate the job.²⁷⁹ Large-scale mining MNCs prefer to make use of established global value chains and engage with foreign businesses that have a proven record of expertise and specialised skills.²⁸⁰ Further, a mining rights holder is required to employ citizens that have “relevant qualifications or skills”²⁸¹. However, the wording of the legislation is very broad and does not stipulate specific targets for MNCs to comply with these requirements. This gives MNCs operating in the industry the liberty to qualify their compliance on their own terms.

Operating through a permanent establishment also impacts the success of these requirements to strengthen the technical capacity of Zambian citizens and businesses. This is because the development of local employment must effectively be managed by the mining right holder, to maximise opportunities to support local businesses.²⁸² First, to transfer technology and skills, an aggressive programme that can be pursued by the MNC and monitored by the regulatory authorities is necessary. For instance, First Quantum Minerals (“FQM”) has a supplier development programme through which it provides training and teaching support for local businesses on how to quote tenders and estimate prices.²⁸³ However, even with programmes such as these, only 10.6 percent of the total procurement value of goods and services is supplied by local Zambian businesses.²⁸⁴

The requirements of managing local content bring the effect and extent of artificial avoidance of permanent establishment status to the fore.²⁸⁵ The OECD model lists the activities of an enterprise that are considered in deciding whether it has a permanent establishment. This list of activities is reproduced in the provisions of the ITA, and it excludes a place of

²⁷⁷ Section 20(2) of the Mines and Minerals Development Act.

²⁷⁸ AGS Programme (2021) note 78.

²⁷⁹ *Ibid* at 20.

²⁸⁰ *Ibid* at 10.

²⁸¹ This is the wording used in Section 20(2)(a) of the Mines and Minerals Development Act.

²⁸² Literature on managing local content shows that companies must be able to make a strategic contribution towards building local content and must do so using an effective local content policy. In the extractives sector particularly, large-scale companies should be required to strategically plan for how they will implement local content requirements. See D.O Gbegi and J.F Adebisi ‘Managing Local Content Policies in the Extractive Industries’ (2013) 4:7 *Research Journal of Finance and Accounting*.

²⁸³ AGS Programme (2021) note 78.

²⁸⁴ *Ibid* at 3.

²⁸⁵ In the case *Cadbury Schweppes v Commissioners of Inland Revenue* (2006) ECR I-07995, the European Court of Justice discussed the concept of “artificial avoidance” and stated that an artificial arrangement of an enterprise is a fictitious establishment not carrying out any genuine economic activity. The Court states that a front subsidiary or a letter box subsidiary are examples of such artificial arrangements.

business on which the main activities carried out are of a preparatory or auxiliary nature.²⁸⁶ In the Zambian mining value chain, companies that are subsidiaries of original equipment manufacturers (“OEMs”) are classed as tier – 1 suppliers who have a local presence, but do not have established manufacturing plants.²⁸⁷ Consequently, tier – 1 suppliers that mainly carry out preparatory or auxiliary activities have a minimal economic connection to local businesses because they do not have physical facilities to demonstrate and teach Zambians how to operate such equipment in a practical way. As a result, tier – 1 companies do not implement strategic actions to upscale local employment opportunities, because they operate within the group structure of the OEM and will use other specialised service providers within the group. The incentive to operate an artificial arrangement which will not be classified as a permanent establishment encourages MNCs operating as tier – 1 suppliers to utilise Zambian businesses only in a way that suits the enterprise maintenance needs. This distorts the genuine economic connection that is necessary to build local content and maximise value addition creation in the mineral resources sector.

5. Trade mis-invoicing and local supplier capacity

This section of the research analyses how illegal tax practices affect competition and productivity of local business suppliers in the mining value chain. A key component of this section analyses the nexus between IFFs facilitated by illegal tax practices of MNCs, and the macrostructure of the Zambian economic market.

5.1 The link between global trade, revenue generation and market competition

Zambia has multiple sources of tax revenue from the mineral resources extractives sector in form of corporate income tax, royalties and personal taxes.²⁸⁸ According to the optimal tax theory of economics, this ensures that the government designs the taxation system of the sector to tax profits of mining companies optimally and expand the tax base.²⁸⁹ Most governments are engaged in a system of tax competition to try and attract more capital to broaden the prospects of creating an optimal tax base.²⁹⁰ This leads to a system of differential rates of treatment for different activities in the mining sector, and various incentives to attract more investment. In doing so, the government considers the different market structure in a country’s overall economy, and how different actors will interact in the administration of the tax system.²⁹¹

²⁸⁶ Section 81 AA of the Income Tax Act adopts the wording of Article 5 of the OECD Model.

²⁸⁷ African Development Bank ‘Analysis of Input Goods and Services in Zambia’s mining industry’ available at <https://prospero.co.zm/app/uploads/2020/08/AFDB-REPORT.pdf> accessed on 26 November 2021.

²⁸⁸ The design of the tax base is usually the focus of debates in Zambia. Governments have previously tried to reap huge benefits from mining companies when prices of minerals are high, and this has sometimes led to a distortive tax system.

²⁸⁹ P Pistone, J Roeleveld, J Hattingh, JFP Nogueira and C West *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (2019).

²⁹⁰ See generally W.E Oates *Fiscal Federalism* (1972); N. Sari, M. Dewi and Y. Sun ‘The effect of tax holiday on economic growth related to foreign investment’ (2015) 211 *Procedia-Social and Behavioral Sciences* 1008-1015.

²⁹¹ Robert C. Brears *Natural Resource Management and the Circular Economy* (2018) 1.

