

**RE-VISITING THE ‘RESOURCE CURSE’:
LAW AND MINING GOVERNANCE IN SOUTHERN AFRICAN
DEVELOPMENTAL STATES**

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Abstract

Using the case studies of Botswana, South Africa, and Zambia, this dissertation interrogates the applicability of the developmental state paradigm to mining developmentalism in Southern Africa. Since the advent of neoliberal Washington Consensus policies and the rise of the “resource curse” theory beginning in the 1980s, African states have been discouraged from pursuing interventionist policies in their mining sectors. Instead, through the methods of conditionality and transnational norm-creation, many African states were pressured to adopt “good governance” principles that limited their role, and the role for law, in expanding opportunities for mining-led development across the region.

As growing consensus challenged the efficacy of neoliberal approaches to mining governance, all three case studies (along with other mining-dependent African countries) introduced measures that increased state intervention in mining. These initiatives fall under three general categories: enhancing local content and participation, developing cross-sectoral linkages, and broader resource nationalism. To investigate the potential conflict that arises between implementing these measures and adhering to good governance norms, this dissertation asks whether the developmental state paradigm—popularized by East Asian states—offers an alternative framework to effectively govern mining-led development.

This dissertation is rooted in critical law and development scholarship and seeks to expand disciplinary and methodological boundaries of the developmental state (or “new” developmental state) beyond its current focus on economic growth indicators. Moreover, this dissertation inherently relies on interdisciplinary scholarship to examine its research question, including literature from African studies, political science, development studies and economics.

By using mining developmentalism in Southern Africa to interrogate orthodox law and development approaches to the developmental state, this dissertation concludes that a rights-based approach to conceptualizing the developmental state—and more specifically, the mining developmental state—could better account for the needs of local populations when states embrace this development model. Accordingly, this dissertation attempts to address these gaps in the mining developmental state framework by evaluating recent state practice in Botswana, South Africa and Zambia, and considering the deleterious effects of extractivism in each country and the ways in which they could be ameliorated using a rights-based approach.

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1 Introduction

“Africa has made the world rich with our minerals, our gemstones adorn crowns and homes around the world; it is time to make Africa prosperous, and enable her people to attain a dignified standard of living.”

-President Nana Akufo-Addo, The Republic of Ghana¹

1.1. New directions in Southern Africa’s mining developmentalism

At the 2019 African Mining Indaba,² President Nana Akufo-Addo of Ghana stood before hundreds of mining investors and executives to declare that African³ countries deserved more benefits from mining⁴—it was no longer acceptable that foreign mining companies profited from the continent’s vast mineral wealth while so many of its inhabitants remained poor.⁵ President Akufo-Addo’s comments reflected a longstanding belief held by many Southern African⁶ governments since the end of colonial rule: mining could promote economic and social

¹ “Africa: ‘Mining must make Africa prosperous not poor’ – President Akufo-Addo” (5 February 2019), online: allAfrica News <<https://allafrica.com/stories/201902060323.html>> [President Akufo-Addo].

² The African Mining Indaba is an international mining investment conference held annually in Cape Town, South Africa. The conference brings together African governments and investors to discuss business opportunities across the continent (see African Mining Indaba, online: <<https://www.miningindaba.com/Page/about>>).

³ Where appropriate, this dissertation refers to the histories, theories, and current events that are relevant to all African countries where large-scale mining operates. This is not intended to detract from this dissertation’s focus on Southern Africa—and three case studies from that region—to examine the research question and arrive at its conclusions. Nor does this method or use of this terminology intend to homogenize the diverse political, economic and legal traditions among African mining countries. Instead, its use acknowledges shared experiences of colonialism, neoliberalism, and foreign investment in various mining regimes across Africa.

⁴ “Mining” is used in this dissertation to refer to the large-scale, industrial extraction of valuable, non-renewable minerals, metals and other geographical materials from the earth. The extracted mineral or metal product is inherently of economic value due to its use in other sectors, including technology, construction, and manufacturing (United Nations Economic Commission for Africa and the African Union, *Minerals and Africa’s Development: The International Study Group Report on Africa’s Mineral Regimes* (United Nations Economic Commission for Africa, 2011) at 11 [“UNECA/AU”]).

⁵ President Akufo-Addo, *supra* note 1.

⁶ For the purposes of this dissertation, “Southern Africa” refers to the member states of the Southern African Development Community (SADC): Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe. SADC is a regional economic community that is committed to regional integration and eradicating poverty through economic development and ensuring peace and security (<https://www.sadc.int/about-sadc>).

development⁷ across the region.⁸ Mining's vast wealth and developmental potential⁹ has been pivotal to state formation in Southern Africa from colonialism through post-colonial neoliberal interventions and more recent foreign investment. Due to its economic importance, this dissertation limits its analysis to large-scale mining operations carried out by private, often foreign, corporations or state-owned enterprises. Artisanal and small-scale mining—forms of mining conducted with less financing, employees, and technology¹⁰—are not examined here because their limited regulation has made it difficult to verify their contribution to national socioeconomic development across Southern Africa.¹¹

How mining developmentalism (or mining-led development)¹² was conceptualized has varied since independence swept across the region in the mid-twentieth century. The early post-colonial period marked the rise of nationalist politics in many Southern African countries, resulting in interventionist domestic policies aimed at expanding the scope of public sector engagement in mining operations.¹³ These interventions waned during the debt crisis of the

⁷ “Development” is not a settled concept—there are various definitions that comprise different considerations, including economic, social, environmental, capabilities, and human rights. This dissertation adopts an understanding of development that comprises economic and social factors under the umbrella of a nuanced rights-based approach to development. This definition is explained further in section 1.2.1 and Chapter Three.

⁸ African Union, *Africa Mining Vision* (February 2009), online: Africa Mining Vision <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf> at 10 [AMV].

⁹ Africa Progress Panel, *Africa Progress Report 2013: Equity in Extractives: Stewarding Africa's natural resources for all*, online: <<http://www.africaprogresspanel.org/>> at 43.

¹⁰ UNECA/AU, *supra* note 4 at 11.

¹¹ Gavin Hilson, “Small-scale mining, poverty and economic development in sub-Saharan Africa: An overview” (2009) 34:1–2 *Resources Policy* 1 at 2.

¹² “Developmentalism” is a method of structuring economic activity that relies on enhanced state intervention and regulation of the market. It differs from economic liberalism and neoliberalism, which seeks to limit the role of the state in market activity (Luiz Carlos Bresser-Pereira, “Two forms of capitalism: developmentalism and economic liberalism” (2017) 37:4 *Brazilian Journal of Political Economy* 680). Accordingly, “mining developmentalism” and “mining-led development” are used interchangeably to refer to state reliance on mining—through a combination of regulation and direct intervention—as a way to promote socioeconomic development.

¹³ Hany Besada & Phillippe Martin, “Mining codes in Africa: emergence of a fourth generation?” (2015) 28:2 *Cambridge Review of International Affairs* 263 at 266.

1980s, as governments seeking financial aid from the Bretton Woods Institutions (BWIs)¹⁴ were forced to adopt neoliberal policy reforms that limited their involvement to regulating industry to create a conducive investment climate.¹⁵ The failure of Southern African states to capitalize on their mineral wealth was also attributed to the “resource curse,” a political economy theory put forth by economic geography professor Richard Auty,¹⁶ which quickly became synonymous with a state’s inability to transform its mineral wealth into sustainable socioeconomic development. Armed with Auty’s description of the problem,¹⁷ development practitioners and the BWIs attributed poor economic performance in the region to weak governance and ineffective institutions. To combat the curse, a set of political and economic policies—packaged as “good governance”—were proposed for states to achieve their socioeconomic development goals,¹⁸ including measures framing the state as the regulator of mining and not an active participant in the industry.

¹⁴ The Bretton Woods Institutions comprise the World Bank and International Monetary Fund (IMF). They were created near the end of World War Two at a meeting of 44 allied countries in Bretton Woods, New Hampshire. Their aim was to assist with post-war reconstruction and development. Over time, as post-war reconstruction dissipated, their mission evolved to respond to the financing needs of developing countries—first on a project-scale, then eventually large-scale “structural adjustment loans.” It was through these loans that the BWIs implemented a neoliberal economic policy agenda—the “Washington Consensus”—that favoured privatization, trade liberalization, and government austerity (Joseph E Stiglitz, *Globalization and its Discontents* (New York: WW Norton & Company Inc, 2002) at 11-17).

¹⁵ Besada & Martin, *supra* note 13 at 266.

¹⁶ Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge, 1993).

¹⁷ Subsequent academic studies supported Auty’s conclusion; see Jeffrey Sachs & Andrew Warner, “Natural Resource Abundance and Economic Growth” (1995) NBER Working Paper No. 5398; Paul Collier & Benedikt Goderis, “Commodity Prices, Growth, and the Natural Resource Curse: Reconciling a Conundrum” (2007) University of Oxford, Department of Economics Working Paper No. WPS/2007-15; William Easterly & Ross Levine, “Tropics, germs, and crops: how endowments influence economic development” (2003) 50:1 *Journal of Monetary Economics* 3; Halvor Mehlum, Karl Moene & Ragnar Torvik, “Institutions and the Resource Curse” (2006) 116:508 *The Economic Journal* 1.

¹⁸ Anthony Anghie, “Universality and the Concept of Governance in International Law” in Edward Kofi Quashigah & Obiora Chinedu Okafor, eds, *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) 21 at 21.

While good governance norms dominated neoliberal policy interventions throughout the 1990s, several mining-dependent¹⁹ Southern African states—including Angola, Botswana, the Democratic Republic of the Congo (DRC), Mozambique, South Africa, Tanzania, and Zambia—have slowly shifted away from conforming to these norms over the course of the last commodities super cycle.^{20,21} Instead, they have embraced mining law reforms reintroducing direct state intervention in the industry. These reforms, driven in large part by the new wealth generated by the commodities boom, have been adopted by several states as a catalyst for the promotion of their stalled development agendas.²²

Despite the significant wealth that mining presents, much of Southern Africa exhibits the “paradox of plenty”²³—the abundance of mineral resources has not yet produced meaningful improvements in quality of life across the region.²⁴ The use of mining to promote sustainable economic growth and community development across Southern Africa hinges on a state’s ability to effectively govern the industry for that purpose. Developmental legal mechanisms are a necessary component of these efforts, which is an issue with which the field of law and

¹⁹ Use of the term “mining-dependent” in this dissertation is akin to the “resource-rich” descriptor used by the International Monetary Fund to describe countries that are economically dependent on mining, particularly as a source of government revenue and export earnings (International Monetary Fund, “Sub-Saharan Africa – Sustaining Growth amid Global Uncertainty” (2012), World Economic and Financial Surveys, online: <www.imf.org/external/pubs/ft/reo/2012/afr/eng/sreo0412.pdf> at 61).

²⁰ A “commodities super cycle” is an extended period during which commodity prices (for such products as oil, gas, metals and minerals) are above average. From 2000-2014, the prices of several minerals (including gold, platinum, iron, zinc and copper) surged due to increased demand from emerging countries, most notably China (UNECA/AU, *supra* note 4 at 24-25).

²¹ Besada & Martin, *supra* note 13 at 266; Jack Jacobs, “An Overview of Revenue Flows from the Mining Sector: Impacts, Debates, and Policy Recommendations” in Bonnie Campbell (ed), *Modes of Governance and Revenue Flows in African Mining* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2013) 16 at 17.

²² Aniket Bhushan, Yiagadeesen Samy & Kemi Medu, *Financing the Post-2015 Development Agenda: Domestic Revenue Mobilization in Africa* (September 2013), online: The North-South Institute <<http://www.nsi-ins.ca/wp-content/uploads/2013/11/Financing-the-Post-2015-Africa-Report-September-2013.pdf>> at 3.

²³ Francis B Nyamnjoh & IM Jimu, “Success or Failure of Developmental States in Africa: Exploration of the Development Experiences in a Global Context”, in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 16 at 18.

²⁴ *Ibid*.

development has yet to meaningfully engage. Likewise, the discipline has not turned its attention to the conflict between the “resource curse-good governance” nexus and the recent law reforms undertaken by mining-dependent Southern African states. Instead, over much of the post-colonial period, law and development scholarship has been concerned with understanding the relationship between law and economic development—particularly the legal mechanisms that successfully promoted growth and other economic indicators—while also proposing regulatory measures that could sustain those outcomes.²⁵ Today, although there is no consensus of the role of law in development,²⁶ law and development theories like the “developmental state” may be useful tools in conceptualizing legal interventions in mining that may mitigate the resource curse and governance deficit in Southern African states.

The “developmental state”—or the “new developmental state”²⁷ as law and development scholar David Trubek describes it today—is a paradigm that describes how developing countries prioritize economic development and design effective policies to promote this goal.²⁸ It traces its theoretical origins to the interventions made by post-World War Two governments in East Asia (notably Japan, South Korea, Singapore, and Taiwan) to promote industrialization and achieve high rates of economic growth.²⁹ Although development has featured prominently in the governance agenda of several post-colonial Southern African states, none—with the possible

²⁵ Celine Tan, “Beyond the ‘Moments’ of Law and Development: Critical Reflections on Law and Development Scholarship in a Globalized Economy” (2019) 12:2 *Law and Development Review* 285 at 288; Ada Ordor, “Tracking the Law and Development Continuum through Multiple Intersections” (2015) 8:2 *Law and Development Review* 333 at 335.

²⁶ David M Trubek & Alvaro Santos, “Introduction: the Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge; New York: Cambridge University Press, 2006) 1 at 3.

²⁷ David Trubek, “Developmental States and the Legal Order: Towards a New Political Economy of Development and Law” (2009) University of Wisconsin Legal Studies Research Paper No. 1075 at 35.

²⁸ Liliana Lizarazo-Rodríguez, “Mapping Law and Development” (2017) 4 *Indonesian Journal of International and Comparative Law* 761 at 774.

²⁹ Esteban Pérez Caldentey, “The Concept and Evolution of the Developmental State” (2008) 37:3 *International Journal of Political Economy* 27 at 27.

exception of Botswana—have elevated themselves to the standard set by East Asia.³⁰ Today, as many mining-dependent Southern African states remain mired in the paradox of abundant natural resource wealth and extreme poverty,³¹ the developmental state may help explain the interventions states are taking to extract greater benefits from mining, which differentiates this approach from the neoliberal tenets of the good governance paradigm that seeks to limit state involvement in the sector.

Over the past twenty years, Southern African states have reclaimed policy space in their mining industries by redesigning their regulatory and governance regimes in favour of socioeconomic development. This development is contrary to the recommendations that had emerged from the logic of the resource curse thesis and subsequent contemporary neoliberal good governance discourse, which suggests that states should, in fact, minimize their reliance on mining and limit state interventions in the sector unless “proper” institutions are in place. Using Botswana, South Africa and Zambia as case studies, this dissertation seeks to explore this conflict by interrogating the resource curse thesis and good governance discourse. It not only critiques this paradigm—it goes further and hypothesizes if the developmental state framework offers an alternative means to govern mining-led development across Southern Africa. This research question is undoubtedly normative in nature.³² Wherever possible, this dissertation seeks to assess the prescriptive potential of the developmental state while also problematizing its underlying suppositions, in addition to those of traditional good governance discourse.

³⁰ Peter Meyns & Charity Musumba, *The Developmental State in Africa: Problems and Prospects* (INEF Report, 101/2010) (Duisburg, Germany: Institute for Development and Peace, University of Duisburg–Essen, 2010) at 45.

³¹ Nyamnjoh & Jimu, *supra* note 23 at 18.

³² Sundhya Pahuja, “Practical Methodology: Writing about How We Do Research” in Nicholas Tsagourias, ed., *Handbook on Methodologies in International Law* (forthcoming, Edward Elgar, 2020).

1.2. Situating the study: mining developmentalism in post-colonial development

Central to this dissertation's analysis is the assertion that large-scale mining can promote development across Southern Africa if managed effectively. Mining is an economic activity that can potentially contribute to national economic development, broadly defined as growth, Gross Domestic Product (GDP), employment and other related criteria. However, the development agenda that mining supports and the beneficiaries of that agenda continue to be a contested site of policy-making across Southern Africa. While economic components of development are a critical focus of this dissertation, it also adopts a broader perspective that looks beyond the economic sphere. Accordingly, this dissertation adopts a rights-based approach to mining-led development that accounts for several economic and social impacts.³³ While using mining to promote national and local development is not without its critics (some of which are summarized below in section 1.2.2), this dissertation presumes that mining is a desirable economic activity that can potentially be designed to promote socioeconomic development across Southern Africa.

1.2.1. Defining and problematizing “development”

Mainstream conceptions of development—at least as it is understood in the Global North—emerged after the end of World War Two when politico-economic ideology divided the world between the United States and its allies in the West and the former Soviet Union and its Eastern Bloc allies.³⁴ Despite its prominence in post-World War Two international relations, notions of “developed” and “undeveloped” civilizations predate the twentieth century. Colonial conquest was premised on the idea that certain peoples were “savages” and lacked the advanced attributes

³³ Mining also has a significant environmental impact, which this dissertation does not address.

³⁴ Kerry Rittich, “Theorizing International Law and Development” in Anne Orford & Florian Hoffman, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: OUP, 2016) 820 at 820 [Rittich, “Theorizing”].

of “civilized” populations.³⁵ After World War Two, this dichotomy evolved into a graduated scale that dominated development discourse:³⁶ “developing,” or “Third World” populations were situated at one end, and “developed” or “First World” states at the other.³⁷ Differences in wealth (calculated using economic statistics like GDP or Gross National Income) catalogued states along the scale as “low”, “middle”, or “high” income countries.³⁸ The methodology of measuring income has been critiqued by several authors, including Kerry Rittich, Sundhya Pahuja, Sally Engle Merry and Ruth Buchanan (along with collaborators Kimberley Byers and Kristina Mansveld). These scholars not only contend that this mechanism is flawed but that these measures further entrench income hierarchies.³⁹

Contemporary understandings of the world are shaped by Northern framings of development and classifications such as those described above. Although it has helped conceptualize income differences between states,⁴⁰ development has also concealed the historical

³⁵ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge, UK: Cambridge University Press, 2011) at 46 [Pahuja, *Decolonising*].

³⁶ *Ibid.*

³⁷ “Global North” and “Global South” are two additional monikers that are often used to identify this seeming economic and political divide between states. “Global South” is often used as an alternative to “Third World” that represents economically-disadvantaged states, many of which were former colonies. This distinction is not perfect, especially as several states in the Global South exert significant economic and political influence internationally, such as China, India and Brazil. Nonetheless, this conceptual divide is a useful way to map the economic, political and ideological differences that shaped the world in the post-colonial era (Anne Garland Mahler, “Global South” in Eugene O’Brien, ed, *Oxford Bibliographies in Literary and Critical Theory* (New York: Oxford University Press, 2017).

³⁸ Espen Beer Prydz & Divyanshi Wadhwa, “Classifying countries by income” (September 9, 2019), online: The World Bank <<https://datatopics.worldbank.org/world-development-indicators/stories/the-classification-of-countries-by-income.html>>.

³⁹ See, for example, Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 203; Sundhya Pahuja, “Global Poverty and Good Intentions” in Ruth Buchanan & Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (London: Hart Publishing, 2014) 31; Sally Engle Merry, “Measuring the World: Indicators, Human Rights and Global Governance” (2011) 52:3 *Current Anthropology* S83; Ruth Buchanan, Kimberley Byers & Kristina Mansveld, “‘What gets measured gets done’: exploring the social construction of globalized knowledge for development” in Moshe Hirsch & Andrew Lang, eds, *Research handbook on the sociology of international law* (Cheltenham, UK: Edward Elgar Publishing, 2018) 101.