MNCs as taxpayers are part of the general economic exchange between Zambia and other countries, and their direct investment in the economy creates inward and outward financial flows.²⁹² Inward flows represent investment in the trade of goods and services into the country, whilst outward flows represent capital account transactions out of the country based on the trade of goods and services.²⁹³ This creates an economic model in which raw materials used by mining companies leave the economy either as a finished product after a process of manufacture, or as unprocessed minerals that are sold to other entities or businesses in their raw form.²⁹⁴ Trade is inextricably linked to competition on the market, because the formation of a market creates a value chain for the trade of those goods and services.²⁹⁵ At a domestic level, companies naturally compete to gain a larger share of the export market, and those with a larger share contribute more to the export growth of the economy. As a regulator, the government is then inclined to structure the tax system in a way that benefits the most productive companies with further resources to increase their efficiency.²⁹⁶ Increased efficiency translates to increased consumption of goods and services by consumers.²⁹⁷ Thus, increased competition is linked to higher revenue generation as these businesses or companies participate to increase their efficiency in creating more goods and services for trade in the market.

At an international level, trade is facilitated by MNCs that create new markets in different countries and new trade routes for goods and services.²⁹⁸ Typically, subsidiaries extract minerals from the mine and export raw mineral resources out of the extracting country to a different subsidiary in another country where the raw materials are stored. The raw materials are exported again to another country to be subjected to a manufacturing process, and again to an additional country for final consumption.²⁹⁹ This creates a global value chain of consumption structured around extraction, trade, and transportation services of the mineral product in multiple countries.³⁰⁰ This is the typical trade value chain in which local businesses and MNCs operate.³⁰¹

²⁹² Leonce Ndikumana, James K. Boyce and Ameth Saloum Ndiaye 'Capital Flight from Africa: Measurement and Drivers' in Ibi Ajayi and Leonce Ndikumana (eds) *Capital Flight from Africa: Causes, Effects, and Policy Issues* (2014).

²⁹³ *Ibid* at 5.

²⁹⁴ *Ibid* at 2.

²⁹⁵ Tanja Goodwin and Martha Denisse Pierola 'Export Competitiveness: Why Domestic Market Competition Matters' (2015) *Trade and Competitiveness Global Practice* 1-10.

²⁹⁶ *Ibid* at 8.

²⁹⁷ Brears (2018) note 291.

²⁹⁸ United Nations Conference on Trade and Development '80% of trade takes place in 'value chains' linked to transnational corporations, UNCTAD report says' available at <https://unctad.org/press-material/80-trade-takes-place-value-chains-linked-transnational-corporations-unctad-report> accessed on 13 November 2021.

²⁹⁹ This is the typical illustration of the global value chain in which Mopani Copper Mines as a subsidiary of Glencore International AG was operating. Copper would be extracted and sold primarily in raw material form to Switzerland for processing by other companies in the group. See Gregor Dobler and Rita Kesselring 'Swiss extractivism: Switzerland's role in Zambia's copper sector' (2019) 57:2 *The Journal of Modern African Studies* 223 – 245.

³⁰⁰ Dobler and Kesselring (2019) at 228.

³⁰¹ *Ibid* at 229.

5.2 Decline in quality of goods produced by local businesses due to trade mis-invoicing

Zambian mining companies do not mainly utilise mineral resources for mass production and sale purposes.³⁰² Recently, the government emphasised that increasing productivity is critical for economic recovery strategies to scale up and increase production of minerals on demand like copper that will be traded globally.³⁰³ The government's main strategy of increasing production is driven by the objective of promoting domestic value addition for minerals such as copper, gold, manganese and gemstones.³⁰⁴ This is important to localise industrial production of minerals within Zambia, so as to ensure that mineral resources traded internationally will generate more revenue.³⁰⁵

The mining global value chain has multiple actors – producers, traders, suppliers, and consumers. Aside from the large-scale mines that are producers, traders and suppliers are the second most important actors in the value chain.³⁰⁶ Traders create the link between the producers and consumers, as consumers are unable to purchase the minerals directly from the producers. The business of a trader is essentially made on high volumes of trade, as opposed to high margins of the cost of the mineral.³⁰⁷ An illustration of the copper global value chain in the Zambian context is apposite. Between 2006 and 2017, an estimated 40-50 per cent of copper produced in Zambia was exported to Switzerland.³⁰⁸ One group company FQM produces approximately one third of the country's copper, and all of it is sold to only two trading companies in Switzerland – which themselves are part of the FQM group.³⁰⁹ Drawing back on the group efficiency theory, FQM has invested in connected entities to provide services for warehouse storage, transportation, fuel, testing and certification, so as to control the profits and confine risks of trading copper between Zambia and Switzerland as the declared destination.³¹⁰ This results in a situation whereby a Swiss entity is present in different segments of the value chain between production and consumption, to safeguard and promote the group's shared interest of increased trading profits.

This intra-group trade creates an avenue for decreased tax liability for the group.³¹¹ However, this must be viewed in light of Zambia's strategies for mineral production and sale. The Zambian economic model encourages the creation of an environment that incentivises more productivity and mineral beneficiation, and ultimately an increase in the value and volume of globally traded goods and services.³¹² Thus, unrelated businesses, i.e. local businesses, operate outside this

³⁰² The main mineral produced for export purposes is copper, and currently only about 800,000 tonnes per annum is produced from existing mines.

³⁰³ 2022 National Budget Speech Address at 16.

³⁰⁴ *Ibid* at 17.

³⁰⁵ Localising industrial production from subsidiaries has led to Switzerland becoming a mass exporter of copper, even though it has no mineral resources because copper is imported and exported from Switzerland with no reference to its country of extraction.

³⁰⁶ Dobler and Kesselring (2019) note 299 at 227.

³⁰⁷ *Ibid* at 228.

³⁰⁸ *Ibid* at 230.

³⁰⁹ Mineman 'Training in Londong for Metalcorp trading' available at [http://www.mineman.com/News/2013-\(2\)/Training-in-London-for-Metalcorp-Trading.aspx](http://www.mineman.com/News/2013-(2)/Training-in-London-for-Metalcorp-Trading.aspx) accessed on 13 November 2021.

³¹⁰ Dobler and Kesselring (2019) note 294 at 231.

³¹¹ Adugna Lemi 'Catch me if you can: Trade mis – invoicing and capital flight revisited' available at <https://www.freit.org/WorkingPapers/Papers/TradePatterns/FREIT1403.pdf> accessed on 23 November 2021.

³¹² Minerals Resources Policy 2013 at 2.

established group global value chain and have limited opportunities to increase their share of market competition to provide these goods and services. Trade mis-invoicing by MNCs and other group entities particularly hurt unrelated local companies. Trade mis-invoicing is defined as the deliberate falsification of the value on an international transaction for the trade of goods and services.³¹³ An entity that moves value illicitly through other countries by deliberately over-invoicing trade imports, or under-invoicing trade exports can conceal and/or divert inward and outward financial flows from the country's trade system.³¹⁴ As discussed in chapter three of this dissertation, trade mis-invoicing by MNCs is motivated by a profit-making incentive to avoid taxes by shifting taxable income from one jurisdiction to another.³¹⁵

Due to trade mis-invoicing, statistics show a trade value gap of approximately 22.53 percent, between 2008 to 2017 from trade between Zambia and other countries.³¹⁶ The problem begins with the fact that imported goods are tax-exempt, whereas locally produced goods and services are not – raising the input costs of goods and services for local companies.³¹⁷ For instance, surveys show that copper cables produced locally are more costly than imported copper cables.³¹⁸ Though this gives MNCs the incentive to lower their cost of business by procuring imported goods and services, it also creates the opportunity for MNCs to divert trade by over-invoicing imports. Consequently, this reduces opportunities for manufacturing by local businesses which are then forced to create multiple products to make sales. In the long run, this compromises the ability of local businesses to create quality products that can match international supplier standards.³¹⁹ Thus, local businesses struggle to compete with MNCs and to increase their supply capacity of quality products in the Zambian mining value chain.

6. Conclusion

The illegal tax practices of MNCs affect Zambia negatively as it loses revenue through IFFs. Additionally, locally – owned ASM companies lose opportunities to access finance and scale up mineral productivity. MNCs' involvement and preference for foreign-owned companies within the group structure chain prevents locally – owned businesses from growing and competing on the market with these suppliers of goods and services. Locally – owned businesses producing inferior quality goods are unable to make substantial profits that can be reinvested into the domestic economy because they cannot afford to use inputs from other sectors of the economy. Consequently, MNCs continue to dominate the mining value chain, and this hinders efforts to integrate the mining sector with other service sectors through linkages.

³¹³ Intra note 286 at 5.

³¹⁴ Global Financial Integrity 'Report on Trade-Related Illicit Financial Flows in 135 Developing countries: 2008 – 17' available at <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2020/03/GFI-Trade-IFF-Report-2020-Final.pdf?time=1585017856> accessed on 13 November 2021.

³¹⁵ See Section 4.1 in Chapter Three.

³¹⁶ United Nations Conference on Trade and Development (2021) note 298.

³¹⁷ AGS Programme (2021) note 78.

³¹⁸ Ibid at 14.

³¹⁹ Ibid at 19.

CHAPTER FIVE: CONCLUSION & RECOMMENDATIONS FOR LEGAL REFORM

1. Introduction

Mining traditionally follows a hierarchical value chain, in which new entrants in the sector are hindered by different factors and patterns such as volatility, uncertainty, and lack of technical capacity to expand.³²⁰ This means that the mineral value chain has different tiers and different actors that dominate particular sectors of the industry. The formation of linkages between the mining sector and the domestic economy has been identified as being particularly important to maximise opportunities for value addition in a diversified economy.³²¹ This research has shown that achieving these objectives requires a coordinated effort from the various actors in the industry, being the government, multinational corporations (“MNCs”), and other service industry players. This chapter concludes the research by recommending changes to the legal and regulatory framework that will aid the government’s goal of optimising value addition from the sector.

2. Research themes and emphasis of the Research

This dissertation examined the economic and legal context of mining in Zambia. It focused on identifying how the taxation of upstream activities of MNCs in the mining value chain affects value addition. The research examined the Income Tax Act, the Mines and Minerals Development Act, the Constitution, and various policies such as the National Vision 2030, the National Budget for the year 2022, and Zambia’s development plans implemented over five-year periods. These laws and policies provide the regulatory framework that anchors Zambia’s plans for integrated multi-sectoral development.³²² Recently, the government has proposed the eighth national development plan for adoption which outlines the governments’ specific outcomes such as developing a diversified economy and creating a competitive private sector.³²³ This demonstrates that diversification is and will be considered a crucial component of economic plans and policies for the foreseeable future.

Concerns for increased value addition and diversification from various sectors of the economy informed the core research questions of this dissertation. Bearing in mind that projections for economic recovery are focused on the mineral extractives industry, this begs the question whether the current regulatory framework is adequate to achieve all government’s aims, and importantly, to address the challenges of illicit financial flows (“IFFs”) in the industry. This research was confined to

³²⁰ H.J Van Zyl, W.G Bam and J. D Steenkamp ‘Identifying barriers to growth in mineral value chains’ (2020) 120:2 Journal of the Southern African Institute of Mining and Metallurgy available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532020000200009 accessed on 22 November 2021.

³²¹ A. Caramento ‘Cultivating Backward Linkages to Zambia’s Copper Mines: Debating the Design of and Obstacles to Local Content’ (2020) 7:2 *Extractive Industry Society* 310-320.

³²² The Seventh National Development Plan available at <https://www.mndp.gov.zm/wp-content/uploads/2018/05/7NDP.pdf> accessed on 19 October 2021.

³²³ Ministry of Finance and National Planning ‘2022 – 2024 Budget Call Circular: A Manual for preparing the 2022 – 2024 Medium Term Expenditure Framework and the 2022 Budget’.

illegal tax practices of MNCs as a form of IFFs, and sought to answer the question: to what extent do these practices affect value addition creation from the mineral extractives sector? By examining the policy framework that provides for the creation of inter-sector linkages, the research analysed the extent to which MNCs as major actors in the industry interact with other stakeholders to achieve value addition and diversification. This dissertation relied on doctrinal research conducted using primary sources of information such as government reports and policies, legislation, and case law. Secondary literature sources such as journal articles, textbooks, and commentaries of organisations such as the Organisation for Economic Co-operation and Development (“OECD”) were also consulted.