⁴⁰ Pahuja, *Decolonising*, *supra* note 35 at 65.

inequities that have contributed to contemporary global inequalities. Instead, “development” has become a convenient means for wealthier nations and international organizations to direct and coordinate nation building in the Global South through such mechanisms as rule of law reform, foreign investment, structural adjustment conditionalities, and development assistance.⁴¹ Contrasting understandings of development have become a point of international contestation for Northern and Southern states,⁴² as disputes between the preeminence of political and civil rights versus economic and social priorities dominated international debate in the early post-colonial era.⁴³ Newly independent states also galvanized around collective action to reimagine the international legal and economic order, including at conferences such as that in Bandung, Indonesia in 1955,⁴⁴ and in international bodies such as the United Nations General Assembly where the call for a New International Economic Order was advanced in the 1970s.⁴⁵ More recently, expansive definitions of development have become prevalent, including the capabilities approach popularized by Amartya Sen, as well as notions of “human development” proffered by the United Nations Human Development Index. Additionally, concerns about balancing consumption and production with environmental and social factors have entered the conversation as development discourse has adopted the mantra of sustainability over the past 30 years. Embodied in the Sustainable Development Goals and Agenda 2030, poor and wealthy states

⁴¹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003) at 26.

⁴² Pahuja, *Decolonising*, *supra* note 35 at 66.

⁴³ Rittich, “Theorizing”, *supra* note 34 at 823.

⁴⁴ Luis Eslava, Michael Fakhri & Vasuki Nesiah, “The Spirit of Bandung” in Luis Eslava, Michael Fakhri & Vasuki Nesiah, eds, *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017) 3 at 3.

⁴⁵ Rittich, “Theorizing”, *supra* note 34 at 823.

have, to some extent, coalesced around an idea of development that promotes prosperity while protecting the environment, advancing gender equality, and combatting climate change.⁴⁶

Although mining is an activity that affects different components of the sustainable development agenda, this dissertation does not adopt that definition of development due to its breadth in addressing three separate dimensions (the economic, social and environmental).⁴⁷ Instead, this dissertation embraces a rights-based⁴⁸ approach to development (RBAD) that considers national economic interests—such as growth, enhanced employment and income-generating opportunities—alongside community empowerment, which in the mining context necessitates adopting the right of free, prior and informed consent (FPIC). As will be discussed further in Chapter Three, this dissertation uses this definition in an attempt to entrench the socioeconomic interests of local mining-affected communities in national development agendas. This approach is not regarded as a panacea. Rather, as explained further in Chapter Three, this definition seeks to incorporate a measure of state accountability that could otherwise be absent in the new wave of mining developmentalism taking shape across Southern Africa.⁴⁹ To narrow this analysis, considerations related to gender and the environment are not examined in this dissertation.

⁴⁶ Sustainable Development Goals, online: <<https://sustainabledevelopment.un.org>>.

⁴⁷ *Ibid.*

⁴⁸ Human rights are also contested in critical development scholarship. This dissertation adopts a conception of a “rights-based approach” to development as its been enunciated in the agreements and jurisprudence of the African Commission and Court for Human and Peoples’ Rights and various scholars in the field (see Chapter Three). It is a definition that adopts economic and social components in an accountability framework that expands the function of the developmental state.

⁴⁹ BS Chimni, “Third World Approaches to International Law: A Manifesto” in Anthony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden, Netherlands: Brill Academic Publishers, 2003) 47 at 70.

1.2.2. Mining developmentalism versus extractivism

Mining has supported economic life in Southern Africa for centuries, even before the arrival of European colonialists. As colonialism took hold across the region in the late nineteenth and early twentieth centuries, mining became entrenched in the economic fabric of the colonial state, making it a vital part of its survival and a mechanism of oppression, dispossession and displacement. In the post-colonial era, mining has remained vital to several Southern African economies. A recent analysis of mining by the International Council on Mining and Metals concluded that in both Zambia and the DRC, mineral rents⁵⁰ comprised more than five percent of GDP.⁵¹ Minerals, metals and coal products also comprised at least 25 percent of exports in nine Southern African states,⁵² and upwards of 50 percent of exports in four of these countries (both Botswana and Zambia fall within this group).⁵³ The production value of mining was also at least 10 percent of GDP in seven countries, including all three case studies.⁵⁴ This data suggests that mining remains critical to the economic survival of several Southern African states, including the three case studies.

It is possible, therefore, for states to maximize the developmental potential of mining through revenue generated from taxation, establishing cross-sectoral linkages that combat the enclave nature of mining and ensure it contributes to other sectors of the economy (both local procurement requirements and production linkages support this approach). Of course, a positive

⁵⁰ “Mineral rents” are the profits generated from mining (the difference between the price the product can be sold minus the costs of production).

⁵¹ International Council on Mining and Metals, *Role of Mining in National Economies: Mining Contribution Index 2018* (September 2018), online: <https://www.icmm.com/website/publications/pdfs/social-and-economic-development/181002_mci_4th-edition.pdf> [ICMM].

⁵² The states are: Botswana, the DRC, Madagascar, Mozambique, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe (*Ibid*).

⁵³ These countries are: Botswana, the DRC, Namibia, and Zambia (*Ibid*).

⁵⁴ These states are: Botswana, the DRC, Madagascar, Mozambique, South Africa, Zambia, and Zimbabwe (*Ibid*).

correlation between mining and socioeconomic development is not guaranteed, and inherently depends on the functionality of institutions in place. Increased dependence on mining can also limit the long-term developmental prospects of states because it creates a dependency that is easily affected by the global political economy. This dissertation adopts the position that mining developmentalism is not a panacea for Southern Africa's development challenges;⁵⁵ it should be considered as one possible method that could be utilized concurrently with others.

Conversely, critics of mining developmentalism contend that it is not a new form of economic development in the post-neoliberal state.⁵⁶ Like extractivist forms of development in the neoliberal era, mining developmentalism continues to operate within a global capitalist system that elevates the economic interests of transnational corporations over those of local communities that are forced to contend with corporatist mining activity. Rather than alleviate or eliminate these harmful conditions, critics argue that states are merely undertaking new measures meant to reform their relationships with global capital and ensure a greater share of the benefits derived from mining.⁵⁷ Like many of their counterparts across Southern Africa, Botswana, South Africa, and Zambia have attempted these undertakings with mixed results for the state and local communities. This dissertation aims to evaluate these outcomes and assess their progress, as well as their implications, for current mining developmentalist efforts taking shape in Africa. The extractivist critique offers a lens to do so. Although this dissertation situates its analysis in law

⁵⁵ Chris WJ Roberts, "The other resource curse: Extractives as development panacea" in Hany Gamil Besada, ed, *Governing Natural Resources for Africa's Development* (New York: Routledge, 2017) 64 at 87.

⁵⁶ Henry Veltmeyer & James Petras, "A new model or extractive imperialism?" in Henry Veltmeyer & James Petras, eds, *The New Extractivism: A Post-Neoliberal Development Model or Imperialism of the Twenty-First Century?* (London: Zed Books, 2014) 21 at 28.

⁵⁷ *Ibid* at 39.

and development and developmental state frameworks, it also discusses the limitations of these two paradigms⁵⁸ while still acknowledging the role mining can play to catalyze development.

1.3. Framing the study: the developmental state in law and development

This dissertation frames its study of mining developmentalism within law and development scholarship for three reasons. First, neoliberal policies have constrained state action in the mining sector for several decades. The recent pivot away from this neoliberal policy agenda has been led by developing countries opposed to its poor outcomes despite the continued influence of the BWIs, other international organizations, and transnational “good governance” norms in shaping mining governance. To entrench mining developmentalism as the new economic order, states have been introducing new laws and legal institutions designed to reform public-private partnerships, reduce inequality, and empower citizens.⁵⁹ These actions are in line with the developmental state, which was first conceived by political economist Chalmers Johnson when he studied economic development in Japan.⁶⁰ Second, law and development scholarship—through the work of David Trubek, Diogo Coutinho, Mariana Prado, and Mario Schapiro in Brazil—has adopted this framework to analyze its challenges for law. Few other legal disciplines offer relevant theoretical paradigms rooted in examining the economic activities of states, its impact on development, and its affect on the changing roles for law. Lastly, by adapting this framework to the Southern African context, this dissertation wishes to contribute to the burgeoning and evolving field of law and development, which has yet to grapple with the

⁵⁸ See Chapter Seven.

⁵⁹ David M Trubek, Diogo R Coutinho & Mario G Schapiro, “New State Activism in Brazil and the Challenge for Law” in David Trubek et al, eds, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013) 28 at 28.

⁶⁰ Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford: Stanford University Press, 1982).

significance of mining developmentalism to evolving understandings of law and development in Southern Africa.⁶¹

Adopting this framework necessarily inclines this dissertation towards an interdisciplinary examination of the topic. The developmental state has been thoroughly analyzed, debated, and critiqued in political science, economics, development, and African studies literature. This dissertation relies extensively on that scholarship to inform conceptions of the developmental state in the field of law and development. It blends terminology and theories from these disciplines with ideas and emerging trends in law and development to define the developmental state and its constitutive institutions: development-oriented political leadership, an autonomous and effective bureaucracy, performance-oriented governance, and production coordination and conflict management.⁶² These institutions are examined alongside emerging mining developmental state institutions uniquely identified for this dissertation—local content and participation requirements, expanding cross-sectoral linkages, and broader resource nationalism—to partly conceptualize the *mining developmental state*,⁶³ a developmental state that is largely reliant on mineral wealth to advance its development agenda.