3. Findings of the research

The dissertation was structured over five chapters. The first chapter outlined the contextual background of the research, the research aims and objectives, and the questions that were answered in this research.

In chapter two, the research analysed the economic context of Zambia’s mining sector. The research showed that mining has been a significant component of the economy since the early 1900s. Chapter two also traced the economic significance of mining in various governmental policies – from pre-colonialism to present day multi-party democracy. From a predominantly export based sector incentivised by World Bank strategies for foreign investment, the mineral extractives industry has expanded to include several sub-sectors and service providers such as technology, transport, and warehousing. The research also showed that the extractives sector is connected to other sectors of the economy using linkages. Through fiscal linkages, production linkages, consumption linkages and horizontal linkages, actors in the sector can increase their competitive advantage, share skills and capacity, and diversify the production of manufactured goods and services.³²⁴ Current policies for the country’s economic development emphasise the creation of an integrated multi-sectoral economy that is connected by these linkages.³²⁵

The analysis in chapter two also highlighted the role played by MNCs in the creation of value addition from the mineral extractive industries. Through local content requirements, the government encourages industrialisation of the mineral resources extractives sector, by ensuring that preference is given to domestic goods and services in the mineral development process.³²⁶ This also applies to local employment creation, as mining right holders are required to give preference to citizens with the requisite expertise, and to carry out training programmes to teach managerial and technical skills to more Zambians.³²⁷

Overall, the chapter demonstrated that Zambia has in place a legislative framework for the creation of value addition from the mineral extractives sector. This framework however provides a generic structure within which the different role-players

³²⁴ J Humphrey & H Schmidt ‘Governance in Global Value Chains’ (2001) 32 *IDS Bulletin* 19-29.

³²⁵ Mineral Resources Policy (2013).

³²⁶ Section 20 of the Mines and Minerals Development Act No. 11 of 2015.

³²⁷ *Ibid.*

of the industry are expected to coordinate their efforts to achieve the goal of mineral diversification in the minerals policy – it does not specifically set out the different dynamics of each actor involved in the value chain.

Chapter Three expanded the research to identify the role of specific actors involved in the mineral resource value chain. Focusing on the commercial practices of MNCs in the extractives industry, the chapter outlined the major commercial context in which MNCs operate. The chapter also showed that MNCs have a layered operating structure in which different companies in the group are part of a global economic network that thrives in different markets and competitive environments.³²⁸ Because they operate in different markets, they are subject to different legal frameworks for tax regulation across various jurisdictions. Governments also support these MNCs operating in their countries to protect the competitive advantage that drives innovation in the domestic market.³²⁹ Additionally, to protect the economy from the harmful effects of tax avoidance from cross-border trade, the government enters bilateral tax treaties with other States to affirm Zambia's taxing rights. However, bilateral tax treaties are limited to issues of substantive law, and the Zambia Revenue Authority ("ZRA") must administer tax treaties in accordance with domestic law considerations and a certain degree of specialist knowledge about the activities of MNCs throughout the mining value chain. Given this variance in implementing treaties, MNCs have the incentive to abuse their layered structure to artificially avoid creating a permanent establishment, and they also have opportunities to misuse tax relief under the broad provisions of tax treaties.

Additionally, chapter three considered the tax implications of the ways in which MNCs structure their business and organisational structure. The chapter showed that because the activities within an MNC are intricately connected, this creates the opportunity for mispricing of goods and services transferred within the group and this enables them to externalise revenue from the economy illegally. The chapter also showed that through excessive debt-shifting, MNCs operating with severely thinly capitalised structures can contribute to the erosion of the country's tax base.

Chapter four of the dissertation discussed the specific aspects of value addition creation that are affected by these illegal tax practices of MNCs. It identified the growth of the small-scale mining sector, local capacity building and mineral beneficiation as key components of value addition creation from the minerals extractives sector. First, chapter four showed that access to finance is critical to growing the small – scale mining sector. Using an illustration of Mopani, the chapter showed that the excessive debt structure of thinly capitalised MNCs limits opportunities for funding available to businesses in the artisanal and small-scale mining ("ASM") sector. This hinders ASM businesses from joining the mineral value chain and scaling up production of minerals to comparable levels as large-scale MNCs operating in the sector.

Secondly, the chapter showed that the broad manner in which transfer pricing regulations are administered by the ZRA does not promote the objectives of mineral beneficiation. The chapter also showed that tier – 1 suppliers that operate within MNCs performing auxiliary and preparatory activities artificially avoiding permanent establishment status do not actively manage local employment programmes to promote skills development of local businesses. Additionally, chapter

³²⁸ John Kyove et al 'Globalization Impact on Multinational Enterprises' (2021) 2 *World review* 216-230.

³²⁹ *Ibid* at 217.

four highlighted how abusive practices such as trade mis-invoicing and preference for foreign-owned entities and imported goods thwart competition and affect the quality of goods and services produced by local businesses.

4. Recommendations for legal reform

This dissertation discussed the multi-dimensional effects of abusive tax practices of MNCs throughout Zambia's mining value chain. Many of the challenges to increased value addition raised in this research require multi-stakeholder collaboration and coordination, to address the specific challenges faced by local businesses in Zambia's mining sector. These recommendations for legal reform are given considering the country's objectives to create an integrated multi-sector economy.

4.1. Establishing a regulatory framework to align substantive treaty provisions and domestic law considerations

The research found that MNCs operating in the mineral resources extractives industry pose significant challenges to tax authorities in the application of double tax treaties. This is because different issues arise in different stages of the mining project which impact tax considerations for the domestic application of double tax treaties.³³⁰ Tax treaties do not replace domestic law entirely, as they merely confirm the ZRA's mandate to tax amounts ordinarily taxable under domestic law.³³¹ Thus, foreign businesses with a permanent establishment are placed on the same footing as nationals carrying out similar commercial activities. The effect is that tax treaties allocate the margin of tax revenue that will be subjected to domestic tax.³³² However, because tax treaties are automatically binding without further adoption by parliament,³³³ this makes it difficult for supporting regulations to be passed by parliament to guide the ZRA on domestic law application and interpretation of tax treaties for tax payments that are not contained within the treaty. For instance, the Income Tax Act was recently amended to provide for taxation of payments on commodity royalties transferred between entities that are resident and non-resident entities based on the commissioner general's assessment.³³⁴ Deductions of commodity royalties are not provided for in any of the tax treaties in place between Zambia and other countries.³³⁵ This creates a variance in the administration of tax treaties by the ZRA, and additional opportunities for abuse. It is recommended that the law be aligned to account for the fact that because tax authorities require additional information about the specific activities in the mining value chain, the process of ratifying and administering tax treaties should be subject to a broader process of

³³⁰ United Nations *Handbook on Selected Issues for the Taxation of the Extractive Industries by Developing Countries* (2017) 42.

³³¹ Brian J. Arnold 'An Introduction to Tax Treaties' available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT_Introduction_Eng.pdf accessed on 29 November 2021.

³³² *Ibid* at 10.

³³³ Section 2 of the Ratification of International Agreements Act No.24 of 2016.

³³⁴ Zambia Revenue Authority 'Practice Note No.1/2021' available at <https://www.zra.org.zm/wp-content/uploads/2021/02/Practice-Note-No.-1-of-2021..pdf> accessed on 30 November 2021.

³³⁵ *Ibid* at 14.

parliamentary approval. This will allow the ZRA to align the specific objectives of the tax treaty within the context of domestic law.

4.2. Establishing specific legislation to regulate local content

The research showed that large-scale MNCs need an aggressive local content strategy to manage and maximise opportunities for the use of goods and services supplied by local businesses. The government has recognised that Zambian businesses require upgraded technical skills to match these improvements in equipment and machinery.³³⁶ It is therefore recommended that the government enacts specific legislation to regulate local content in the mineral extractives sector, to ensure that MNCs are actively managing and supporting the development of skills and technical capacity of Zambian businesses. Additionally, such legislation should also address the challenges affecting the quality of goods and services provided, by setting a standard to ensure that businesses accurately improve the standard of goods and services they will be providing. The regulatory framework must stipulate adequate quality control requirements to be followed by local businesses operating in the value chain, as well as penalties if these requirements are not followed.³³⁷

4.3. Enhancing transparency and consistency in production reporting to promote local mineral beneficiation

Chapter four highlighted the challenges faced in the regulation of production reporting, due to the lack of coordination between the ministry of mines and mineral development and the Zambia Revenue Authority (“ZRA”). Transfer pricing regulations are administered by the ZRA in isolation from the ministry of mines and mineral development.³³⁸ Zambian authorities must collaborate to assess and verify production data reported by MNCs, not only for purposes of determining tax liability – but to determine purity and volume of mineral ores exported. It would then be possible for regulatory authorities to implement a networking programme within which MNCs are required to build a network with local businesses, which should be submitted as part of the MNC’s overall production reports. This will assist in identifying opportunities and challenges for local businesses to participate in mineral beneficiation across the mining value chain.

4.4. Align fiscal incentives and policies to encourage growth of local businesses’ supply capacity

Zambia’s objectives and strategies for economic growth are influenced by a general investment climate marked by tax competition with other countries.³³⁹ These measures are designed to encourage foreign investment. For instance, imported

³³⁶ AGS Programme (2021) note 78.

³³⁷ Quality control is defined as “the operational techniques and activities used to fulfill requirements for quality”. See ASQ ‘Quality Assurance & Quality Control’ available at <https://asq.org/quality-resources/quality-assurance-vs-control> accessed on 26 November 2021.

³³⁸ Zambia does not have separate legislation dealing with transfer pricing in the mining sector. Transfer pricing is regulated within the audit department of the Zambia Revenue Authority as it administers the Income Tax Act.

³³⁹ A. Klemm ‘Causes, benefits, and risks of business of business tax incentives’ (2010) 17 *International Tax and Public Finance*.

capital equipment and machinery are zero-rated for value-added tax (“VAT”), and this encourages MNCs in the mining sector to use imported goods.³⁴⁰ These incentives are utilised mainly by tier – 1 contractors which are part of a group of OEMs.³⁴¹ However, the domestic manufacturing sector remains undeveloped because local businesses incur high input costs to produce inferior quality goods which are not favoured by MNCs. Moreover, these incentives encourage local businesses to import supplied goods because while these imports are VAT exempt, locally manufactured goods are subject to VAT. Therefore, it is necessary to examine the nature of incentives given to local manufacturers, to ensure that fiscal incentives to attract foreign investment are aligned with measures to encourage innovation of local businesses.

5. Conclusion

The costs and benefits of increasing value addition from the mining sector must be considered in light of the strengths and weaknesses of the different actors in the sector. To reach Zambia’s goals of having an integrated multi-sectoral economy, the government must identify strategic ways through which it can optimise local capacity of different supply sectors throughout the mining value chain. Zambia’s mining sector needs a comprehensive approach that enables both different local businesses and MNCs to align their respective capabilities and contribute positively to the country’s objectives of integrated economic development.

³⁴⁰ Zambia Revenue Authority ‘Vat Liability Guide’ available at <https://www.zra.org.zm/wp-content/uploads/2020/07/VAT-Liability-Guide-2020-1.pdf> accessed on 29 November 2021.

³⁴¹ African Development Bank ‘Analysis of input goods and services in Zambia’s mining industry’ available at <https://prospero.co.zm/app/uploads/2020/08/AFDB-REPORT.pdf> accessed on 29 November 2021.

Bibliography

Primary sources

Cases

Guinness v Land Corporation of Ireland (1882) 22 ChD 349.

Mopani Copper Mines Plc v Zambia Revenue Authority Appeal No. 24 of 2017.

Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service (923/2017) [2018] ZASCA 153; [2019] 1 All SA 106.

Zambia Sugar Plc v Fellow Nanzaluka Appeal No. 81 of 2001.

Legislation

The Constitution of Zambia Chapter 1 of the Laws of Zambia.

The Income Tax Act Chapter 323 of the Laws of Zambia.