Critical scholarship from law and development and international law are used to assess the developmental state's efficacy to govern mining developmentalism. One of the critical

⁶¹ The contours of law and development scholarship have yet to be clearly defined. Recent academic gatherings convened under the law and development theme (for example, those organized by the Law and Development Research Network and the Law and Development Institute) included presentations on theoretical conceptualizations of law and development, global economic governance, human rights, women's rights, institutions, natural resource conflicts, the environment, legal pluralism, intellectual property, LGBTQ+ rights, and rule of law interventions. The only dedicated publication in the field, the *Law and Development Review*, has also published articles covering a wide range of topics.

⁶² Meyns & Musamba, *supra* note 30 at 21.

⁶³ My phrasing "mining developmental state" is a variation of Devin Joshi's "resource developmental state" first used in his article "Varieties of Developmental States: Three Non-Western Pathways to the Millennium Development Goals" (2012) 28:3 *Journal of Developing Societies* 355. Using "mining" rather than "resource" is meant to emphasize the developmental state's reliance on mineral wealth.

international law disciplines this dissertation relies on is Third World Approaches to International Law (TWAIL). Although this study is not squarely rooted in TWAIL methodology for the reasons discussed above, its scholarship informs the critical lens used to evaluate transnational good governance norms,⁶⁴ and the limitations of the developmental state within the field of law and development. By partly framing its critical lens in TWAIL, this dissertation aims to integrate that scholarship into broadening conceptualizations of the mining developmental state: it rejects the hegemony of transnational norms and institutions, attempts to incorporate and use rights-language effectively, and reinforces an accountability mechanism that centres local interests.⁶⁵ This approach is similar to that of law and development scholars like Ruth Buchanan, Sundhya Pahuja, and Kerry Rittich, whose scholarship consistently dialogues with TWAIL scholars such as Anthony Anghie, Bhupinder Chimni, Luis Esclava, James Gathii, Karin Mickelson, Obiora Okafor, and Balakrishnan Rajagopal.

Despite framing its analysis using the developmental state, this dissertation also acknowledges critiques of the paradigm. Some scholars contend developmental state scholarship is inductive—its paradigm emerged from a description of “successful” states rather than offering an explanation of their success.⁶⁶ Others have criticized the minimization of democratic values in the discourse,⁶⁷ particularly the contention that they are not essential to its function.⁶⁸ Successful

⁶⁴ See, for example, James Gathii, “Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States” (2000) 45:5 Vill L Rev 971.

⁶⁵ Chimni, *supra* note 49 at 72.

⁶⁶ Ben Fine, “Beyond the Developmental State: An Introduction” in Ben Fine, Jyoti Saraswati & Daniela Tavasci, eds, *Beyond the Developmental State: Industrial Policy into the Twenty-First Century* (London: Pluto Press, 2013) 1 at 9.

⁶⁷ Omano Edigheji, *A Democratic Developmental State in Africa? A concept paper* (Johannesburg: Centre for Policy Studies, 2005) at 14.

⁶⁸ Mariana Mota Prado, Mario Schapiro & Diogo R Coutinho, “The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil” (2016) 9:2 Law and Development Review 369.

developmental states (with the possible exception of Botswana) have also not relied on natural resources—industrial and trade policy were essential to the East Asian models that are foundational to this paradigm—leading some to question whether the developmental state can successfully base its policy agenda in resource extraction.⁶⁹ Notwithstanding the relevance of these critiques, this dissertation positions itself in developmental state orthodoxy to allow for a thorough analysis of its application to mining developmentalism.

Before moving to an explanation of the methodology, some important terms must first be explained and defined. First, this dissertation takes a “fundamentally optimistic perspective on the role of law...in development.”⁷⁰ As explained further in Chapter Three, the view taken in this dissertation is distinguishable from that of orthodox law and development scholars who have been criticized for naively promulgating the benefits of law reform efforts in developing countries. Like these proponents, however, the normative nature of this dissertation’s research question asserts the premise that “law matters,”⁷¹ and that the laws and legal institutions of the mining developmental state can significantly affect development. The “law” and “legal institutions” this dissertation examines are confined to formal, state-sanctioned examples given its focus on the developmental state, a method of organizing state infrastructure that is governed by a national government and constituted by various legal, political, and economic institutions. Accordingly, the laws and legal institutions analyzed in this study include legislation, government policy, jurisprudence, and international agreements. Informal and customary laws

⁶⁹ Thandika Mkandawire, “Thinking about developmental states in Africa” (2008) 25 Cambridge Journal of Economics 289 at 305.

⁷⁰ Kevin Davis & Michael Trebilcock, “The Relationship between Law and Development: Optimists versus Skeptics” (2008) 56 Am J Comp J 895 at 896.

⁷¹ *Ibid.*

and institutions, which also shape law and development across Southern Africa,⁷² are not included in this dissertation's analysis.

Defining “governance” is more complex given its various definitions in the literature. A frequently-used definition conceived by Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, the authors of the World Bank's 1999 *Governance Matters* report, defines “governance” broadly as

the traditions and institutions by which authority in a country is exercised. This includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institutions that govern economic and social interactions among them.⁷³

In its 2017 World Development Report, *Governance and the Law*, the World Bank altered this definition slightly and defined “governance” as “the process through which state and non-state actors interact to design and implement policies with a given set of formal and informal rules that shape and are shaped by power.”⁷⁴ Central to both definitions is the state, which carries out its authority over markets and citizens through some form of central government. A key difference between the two definitions is the view of what governance should entail—“formulate and implement sound policies” in the first definition versus no such qualification in the second.

Defining and conceptualizing governance remains contentious. The paradigm has often been deployed as part of the global politico-economic hegemony of the BWIs and like-minded states. Thus, “the problem of development...transformed into a question of governance.”⁷⁵ Some scholars have gone so far as to contend that the term “risks becoming an empty catch-all

⁷² Ruth Buchanan & Peer Zumbansen, “Introduction: Approximating Law and Development, Human Rights and Transitional Justice” in Ruth Buchanan & Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (London: Hart Publishing, 2014) 1 at 8.

⁷³ Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobaton, *Governance Matters* (Washington, D.C.: The World Bank, 1999) at 1.

⁷⁴ World Bank, *World Development Report 2017: Governance and the Law* (Washington, DC: World Bank, 2017) at 3.

⁷⁵ Rittich, “Theorizing”, *supra* note 34 at 823.

phrase.”⁷⁶ In light of its disciplinary focus, this dissertation adopts a state-centric definition of governance that encompasses governmental execution of coordinative functions aimed at directing, commanding or controlling public and private actors via institutions, norms, laws and regulations.⁷⁷ By extension, “mining governance” refers to the exercise of coordinative governmental authority as it relates to the mining industry.

1.4. Nature of the study: qualitative case studies of Botswana, South Africa, and Zambia

This dissertation uses a multi-case study methodology that facilitates both the exploration of developmental state institutions in various countries and a comparative analysis of the effects of the developmental state apparatus on mining governance. Specifically, multi-case study methodology is fundamental to answering the research question because it supports a comparative exploration of the historical context and current conditions at the state level, the dynamics of the specific developmental state institutions to be studied, and the specific mining sectors in which they operate. This exploration is particularly important due to the differing levels of developmental state institution integration into government apparatuses across Southern Africa, as well as the varying effects of the resource curse–governance poor nexus.

1.4.1. Why study Botswana, South Africa, and Zambia?

Botswana, South Africa, and Zambia were selected for the comparative value they offer. First, mining dominates the economies of all three countries and has been, to varying degrees,

⁷⁶ Mari-Lise du Preez, “Interrogating the ‘Good’ in ‘Good Governance’: Rethinking Natural Resource Governance Theory and Practice in Africa” in J Andrew Grant, WR Nadège Compaoré, and Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 25 at 25.

⁷⁷ *Ibid.*

instrumental to each state's developmental agenda.⁷⁸ All three countries have also implemented significant reforms in their mining industries over the last twenty years. In Botswana, the state has attempted to diversify its economy away from mining and into more downstream activities such as diamond cutting and polishing, while the respective governments in South Africa and Zambia have endeavoured to better harness the developmental potential of their mining industries.

Second, each country has been differently affected by the resource curse and poor governance. As will be discussed further in Chapter Four, Botswana is often considered an exception to the resource curse and the benchmark for good governance across Africa.⁷⁹ On the other hand, South Africa and Zambia are regarded as weak governance states in various metrics. For example, according to the 2017 Resource Governance Index (RGI), which is a highly-regarded metric of natural resource governance, both Zambia and South Africa were ranked as “weak” (the third lowest rank after “good” and “satisfactory”) which respective composite scores of 50 and 57 out of 100 points.⁸⁰

Third, all three states have variably adopted institutional elements of the developmental state, with higher level of adoption evident in Botswana, less in South Africa, and very little in Zambia.⁸¹ Lastly, neither Botswana nor South Africa have joined the Extractive Industries Transparency Initiative (EITI), the world's foremost governance standard for resource extraction.

⁷⁸ All three countries have small oil and gas sectors (relative to mining) that will not be studied so that the research project remains sufficiently narrow.

⁷⁹ Meyns and Musamba, *supra* note 30.

⁸⁰ Resource Governance Index, online: Natural Resource Governance Institute: <<https://resourcegovernanceindex.org>>. Botswana's RGI score was 61, which further cements its reputation as a good governance model in Southern Africa. The RGI scoring categories (out of 100) were: good (>74), satisfactory (60-74), weak (45-59), poor (30-44), and failing (<30).

⁸¹ Pamela Mbabazi & Ian Taylor, “Botswana and Uganda as Developmental States(?)” in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 1.

Only Zambia is a member,⁸² which raises questions about why certain mining-dependent Southern African states choose not to join the governance initiative.

1.4.2. Empirical research using the qualitative case study

The qualitative case study is “an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context.”⁸³ This approach is beneficial to answering the research question because of how it operationalizes the investigation. First, the qualitative case study is concerned with addressing a particular phenomenon, whether it be a specific event, occurrence, range of programs, or activities.⁸⁴ Case studies can be used to research a broad range of inquiries that are focused on a diversity of topics, such as individuals, social groups, and institutions.⁸⁵ As such, specific country case studies lends itself well to the examination of evolving economic, social and political mining developmental state institutions.

Second, the qualitative case study examines the phenomenon being studied in its “natural context, bounded by space and time,”⁸⁶ thus making the analysis very specific, and easier to understand that which is the central focus of the inquiry. For example, using the qualitative case study to examine developmental state institutions in Southern Africa restricts the analysis to those that are operationalized in each state over a specific period of time (primarily over the past twenty years). Third, the qualitative case study allows for extensive use of data from varied sources; the information collected is not restricted to observations, but can include other

⁸² Zambia is deemed EITI compliant, and last filed a country report stating the payments it received in 2014 (Extractive Industries Transparency Initiative, online: <<https://eiti.org/zambia>>).

⁸³ Robert K Yin, *Case Study Research: Designs and Methods*, 4th ed, (Thousand Oaks, CA: Sage Publications, 2009) at 18.

⁸⁴ Dawson R Hancock & Bob Algozzine, *Doing Case Study Research: A Practical Guide for Beginning Researchers* (New York: Teachers College Press, 2006) at 15.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

secondary sources critical to the investigation. Data collection in qualitative case studies also benefits from prior research that helps orient and guide the data that will be collected and analyzed.⁸⁷

Using a qualitative multi-case study is best suited to answering the research question for three reasons. First, determining whether developmental state institutions can effectively govern new directions in Southern African mining requires that this dissertation examine the history, context, and current conditions within the state, the specific developmental state institutions to be studied, and the extractive sector in which they operate. Second, drawing any conclusions from a single case study confines the applicability of the results to a single case; examining developmental state institutions in multiple cases can help draw both case-specific and cross-case conclusions,⁸⁸ which can thus help inform theoretical understandings of legal institutions and mining governance in the developmental state. Since the developmental state experience varies across mining-dependent Africa, multiple-case studies can illuminate the various ways in which Southern African states are adapting developmental state institutions to their specific context, and their impact on mining governance. Lastly, by using a qualitative case study, this dissertation adopts a multi-faceted approach to data collection that is informed by sufficient prior research, and the proper theoretical orientation.

⁸⁷ Yin, *supra* note 83 at 18.

⁸⁸ *Ibid* at 20.

Various studies from law and development⁸⁹ have used the same methodological approach as this dissertation. In “New State Activism in Brazil and the Challenge for Law,”⁹⁰ David Trubek, Diogo Coutinho, and Mario Schapiro undertook a qualitative case study of Brazil to propose the “new” developmental state theory, and offer insights into emerging issues in law and development. Using Brazil as a case study, Trubek, Coutinho and Schapiro showcased shifts in development policy and practice, from the period of neo-liberal hegemony to contemporary forms of state activism. Trubek, Coutinho and Schapiro studied recent reforms to Brazilian industrial policy, including a recent government initiative aimed at increasing public-private partnerships to promote economic efficiency.

Another study that examined analogous questions using the case study approach is the Bonnie Campbell edited volume *Mining in Africa: Regulation and Development*.⁹¹ In the book, the various authors evaluated recent mining reforms to better understand their impact on development goals. Each author adopted a case study to respond to the research question in their respective chapter. Case studies included Ghana, Guinea, Mali, Madagascar, and the Democratic Republic of Congo. Like Trubek, Coutinho and Schapiro, the use of case studies in Campbell’s edited volume offered a unique method for analyzing contemporary legislative and policy shifts, and determining their impacts on evolving understandings of mining regulation and governance.

⁸⁹ Although not from law and development, two recently completed PhD dissertations in political science also used the qualitative case study methodology to answer similar research questions. In *Local Content and the Emergence of the Petro-Developmental State in the Gulf of Guinea* (*supra* note 264), Jesse Salah Ovadia used Angola and Nigeria as country case studies to investigate the evolving policy shift that promoted local content and offered the states a way of potentially avoiding the resource curse. WR Nadège Compaoré similarly utilized country case studies in her investigation of why some African states choose to join the EITI, while others do not (*Re-politicizing State Sovereignty in Global Governance: A Political Economy of Transparency in the Oil Sectors of Gabon and Ghana* (PhD Thesis, Queen’s University, 2015) [unpublished]).

⁹⁰ Trubek, Coutinho & Schapiro, *supra* note 59 at 28.

⁹¹ Bonnie Campbell, ed, *Mining in Africa: Regulation and Development* (Ottawa: International Development Research Centre, 2009).

This dissertation takes a similar approach to the aforementioned authors by using three country case studies to understand the emergence of comparable circumstances in mining-dependent Southern Africa.

1.5. Conclusion

The structure of the dissertation is as follows. Chapter Two will discuss the historical material conditions of mining in Southern Africa to illustrate how the changing dynamic of state intervention in the sector contributed to the emergence, and later dominance, of the resource curse theory and its “good governance” solution. Chapter Two will also consider shortcomings of this discourse to conceptions of the role of law in mining governance. Chapter Three will describe law and development scholarship in more detail, and explain the developmental state framework this dissertation adopts for its analysis of the case studies in Chapters Four (Botswana), Five (South Africa), and Six (Zambia). Chapter Seven concludes the dissertation by synthesizing the concepts discussed in the previous chapters and considers whether the developmental state can effectively govern new directions in Southern African mining developmentalism.

2 The “Good Governance” Panacea in Mining

2.1. Introduction

The juxtaposition between Southern Africa’s abundant mineral resources¹ and enduring poverty² has led to the near consensus³ that there is a problem with the way mining is governed in the region.⁴ Political economist Richard Auty first used the term “resource curse” in 1993 to describe the counterintuitive nature of persistent underdevelopment in mineral-rich states.⁵ According to Auty, the over-reliance on wealth generated from resource extraction in resource-rich countries would likely result in detrimental economic and political outcomes.⁶ To combat the curse, international development scholars⁷ and Bretton Woods Institutions (BWIs)—most notably the World Bank⁸—soon began calling for the reform of what they described as weak and

¹ Africa Progress Panel, *Africa Progress Report 2013: Equity in Extractives: Stewarding Africa’s natural resources for all*, online: <<http://www.africaprogresspanel.org/>> at 43.

² *Ibid* at 19.

³ While almost universal agreement blames Southern African governments for the failures in mining governance, many critical development scholars argue that exogenous factors, such as neoliberal structural adjustment programmes, unequal bargaining power between mining multinationals and Southern African states, and the boom-bust nature of commodity prices may also detrimentally affect mining governance. See, for example, Bonnie Campbell, “Factoring in Governance is Not Enough. Mining Codes in Africa, Policy Reform and Corporate Responsibility” (2003) 18:1 *Minerals and Energy* 2 [Campbell, “Factoring”]; Paula Butler, *Colonial extractions: race and Canadian mining in contemporary Africa* (Toronto: University of Toronto Press, 2015); and Pablo Idahosa, “Good Governance, Corruption and the Resource Boom: Africa and Canada in the Global Order” in David Leadbeater, ed, *Resources, Empire and Labour: Crises, Lessons and Alternatives* (Black Point, Nova Scotia: Fernwood Publishing, 2014) 200.

⁴ J Andrew Grant et al, “‘New’ Approaches to the Governance of Africa’s Natural Resources” in J Andrew Grant, WR Nadège Compaoré, & Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 3 at 4.

⁵ Richard Auty, *Sustaining development in mineral economies: the resource curse thesis* (London: Routledge, 1993).

⁶ *Ibid* at 3; Paul Collier & Anke Hoeffler, “Resource Rents, Governance, and Conflict” (2005) 49:4 *Journal of Conflict Resolution* 625 at 627. See Section 2.3 for a description of the economic and political conditions of the resource curse.

⁷ Jeffrey Sachs & Andrew Warner, “Natural Resource Abundance and Economic Growth” (1995) NBER Working Paper No. 5398; Paul Collier & Benedikt Goderis, “Commodity Prices, Growth, and the Natural Resource Curse: Reconciling a Conundrum” (2007) University of Oxford, Department of Economics Working Paper No. WPS/2007-15; William Easterly & Ross Levine, “Tropics, germs, and crops: how endowments influence economic development” (2003) 50:1 *Journal of Monetary Economics* 3; Halvor Mehlum, Karl Moene & Ragnar Torvik, “Institutions and the Resource Curse” (2006) 116:508 *The Economic Journal* 1.

⁸ World Bank, *Strategy for African Mining*, World Bank Technical Paper No 181, Africa Technical Development Series, Mining Unit, Industry and Energy Division (Washington, DC: The World Bank) [World Bank, *Strategy*]; World Bank Group, *Striking a Better Balance—The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review* (September 2004) [World Bank, *Striking*].

malfunctioning institutions that were symptomatic of poor governance. As a result, development efforts in mining-dependent Southern African states continue to be shaped by the now inseparable link between the problem defined as the “resource curse” and its “good governance” solution.⁹ This dynamic, which dominates the way mainstream scholars have understood the problem, is succinctly captured by the formula: “resource wealth + governance deficit = resource curse.”¹⁰

This chapter will explore the emergence of the good governance panacea¹¹ as a response to concerns with mining across Africa and the way law has been used in the sector. Given that much of the discourse has stemmed from an assessment of mining governance across Africa that disregards national or regional conditions, the analysis in this chapter will adopt a continental lens with the understanding that it will not adequately account for some country-specific histories. Nonetheless, the analysis is undertaken in this way to illustrate how governance discourses emerged from particular colonial and post-colonial narratives about mining in Africa. This chapter will also demonstrate how two separate governance metrics—the Extractive Industries Transparency Initiative (EITI) and the Resource Governance Index (RGI)—preserve the traditional approach to mining governance and obscure the role for law in governing mining for development. Section 2.2 provides an overview of the historical material conditions of

⁹ France Bourgoignie & Håvard Haarstad, “From ‘Good Governance’ to the Contextual Politics of Extractive Regime Change” in Jewellord Nem Singh and France Bourgoignie, eds, *Resource Governance and Developmental States in the Global South: Critical International Political Economy Perspectives* (Houndmills, Basingstoke, Hampshire: Palgrave MacMillan, 2013) 87 at 87.