The Income Tax (Transfer Pricing) Regulations 2000 (as amended by The Income Tax (Transfer Pricing)(Amendment) Regulations 2020).

The Mines and Minerals Development Act No.11 of 2015.

The Ratification of International Agreements Act No.24 of 2016.

Treaties and Agreements

The Vienna Convention on the Law of Treaties 1969.

United Kingdom/Zambia Double Taxation Agreement and Protocol (2014).

Policies and reports

Ministry of National Development and Planning 'The National Vision 2030: A prosperous middle-income nation by 2030' available at https://www.mndp.gov.zm/wp-content/uploads/filebase/vision_2030/Vision-2030.pdf accessed on 28 November 2021.

Ministry of Finance and National Planning '2022 – 2024 Budget Call Circular: A Manual for preparing the 2022 – 2024 Medium Term Expenditure Framework and the 2022 Budget'.

Mineral Resources Policy 2013 available at <http://www.azmec.co.zm/downloads/acts/2013%20Mineral%20Resources%20Development%20Policy%20Zambia.pdf> accessed on 19 October 2021.

Natural Resources Governance Institute, *'Political parties and natural resource governance: A practical guide for developing resource policy positions'* (2018).

The Seventh National Development Plan available at <https://www.mndp.gov.zm/wp-content/uploads/2018/05/7NDP.pdf> accessed on 19 October 2021.

Literature

Books

H. B. Campbell *Mining in Africa: Regulation and Development* (The Nordic Africa Institute & Pluto Press, 2009).

Buckley P.J and M.C Casson *The future of the Multinational Enterprise* (2001).

Leonce Ndikumana, James K. Boyce and Ameth Saloum Ndiaye 'Capital Flight from Africa: Measurement and Drivers' in Ibi Ajayi and Leonce Ndikumana (eds) *Capital Flight from Africa: Causes, Effects, and Policy Issues* (2014).

Lorraine Eden *Taxing Multinationals: Transfer pricing and corporate income taxation in North America* 1998.

Philip Daniel et al (eds) *International Taxation and the Extractive Industries* (2017).

Philip Daniel et al *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (2010).

Robert C. Brears *Natural Resource Management and the Circular Economy* (2018).

Roman Grynberg & Fwasa Singogo *African Gold: Production, Trade and Economic Development* (2021).

Stephen W. Mayson, Derek French and Christopher Ryan *Mayson, French & Ryan on Company Law* 14 ed (1998) 277-278.

R.M Auty *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993).

United Nations *Handbook on Selected Issues for the Taxation of the Extractive Industries by Developing Countries* (2017).

W.E Oates *Fiscal Federalism* (1972).

Theses

Boniphace Luhende *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).

Laura-Anne Wilson *Unshackling South African Artisanal Miners: Considering Burkina Faso's legislative provisions as a guideline for legalisation and regulation* (LLM thesis, University of Cape Town, 2018).

Journal Articles

A Caramento 'Cultivating Backward Linkages to Zambia's Copper Mines: Debating the Design of and Obstacles to Local Content' (2020) 7:2 *Extractive Industry Society* 310-320.

A. Klemm 'Causes, benefits, and risks of business tax incentives' (2010) 17 *International Tax and Public Finance*.

Ana Elizabeth Bastida 'From Extractive to Transformative Industries: Paths for Linkages and Diversification for Resource-driven development' (2014) 27 *Mineral Economics* 2-3.

A.N Adedeji, S.F Sidiq and A.A Rahman 'The role of local content policy in local value creation in Nigeria's Oil Industry: a structural equation modeling (SEM) approach' (2016) 49 *Resources Policy* 61-73.

Beth Stevens, 'The Amoralism of Profit: Transnational Corporations and Human Rights' (2004) 20 *Berkeley Journal of International Law* 45–90.

Buckley P.J and M.C Casson 'A theory of cooperation in international business' in F.J Contractor and P. Lorange (eds) *Cooperative Strategies in International Business* 1988.

Chileye Nwapi 'Defining the "Local" in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries' (2015) 8(1) *LDR* 181-216.

Cynthia A Williams 'Civil Society Initiatives and 'Soft Law' in the Oil and Gas Industry' (2004) 36 *New York University Journal of International Law and Politics* 457–502.

De Mooij and S Hebous 'Curbing corporate debt bias: Do limitations to interest deductibility work' (2018) 96 *Journal of Banking and Finance* 368-378.

Evaristus Oshionebo 'Corporations and Nations: Power Imbalance in the Extractive Sector' (2018) 77 *American Journal of Economics & Sociology* 430.

Evelyn Dietsche 'Diversifying mineral economies: conceptualizing the debate on building linkages' (2014) 27 *Mineral Economics* 89-102.

Fitsum S. Weldegiorgis, Evelyn Dietsche and Daniel M. Franks 'Building mining's economic linkages: A critical review of local content policy theory' (2021) 74 *Resources Policy*.

Gregor Dobler and Rita Kesselring 'Swiss extractivism: Switzerland's role in Zambia's copper sector' (2019) 57:2 *The Journal of Modern African Studies* 223 – 245.

H. Besada and P. Martin 'Mining codes in Africa: emergence of a 'fourth' generation?' (2014) 28:2 *Cambridge Review of International Affairs* 263-282.

J Humphrey & H Schmitz 'Governance in Global Value Chains' (2001) 32 *IDS Bulletin* 19-29.

J.H Dunning 'Trade, location of economic activity and the MNEs' in B.Ohlin, P. Hesselborn and P. Wijkman (eds) *The international allocation of economic activity* (1977) 395-418.

John Kyove *et al* 'Globalization Impact on Multinational Enterprises' (2021) 2 *World review* 216-230.

Lee Burns 'International – Income Taxation through the Life cycle of an Extractive Industries Project' (2014) 20:6 *Asia – Pacific Tax Bulletin*.

Lorraine Eden 'Making it work in a 21st-Century World of Multinationals and Nation States' in Thomas Pogge and Krishen Metta (eds) *Global Tax Fairness* (2016) 153-171.