¹⁰ Patricia Galvão Ferreira, *Breaking the Weak Governance Curse: Global Regulation and Governance Reform in Resource-Rich Developing Countries* (SJD Thesis, University of Toronto Faculty of Law, 2012) at 53 [unpublished].

¹¹ Mari-Lise du Preez, “Interrogating the ‘Good’ in ‘Good Governance’: Rethinking Natural Resource Governance Theory and Practice in Africa” in J Andrew Grant, WR Nadège Compaoré, and Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 25 at 25.

African mining, from colonization to the rise of neoliberal¹² policy interventions (often referred to as the “Washington Consensus”) in the 1980s and early 1990s. The section will pay particular attention to the role of states and the legal mechanisms used to govern mining. The resource curse, including its various components, is explained in section 2.3. Section 2.4 examines the historical genesis of “good” governance in African mining and its theoretical origins in the resource curse thesis and Douglass North’s New Institutional Economics theory.¹³ It considers the direct correlation between the increasing popularity of good governance norms and the shrinking role of the African state in mining, and the emphasis on legal measures aimed at achieving this objective. The chapter then shifts its analysis to the RGI and the EITI in section 2.5, examining how each metric constructs and evaluates the role of law in mining governance. Critiques of this approach, which are grounded in neoliberal understandings of the role for law in mining governance, are interrogated in section 2.6. Finally, the chapter concludes by contending that there is a need to reframe governance to support mining-led development by rethinking both the role of the state and the role for law. This endeavour is then taken up in Chapter Three.

¹² Neoliberalism refers to an ideology and policy model that favours free market capitalism and competition. It gained prominence in the 1980s and comprised a series of policy interventions commonly promulgated by the World Bank, International Monetary and conservative donor governments. These policies included “fiscal discipline, tax reform, market-determined interest rates, competitive exchange rates, trade liberalization, opening up to foreign direct investment, privatization of state enterprises, deregulation and legal security of property rights.” Due to the prominence of Washington, D.C. based financial institutions in promoting these policies abroad, the phrase “Washington Consensus” is used interchangeably with “neoliberalism” to describe these policies (Ann Stewart, “Juridifying Gender Justice: From Global Rights to Local Justice” in John Hatchard & Amanda Perry-Kessaris, eds, *Law and Development: Facing Complexity in the 21st Century* (London: Cavendish Publishing Limited, 2003) 36 at 41).

¹³ Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).

2.2. The historical material conditions of mining in Africa

Legal frameworks that governed African mining since the end of colonial rule have facilitated varied state interventions in the industry. Nationalistic policies that saw many African governments participate directly in natural resource production dominated the early post-colonial period.¹⁴ Beginning in the 1980s, mining governance in Africa underwent significant reform as the World Bank and the International Monetary Fund pushed for wholesale privatization of the sector and a redefinition of the role of the state.¹⁵ Using the mechanisms of conditionality, the BWIs were able to oversee the implementation of these reforms, which shifted the role of law to protect private sector interests from state intervention and confined the role of the state to a “nightwatchman.”¹⁶ This section provides an overview of the evolving role of the state in African mining. It is divided into three distinct periods: the colonial period, the early postcolonial period and the rise and dominance of the Washington Consensus during the 1980s and into the 1990s. By doing so, this section aims to illustrate how the historical material conditions of African mining gave rise to the “resource-rich and governance-poor”¹⁷ view of the state.

2.2.1. Colonialism

European competition to locate and control natural resources is a well-documented economic motive for the “Scramble for Africa” and colonization of the continent. In the years following the decline of the slave trade, European merchants turned their attention to the

¹⁴ Hany Besada & Phillippe Martin, “Mining codes in Africa: emergence of a fourth generation?” (2015) 28:2 Cambridge Review of International Affairs 263 at 266.

¹⁵ *Ibid.*

¹⁶ Akbar Noman & Joseph E Stiglitz, “Strategies for African Development” in in Akbar Noman et al, eds, *Good Growth and Governance in Africa: Rethinking Development Strategies* (Oxford: Oxford University Press, 2011) 3 at 34.

¹⁷ Ferreira, *supra* note 10 at 1.

legitimate commercial interests Africa presented.¹⁸ Mining was an established practice in Africa by the time European colonialists sought to monopolize the industry in the late nineteenth century. Early evidence of copper mining, for example, can be traced to 4000 BCE.¹⁹ In the millennia before European contact, the mining of copper, gold, tin, and lead occurred in many parts of the continent, and these commodities were commonly traded with European merchants before colonization.²⁰ As European colonists sought further control over African territory, the search for untapped mineral reserves led to further encroachment in the African interior and the gradual destruction of local institutions.²¹

Following the 1884 Berlin Conference that regulated and institutionalized Europe's colonization of Africa, the exploitative efforts by colonial governments that favoured European ownership created dominant mining industries across Africa and relegated Africans to labourers.²² In West Africa, gold production in the (aptly named) Gold Coast, Nigeria, and Sierra Leone sustained the British colonial state in that region beginning in the early 1900s.²³ While in Southern Africa, British control was entrenched through commercial interests led by Cecil Rhodes and his company De Beers after the discovery of diamonds at Kimberley in 1870.²⁴ Copper mining in Northern Rhodesia and gold mining in Transvaal, South Africa further consolidated British authority in the region. Not to be outdone, Belgian copper mining in the

¹⁸ Kevin Shillington, *History of Africa*, 3rd ed (Houndmills, Basingstoke, Hampshire, UK: Palgrave Macmillan, 2012) at 311 and 343.

¹⁹ *Ibid* at 43; David Sunderland, "Mining" in David Sunderland, ed, *Economic Development of Africa, 1880-1939: Volume 4* (London: Routledge, 2011) 1 at 1.

²⁰ Shillington, *supra* note 18 at 43.

²¹ *Ibid* at 312.

²² United Nations Economic Commission for Africa and the African Union, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* (United Nations Economic Commission for Africa, 2011) at 12 ["UNECA/AU"].

²³ Sunderland, *supra* note 19 at 3.

²⁴ *Ibid* at 1.

Congo helped finance King Leopold's expansive colony.²⁵ By the early part of the twentieth century, mining accounted for more than 40 percent of the exports from five colonies: the Belgian Congo, the Gold Coast, Northern Rhodesia, Southern Rhodesia, and South Africa.²⁶ Not far behind were Angola, Sierra Leone, and South-West Africa.²⁷

Mining as a colonial tool entrenched exploitative institutions and created enclave sectors such that economies and livelihoods across the region depended on this one industry.²⁸ Colonial regimes reinforced the export-oriented nature of extractive industries by extinguishing local mining practices, diverting African labour to resource extraction, and directing investment to the infrastructure necessary to move minerals from the interior to coastal areas for shipment to external markets.²⁹ Since natural resource extraction was an economic priority for the colonial state, specific measures were introduced in order to ensure the primacy of the sector remained intact. These included introducing and implementing political safeguards, legal protections, infrastructure financing, and securing much-needed labour from the local population.

2.2.2. Early post-colonial period

After the independence movements of the 1950s and 1960s, African states inherited enclave mining institutions that were ill-equipped to respond to their immediate developmental needs. This was primarily due to the export-oriented nature of the industry and the few sectoral linkages in place connecting mining to other parts of the domestic economy.³⁰ In a 2011 report

²⁵ UNECA/AU, *supra* note 22 at 12.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* at 13.

²⁹ Walter Rodney, *How Europe Underdeveloped Africa* (Washington, D.C.: Howard University Press, 1981) at 20.

³⁰ Ann Seidman et al, "Introduction", in Ann Seidman, Robert Seidman, Pumzo Mbana, and Hanson Hu Li, eds, *Africa's Challenge: Using Law for Good Governance and Development* (Trenton, NJ: Africa World Press Inc, 2007) 1 at 6.

commissioned for the United Nations Economic Commission for Africa and the African Union, authors from the International Study Group described six features of the “externally-oriented enclave” industries inherited by African states, which can be summarized as follows:

1. Mines were controlled and operated by foreign firms;
2. Minerals were exported as raw materials with little processing, resulting in weak sectoral linkages to the rest of the economy;
3. Mining profits were repatriated to home states where foreign firms were based, while material inputs were imported rather than sourced from local businesses;
4. Minerals remained a top export, yet offered few other benefits to the economy; mines were dependent on imports, profits were repatriated, and expatriates dominated the ranks of senior employees and executives;
5. Mining was a significant source of public revenue; and
6. High-skilled and high-paid mining positions remained reserved for expatriate employees due to the legacy of “the racist division of labour under colonialism that kept Africans in low-skill, low-wage jobs.”³¹

Reversing the enclave nature of mining and ensuring it could contribute to development goals and the broader state-building project was a key policy objective in several newly independent African states. To support this goal, many African governments moved to vest mineral ownership with the state rather than customary rights holders.³² Under the colonial state, local communities were dispossessed of their rights over natural resources.³³ Restoring

³¹ UNECA/AU, *supra* note 22 at 14.

³² James C Murombedzi, “Inequality and natural resources in Africa”, online: UNESCO <<http://unesdoc.unesco.org/images/0024/002459/245936e.pdf>> at 59.