M.A Desai *et al* 'A multinational perspective on capital structure choice and international capital markets' (2004) 59:6 *Journal of Finance* 2451-2487.

M.F Ambrosanio and M.S Caroppo 'Eliminating harmful tax practices in tax havens: Defensive measures by major EU countries and tax haven reforms' (2005) 53:3 *Canadian Tax Journal* 685.

Michael W Hansen 'From enclave to linkage economies? A review of the literature on linkages between extractive multinational corporations and local industry in Africa' *Danish Institute for International Studies Working Paper* 2014:02.

N. Sari, M. Dewi and Y. Sun 'The effect of Tax Holiday on Economic Growth related to Foreign Investment' (2015) 211 *Procedia-Social and Behavioral Sciences* 1008-1015.

Peter J Buckley and Mark C Casson 'The internalisation theory of the multinational enterprise: A Review of the progress of a research agenda after 30 years' (2009) 40 *Journal of Business Studies* 1567.

Oladiwura Ayeyemi Eytayo-Oyesode 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform' (2019) 13 *Law and Development Review*.

R Griffith, H. Miller & M O'Connell 'Ownership of intellectual property and corporate taxation' (2014) 112 *Journal of Public Economics* 12-23.

Sophie Lemaitre, 'Illicit Financial Flows within the extractive industries sector: a glance at how legal requirements can be manipulated and diverted' (2017) 71 *Crime Law & Social Change* 107 – 128.

S Grossman & O Hart 'The costs and benefits of ownership: A theory of lateral and vertical integration' (1986) 94(4) *Journal of Political Economy* 691-719; Y. Barzel *Economic analysis of property rights* 2 ed (1997).

S.M Rupprecht 'Bench mining utilizing manual labour and mechanized equipment – a proposed mining method for artisanal small-scale mining in Central Africa' (2017) 117 *The Journal of the Southern African Institute of Mining and Metallurgy* 25-30.

T.A Gresik, D Schindler & G Schjelderup 'Immobilizing corporate income shifting: Should it be safe to strip in the harbor?' (2017) 152 *Journal of Public Economics* 68-78.

Tanja Goodwin and Martha Denisse Pierola 'Export Competitiveness: Why Domestic Market Competition Matters' (2015) *Trade and Competitiveness Global Practice* 1-10.

Yariv Brauner 'What is the BEPS?' (2014) *Florida Tax Review* 55-70.

United Nations Conference on Trade and Development "Creating Local Linkages by Empowering Indigenous Entrepreneurs" (2011) *African Oil and Gas Services Sector Survey*, vol. 1, Nigeria.

Special Papers

A.P Dourado & R de la Feria *Thin capitalisation rules in the context of the CCCTB*. Working Papers 0804, Oxford University Centre for Business Taxation.

IBFD Tax Treaties and Domestic Law Vol 2 (2006).

Jack Calder 'Transfer Pricing – special extractive industry issues' in Philip Daniel et al (eds) *International Taxation of the Extractive Industries* (2017) 79-111.

Kristina Fröberg and Attiya Waris *Bringing the Billions Back – How Africa and Europe Can End Illicit Capital Flight*. A *Global Studies Report* (2011).

Silvana Tordo et al 'Local Content Policies in the Oil and Gas Sector'. A *World Bank study* (2015).

Electronic

'2020 Budget Address by Honourable Dr. Bwalya K.E Ng'andu' available at https://www.parliament.gov.zm/sites/default/files/images/publication_docs/2021_National_Budget_Speech.pdf accessed on 6 October 2021.

African Union 'Minerals and Africa's Development: An overview of the report of the International Study Group on Africa's Mineral Regimes' available at [14499-wd-overview_of_the_isg_report.pdf \(au.int\)](#) accessed on 19 January 2022.

A.P Dourado & R de la Feria *Thin capitalisation rules in the context of the CCCTB*. Working Papers 0804, Oxford University Centre for Business Taxation available at *Thin Capitalization Rules in the Context of the CCCTB by Ana Paula Dourado, Rita de la Feria* :: SSRN accessed on 12 January 2022.

Adugna Lemi 'Catch me if you can: Trade mis – invoicing and capital flight revisited' available at <https://www.freit.org/WorkingPapers/Papers/TradePatterns/FREIT1403.pdf> accessed on 23 November 2021.

Ana Elizabeth Bastida 'From extractive to transformative industries: paths for linkages and diversification of resource-driven development' *Mineral Economics* Vol 27 (2014) 73-87.

African Development Bank 'Analysis of input goods and services in Zambia's mining industry' available at <https://prospero.co.zm/app/uploads/2020/08/AFDB-REPORT.pdf> accessed on 29 November 2021.

African Progress Panel, '*Equity in Extractives: Stewarding Africa's Natural Resources for All*' available at <http://www.africaprogresspanel.org/2013-africa-progress-report-fact-of-the-day-series/> accessed on 30 May 2021.

Austin Dziwornu Ablo 'The micromechanisms of power in local content requirements and their constraints on Ghanaian SMEs in the oil and gas sector' *Norwegian Journal of Geography* (2017) 67 available at <http://dx.doi.org/10.1080/00291951.2017.1299213>. accessed on 30 September 2021.

ASQ 'Quality Assurance & Quality Control' available at <https://asq.org/quality-resources/quality-assurance-vs-control> accessed on 26 November 2021.

Brian J. Arnold 'An introduction to tax treaties' available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT_Introduction_Eng.pdf accessed on 29 November 2021.

Brian Roach, 'Corporate Power in a Global Economy (2007) Global Development and Environment Institute. Medford, MA: Tufts University. <http://sttpml.org/wp-content/uploads/2014/06/Corporate%5fPower%5fin%5fa%5fGlobal%5fEconomy.pdf> accessed on 4 June 2021.

Christian Chileshe and Henry Chata 'Thin capitalisation and illicit financial flows in Africa- a case of Zambia's mining sector' available at <https://www.researchgate.net/publication/329917273> accessed on 8 September 2021.

H.J Van Zyl, W.G Bam and J. D Steenkamp 'Identifying barriers to growth in mineral value chains' (2020) 120:2 Journal of the Southern African Institute of Mining and Metallurgy available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-62532020000200009 accessed on 22 November 2021.

Global Financial Integrity 'Report on Trade-Related Illicit Financial Flows in 135 Developing countries: 2008 – 17' available at <https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2020/03/GFI-Trade-IFF-Report-2020-Final.pdf?time=1585017856> accessed on 13 November 2021.

George J. Coakley 'The Mineral Industry of Zambia' available at <https://s3-us-west-2.amazonaws.com/prd-wret/assets/palladium/production/mineral-pubs/country/2000/zamyb00.pdf> accessed on 1 November 2021.

Glencore 'Signed contract to sell underlying stake of 73% in Mopani in \$1.5b transaction' available at <https://www.glencore.com/media-and-insights/news/signed-contract-to-sell-underlying-stake-of-73-in-mopani-in-1.5b-transaction> accessed on 21 November 2021.

Intergovernmental Forum on Mining, Minerals and Sustainable Development 'Tax Treaties and the Mining Sector: Identifying the issues and coordinating responses' available at https://www.igfmining.org/wp-content/uploads/2018/08/ISLP-IGF-Dialogue-on-Tax-Treaties-and-the-Mining-Sector_Meeting-Notes.pdf accessed on 22 November 2021.

Jane Korinek The Mining Global Value Chain (OECD Trade Policy Papers, 2020) available at <https://www.oecd-ilibrary.org/docserver/2827283e-en.pdf?expires=1637041452&id=id&accname=guest&checksum=54C21F1846978A2FCB55CD900AF61133> accessed on 15 November 2021.

Isabelle Ramdoo 'Local Content Policies in mineral-rich countries' available at <https://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-193-Local-Content-Policies-Mineral-Rich-Countries-2016.pdf> accessed on 7 July 2021.

Kennedy Chege 'Designing Local Content Frameworks in the Oil, Gas and Mining Sectors in Africa: Principles and Guidelines' available at *Designing Local Content Frameworks in the Oil, Gas and Mining sectors in Africa: Principles and Guidelines | Mineral Law in Africa* (uct.ac.za) accessed on 30 June 2021.

Ministry of Mines and Minerals Development 'Regulatory Impact Assessment: Proposed Local Content Regulations for the Mining Sector' available at <http://www.businesslicenses.gov.zm/uploads/documents/RIA%20REPORT%20FOR%20LOCAL%20%20CONTENT%20REGULATIONS.pdf> accessed on 28 November 2021.

OECD Transfer Pricing Guidelines for National Enterprises and Tax Administrations available at https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page261 accessed on 8 September 2021.

Oswaldo Molina, Jocelyn Olivari and Carlo Pietrobelli Global Value Chains in the Peruvian Mining Sector (Inter-American Development Bank, 2016) available at <https://publications.iadb.org/publications/english/document/Global-Value-Chains-in-the-Peruvian-Mining-Sector.pdf> accessed on 19 November 2021.

Open Zambia 'Small-scale miners welcome SME Ministry' available at *Small-Scale Miners Welcome SME Ministry — Open Zambia* accessed on 24 November 2021.

Sebastian Bustos et al 'Challenges of monitoring tax compliance by multinational firms: evidence from Chile' available at <https://gabriel-zucman.eu/files/BPVZ2019.pdf> accessed on 21st January 2022.

Strategy for African Mining' available at <https://documents1.worldbank.org/curated/en/722101468204567891/pdf/multi-page.pdf> accessed on 7 October 2021.

T.A Gresik, D Schindler & G Schjelderup 'Immobilizing corporate income shifting: Should it be safe to strip in the harbor?' (2017) 152 *Journal of Public Economics* 68-78.

The Shaffer Star: Markets, Export Base Theory available at <https://aae.wisc.edu/ced/wp-content/uploads/sites/8/2013/06/Shaffer-star-markets-export-base.pdf> accessed on 8 October 2021.

Thomas Biesheuvel, Matthew Hill, and Taonga Clifford Mitimangi 'Glencore seals Zambia Copper Sale but must wait for the cash' available at <https://www.bloomberg.com/news/articles/2021-01-19/glencore-agrees-mopani-copper-sale-but-must-wait-for-the-money> accessed on 1 November 2021.

United Nations Conference on Trade and Development '80% of trade takes place in 'value chains' linked to transnational corporations, UNCTAD report says' available at <https://unctad.org/press-material/80-trade-takes-place-value-chains-linked-transnational-corporations-unctad-report> accessed on 13 November 2021.

Uongozi Institute 'Enhancing Value Addition in the Extractive Sector in Africa: Why is it Important and How can it be achieved?' available at <https://media.africaportal.org/documents/Enhancing-Value-Addition-in-the-Extractive-Sector-Africa.pdf> accessed on 18 October 2021.

United Nations Conference for Trade and Development 'Tackling Illicit Financial Flows for Sustainable Development' available at *Tackling Illicit Financial Flows for Sustainable Development in Africa (unctad.org)* accessed on 2 July 2021.

United Nations Economic Commission for Africa 'Illicit Financial Flows: Issues Paper' available at *Assembly AU 17 (XXIV)_E.pdf (africa-union.org)* accessed on 7 July 2021.

Zambia Revenue Authority 'Vat Liability Guide' available at <https://www.zra.org.zm/wp-content/uploads/2020/07/VAT-Liability-Guide-2020-1.pdf> accessed on 29 November 2021.

Zambia Revenue Authority 'Practice Note No.1/2021' available at <https://www.zra.org.zm/wp-content/uploads/2021/02/Practice-Note-No.-1-of-2021..pdf> accessed on 30 November 2021.

Newspapers

Angela Charlton 'G-20 to Multinationals: Pay more taxes' Bloomberg business Week 19 July 2013 available at *G-20 to multinationals: Pay more taxes (newstribune.com)* accessed on 1 January 2022.

Jane Mwansa 'Small-scale miners back ZCCM-IH quest for greater stake in Mopani' available at <https://www.times.co.zm/?p=107916> accessed on 1 November 2021.