³³ *Ibid.*

customary mineral rights at independence was possible; however, several former colonies (including Botswana and Zambia) opted instead to restore traditional access to land while retaining state ownership over minerals.³⁴ This approach was aligned with emerging international law, advanced mainly by newly independent states, that sought to assert state control over natural resources as an integral component of self-determination.³⁵ United Nations General Assembly Resolutions 1803 (XVII) of December 14, 1962, 532 (VI) of January 12, 1952, and 626 (VVI) of December 21, 1952, were three resolutions that expounded on this principle of permanent sovereignty over natural resources.³⁶ The principle entrenched “the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned”³⁷ in international law. Fundamentally, the principle supports state control over natural resources, including: “(1) the right to freely dispose of natural resources; (2) the right to explore and exploit natural resources freely; (3) the right to use natural resources for development; (4) the right to regulate foreign investment; and (5) the right to settle disputes based on national law.”³⁸ This right was often entrenched in the post-colonial constitutions of many African states,

³⁴ *Ibid* at 60.

³⁵ Usha Natarajan, “Third World Approaches to International Law (TWAIL) and the environment” in Andreas Philippopoulos-Mihalopoulos & Victoria Brooks, eds, *Research Methods in Environmental Law* (Cheltenham, UK: Edward Elgar Publishing) 207 at 212.

³⁶ GA Res 1803 (XVII), UNGAOR, 17th Sess, UN Doc A/RES/1803(SVII)-62 (14 December 1962) 1. The issue of permanent sovereignty over natural resources arose at the United Nations in two different, but related, contexts. The first were debates in the General Assembly on the promotion and financing of economic development in under-developed states. The second was related to the preparation of a draft international covenant on human rights. Prior to the resolution’s adoption in 1962, the Commission on Human Rights undertook a study of the right of peoples and nations to permanent sovereignty over their natural resources and noted that the right formed a “basic constituent of the right to self-determination.” (Office of Legal Affairs, Codification Division, “Procedural History” and “Introductory Note”, online: United Nations <http://legal.un.org/avl/ha/ga/ga_1803/ga_1803.html>).

³⁷ GA Res 1803 (XVII) at s 1.

³⁸ Sangwani Patrick Ng’ambi, “Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, From the Angle of *Lucrum Cessans*” (2015) 12:2 *Loy U Chi Int’l L Rev* 153 at 154

as was the case in Ghana, Nigeria and Zambia.³⁹ In other countries, legislation governing extraction included state ownership over mineral resources. For example, section 3(1) of South Africa's *Mineral and Petroleum Resources Development Act* declared the country's mineral resources as the "common heritage of all the people" and embedded custodianship in the state.⁴⁰

Along with vesting mineral wealth in the state, African governments initiated several different policies aimed at further enhancing the benefits of resource extraction. These included the creation of state-owned extractive enterprises to explore mineral deposits and establish production, and securing interest in already existing mining operations.⁴¹ Botswana is one example of an African state that sought the dual role of investor and owner in resource extraction. Soon after its independence in 1966, the Botswana government encouraged the exploration of its resources by foreign mining companies, which led to the discovery of diamonds in several locations across the country.⁴² To promote this investment in the diamonds sector, Botswana entered into an agreement with De Beers, the world's leading diamond mining company, to establish a joint venture in which the state held a 50 percent stake.⁴³

In the decades after independence, the development efforts of African states yielded mixed results as mining's potential was not fully realized across the continent. This sentiment was acknowledged in the *Lagos Plan of Action*, adopted in 1980 by the Organization of African

³⁹ Evaristus Oshionebo, "Fiscal regimes for natural resource extraction: implications for Africa's development" in Francis Botchway, ed, *Natural Resource Investment and Africa's Development* (Cheltenham, UK: Edward Elgar Publishing 2011) 200 at 200; Alastair Fraser & John Lungu, "For whom the windfalls? Winners and losers in the privatisation of Zambia's copper mines," online: <https://sarpn.org/documents/d0002403/1-Zambia_copper-mines_Lungu_Fraser.pdf> at 7. See for example s. 257(1) of the *Constitution of the Republic of Ghana*.

⁴⁰ *Mineral and Petroleum Resources Development Act*, 2002.

⁴¹ UNECA/AU, *supra* note 22 at 14.

⁴² Daron Acemoglu, Simon Johnson & James A Robinson, "An African Success Story: Botswana" (2001) MIT Department of Economics Working Paper 01-37 at 17.

⁴³ Philippe Martin, "A Closer Look at Botswana's Development: The Role of Institutions" (2008) 9 Paterson Review 35 at 43.

Unity, the predecessor of the African Union. Under the mandate of conducting a “strategic review of Africa’s development challenges and potential paths for economic growth and development”,⁴⁴ the Plan stated that:

The major problems confronting Africa in the field of natural resource development include: lack of information on natural resource endowment of large and unexplored areas and the activities of transnational corporations dealing with natural resource assessments; lack of adequate capacity (capital, skills and technology) for the development of these resources; a considerable dependence on foreign transnational corporations for the development of a narrow range of African natural resources selected by these corporations to supply new material needs of the developed countries; the inadequate share in the value added generated by the exploitation of natural resources of Member States due to imperfect pricing and marketing practices; non-integration of the raw materials exporting industries into the national economics of the Member States thus impeding backward and forward linkages; extremely low level of development and utilisation of those natural resources of no interest to foreign transnational corporations; and disappointingly low general contribution of natural resources endowment to socioeconomic development.⁴⁵

Immediately following this acknowledgement, the Plan went on to identify strategic measures that could transform mining’s impact on development. First, Member States were encouraged to conduct a full assessment of their mineral endowments.⁴⁶ A holistic understanding of available resources was regarded as the first step in mapping mining’s potential contribution to socioeconomic development projects. Second, Member States were advised to integrate mining into socioeconomic development planning as a way to “encourage complementarity”⁴⁷ and “promote backward and forward linkages”⁴⁸ within their economies. Strengthening national mining institutions concerned with “training, research, production, processing, fabrication, marketing, [and] finance”⁴⁹ was an additional recommendation.

⁴⁴ UNECA/AU, *supra* note 22 at 5.

⁴⁵ *Lagos Plan of Action for the Economic Development of Africa, 1980–2000* (1980), para 76.

⁴⁶ *Ibid* at para 77(a).

⁴⁷ *Ibid* at para 77(b).

⁴⁸ *Ibid*.

⁴⁹ *Ibid* at para 77(d).

Underperformance in the global mining market continued to mar African states in the decade following the adoption of the *Lagos Plan of Action*. During this time, approximately 45 percent of mineral production in Africa was under state control, and 35 percent was controlled through public-private joint ventures.⁵⁰ However, as state intervention increased across Africa, the region's share of global mineral production decreased from 31.5 percent in 1970 to 10 percent in 1987,⁵¹ while the region received only 4 percent of global investment in mineral exploitation by the late 1980s.⁵² The acknowledgement of Africa's poor performance in mining was not only clear to African states; it soon garnered the attention of the BWIs, most notably the World Bank, as states sought donor assistance to offset budget shortfalls.

2.2.3. The rise of the Washington Consensus hegemony

Africa's bleak economic fortunes at the start of the 1980s were the focus of the World Bank's 1981 report *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (commonly referred to as the "Berg Report" for its principal author, American economist Elliot Berg).⁵³ Launched on the heels of the *Lagos Plan of Action* by a special request from African Members of the Bank, the Berg Report sought to investigate Africa's "economic development problems" and propose "an appropriate program" for resolving them.⁵⁴ Its findings were not optimistic: more than any other region, Africa was hit hardest by the inflation and recession that stemmed from the 1970s global economic crisis. Despite some signs of progress—infrastructure and industrial development, longer life expectancies, and increased school attendance—growth

⁵⁰ World Bank, *Strategy*, *supra* note 8 at 7.

⁵¹ Besada & Martin, *supra* note 14 at 265.

⁵² *Ibid.* In comparison, investment in Australian, Canadian and American accounted ranged from 15-25 percent of global investment by 1989 (World Bank, *Strategy*, *supra* note 8 at 11).

⁵³ World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (Washington, DC: The World Bank, 1981) [World Bank, *Accelerated*].

⁵⁴ *Ibid* at 1.

in per capita income remained below 1 percent for 19 countries between 1960 and 1979 and declined in 15 others.⁵⁵ A combination of internal “structural” factors and external facets of the international economy at the time were blamed for Africa’s poor economic performance.⁵⁶ Internally, the report stressed that the growth of African governments contributed to economic mismanagement by diverting resources away from sectors such as private agriculture and industry that could have supported growth, and instead investing them in state-operated commercial activities and basic social services that were undergoing transformation from colonial rule.⁵⁷

To reverse the economic misfortunes of African states, the Berg Report outlined the Bank’s recommendations for structural adjustment, which became a condition of Bank loans.⁵⁸ Two related elements of structural adjustment had significant bearings on the mining sector: downsizing public sector bureaucracies and state-owned enterprises while simultaneously increasing reliance on the private sector.⁵⁹ Decades later, these reforms proved detrimental to African economies as privatization did not yield the expected results,⁶⁰ a point which will be discussed later in greater detail. The Report also proposed three mining-specific recommendations that aimed to reduce state involvement in mining. First, the Report called for the rehabilitation of mining facilities already in place, many of which were owned and operated by state-owned mining companies.⁶¹ Many African countries found state investment difficult,

⁵⁵ *Ibid* at 2.

⁵⁶ *Ibid* at 4.

⁵⁷ *Ibid* at 40-43.

⁵⁸ Gail M Gerhart, “Review: *Accelerated Development in Sub-Saharan Africa: An Agenda for Action*” (September/October 1997), online: Foreign Affairs <<https://www.foreignaffairs.com/reviews/capsule-review/1997-09-01/accelerated-development-sub-saharan-africa-agenda-action>>.

⁵⁹ World Bank, *Accelerated*, *supra* note 53 at 35.

⁶⁰ Bonnie Campbell, “Revisiting the Reform Process of African Mining Regimes” (2010) Canadian Journal of Development Studies 30:1-2 197 at 205 [Campbell, “Revisiting”].

⁶¹ World Bank, *Accelerated*, *supra* note 53 at 98.

especially as they were facing low profits, civil unrest, or an uncooperative foreign investor. The Report advised African governments to tap into a USD \$365 million aid fund created by European donors under the 1981 Lomé Convention specifically tailored to support mining facility rehabilitation.⁶² Next, the Report encouraged African states to seek additional foreign investment with the assistance of the World Bank through its lending program, which earmarked USD \$700-800 million for new mines.⁶³ Lastly, the Bank advised African governments to seek further donor aid to fund private sector exploration and mineral discovery.⁶⁴ By the late 1980s, mining institutions across Africa were substantially altered as states became regulators and creators of favourable investment environments rather than active participants and proponents of effective mining-led development, in contrast to the principles agreed to in the *Lagos Plan of Action*. Through the politics of conditionality, structural adjustment displaced African solutions from policy-making frameworks.⁶⁵

The structural transformation of African mining institutions culminated in the World Bank's 1992 report *Strategy for African Mining*.⁶⁶ The report represented the first time the Bank shared its explanation for the demise of Africa's mining performance and its rationale for reform in a systematic way.⁶⁷ The Bank made it clear that African governments were expected to create a favourable environment for foreign investment, which at its core required "[a] clearly articulated mining sector policy that emphasizes the role of the private sector as owner and

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid* at 99.

⁶⁵ Thandika Mkandawire & Charles C Soludo, "Introduction: Towards the Broadening of Development Policy Dialogue for Africa" in Thandika Mkandawire & Charles C Soludo, eds, *African voices on structural adjustment: a companion to our continent, our future* (Trenton, NJ: Africa World Press) 1 at 3.

⁶⁶ World Bank, *Strategy*, *supra* note 8 at 7.

⁶⁷ *Ibid* at 2; Campbell, "Factoring", *supra* note 3 at 5.

operator and of the government as regulator and promoter.”⁶⁸ According to the Bank, this regime required African governments to:

- Implement fiscal terms and incentives that were comparable to other developing countries and would sufficiently attract investment;
- Pass domestic legislation that ensured secure access to mining sites and tradable exploration and mining rights;
- End all forms of institutional involvement in the operation and marketing of state-owned mining companies; and
- Privatize state mining operations, either totally or in part. Early adoption of this strategy was recommended as a signal to foreign firms that the government was committed to privatization.⁶⁹

In the words of Bonnie Campbell, a Canadian expert on African mining governance, the Report at its core argued “that to adapt to modern conditions of mining, the primary objective of African countries should be to avoid state ownership and attract private investors.”⁷⁰

Through these recommendations, the Bank was clearly stating that the African state was not equipped to fully realize mining’s potential. Interestingly, the Bank did not ground its assessment in the “resource curse” theory.⁷¹ Instead, the rationale was rooted in the underperformance of African mining sectors up until the late 1980s. In the Bank’s view, mining could provide significant economic benefits to African states, including foreign exchange earnings and tax revenue.⁷² African mining was also important to the rest of the world, as it

⁶⁸ World Bank, *Strategy*, *supra* note 8 at 53.

⁶⁹ *Ibid.*

⁷⁰ Campbell, “Revisiting”, *supra* note 60 at 201.

⁷¹ The term “resource curse” does not appear in the *Strategy for African Mining*.

⁷² World Bank, *Strategy*, *supra* note 8 at x.

accounted for 8 percent of world mine production at the time of publication, with significant untapped reserves unavailable to support the global economy.⁷³

The Report succinctly stated that to successfully attract foreign investment, the following institutional reforms were required immediately: “stable and transparent regulations, which clearly spelt out the rights and obligations of the investor and government; a competitive and well-structured fiscal regime which provided an adequate return to investors and a fair share to the government;...and effective support and monitoring of private mining investment by well-organized government institutions.”⁷⁴ Chapters Four and Five outlined the Bank’s specific strategy for reforming the legal institutional framework governing mining in Africa.

Structuring a country’s Mining Code to “meet the requirements of most investors while safeguarding the national interest”⁷⁵ was a critical reform identified by the Bank. A Mining Code was defined as the “combination of statute law, regulations and agreements which governs the allocation, tenure and operation of mining rights.”⁷⁶ The Bank acknowledged that for many African countries, the legacy of colonialism still influenced the structure of a country’s Code. For example, the Bank noted that many African countries adopted the mining laws put in place during colonialism, and only a few undertook reforms since independence. However, these reforms did not satisfy the Bank’s standard for accommodating private investment. Instead, a country’s Mining Code was expected to adopt two guiding principles if it were to support large-scale private investment: secure long-term title to mining rights; and the rights to explore and extract minerals in return for specific commitments.⁷⁷

⁷³ *Ibid* at 1.

⁷⁴ *Ibid* at xi.

⁷⁵ *Ibid* at 21.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

In addition to a Mining Code, the Report recommended that African countries adopt a Model Agreement that would “formalize the details of arrangements between state and company, fill any blanks or ambiguities in...legislation, and provide safeguards for both the investor and the government which may not be adequately set forth in the law.”⁷⁸ Some of the important clauses the Bank recommended included: clarification of mineral rights in the mining law; obligations of the mineral rights holder, including expenditure obligations, employment, and infrastructure obligations; state participation in the mining project; fiscal provisions, such as license fees, royalties, and stabilization clauses;⁷⁹ and legal safeguards that identified potential dispute settlement procedures like international arbitration through the International Centre for the Settlement of Investment Disputes.⁸⁰

In the decades after the World Bank’s structural adjustment reforms were implemented, the results were optimistically described as mixed at best⁸¹ by the 2007 Policy Big Table comprised of African governments, the African Union, the African Development Bank, and the United Nations Economic Commission for Africa.⁸² Although the reforms did promote higher levels of foreign investment by creating a more favourable investment environment, the Big Table concluded that “African efforts to attract [foreign investment] to their natural resources sector, which led to the formulation of overly generous investment laws and regulations”⁸³ failed

⁷⁸ *Ibid* at 25.

⁷⁹ Stabilization clauses aim to “freeze” the law of the host country to the date the national government enters into an agreement with an extractives company. The effect is to insulate the corporation from future changes to the host country’s laws, which could potentially harm its investment (Evaristus Oshionebo, “Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries” (2010) 10 *Asper Rev. of Int’l Bus. and Trade Law* 1 at 1).

⁸⁰ World Bank, *Strategy*, *supra* note 8 at 26.

⁸¹ UNECA/AU, *supra* note 22 at 17.

⁸² This era is also commonly referred to as “Africa’s lost decade” due to the reversal of post-colonial economic gains caused by the failure of structural adjustment programs (Fadekemi Abiru, “Africa’s Lost Decade” (September 25, 2018), online: The Republic <<https://www.republic.com.ng/augustseptember-2018/africas-lost-decade/>>).

⁸³ UNECA/AU, *supra* note 22 at 17.

to generate meaningful benefits for local populations in several countries. Rather than promote widespread economic growth, reduce unemployment, and respond to sustainable development concerns, the push for neoliberal policy reforms created competition among host states that resulted in a “race to the bottom.”⁸⁴ African countries had reformed mining codes, fiscal regimes and environmental regulations to attract foreign investment, to the detriment of local development goals.⁸⁵

2.3. Africa’s mineral wealth: a curse for development, rather than a blessing

Around the time the Washington Consensus became entrenched in IFI decision-making, economic geography professor Richard Auty developed the resource curse theory to explain the seemingly negative relationship between natural resource wealth and economic growth.⁸⁶ Designed initially to explain why resource-rich states were unable to exploit their mineral wealth to generate sustainable economic growth effectively, the theory has become synonymous with a combination of deleterious economic and political effects in resource-abundant states.⁸⁷ In the years since Auty first proposed the theory, it has become a widely-used explanation for the slow economic growth coupled with political distress experienced by many resource-rich states compared to their resource-scarce counterparts. Other prominent academics—including Jeffrey Sachs, Paul Collier, Macarten Humphreys, Halvor Mehlum and Joseph Stiglitz—promulgated

⁸⁴ Antonio MA Pedro, “The Africa Mining Vision as a model for natural resource governance in Africa” in Hany Gamil Besada, ed, *Governing Natural Resources for Africa’s Development* (New York: Routledge, 2017) 13 at 20.

⁸⁵ Thomas Akabzaa, “Mining in Ghana: Implications for National Economic Development and Poverty Reduction” in Bonnie Campbell, ed, *Mining in Africa* (New York: Pluto Press, 2009) 25 at 28.

⁸⁶ Although Auty’s development and application of the “resource curse” theory stemmed from his analysis of “hard mineral exporters” (notably copper, bauxite and tin producers), his theory contemplated the effects of oil, gas and mineral extraction as well (Auty, *supra* note 5 at 5).

⁸⁷ See Sections 2.3.1 and 2.3.2.

the theory through independent studies.⁸⁸ Further evidence of the theory's widespread adoption was the World Bank's position that natural resource exports posed a structural risk to governance and legal institutions by undermining incentives to reform and instigating conflicts over the management and control of resource rents (or returns in excess of profits).⁸⁹

Critiques of the resource curse eventually emerged after over a decade of the theory's dominance in development scholarship and practice. However, the theory remains the dominant explanation for why resource-rich countries underperform economically and politically. Instead, the critiques offered a nuanced view of the curse that found it was not uniform across jurisdictions and natural resources—the type of resource mattered.⁹⁰ The strongest critiques of the theory went so far as to contend that “there is a latent imperialism in the use of the term ‘resource curse’” and that “[p]erhaps the Global South is the victim of the fossil fuel-fed capitalism of the Global North.”⁹¹ Critiques like this address the power imbalances that maintain the global economic order and permeate the relations between resource-exporting states in the Global South and resource-importing nations in the Global North (plus China). However, these

⁸⁸ Sachs & Warner, *supra* note 7 at 2; Mehlum, Moene & Torvik *supra* note 7; Collier & Goderis, *supra* note 7; Macartan Humphreys, Jeffrey D Sachs & Joseph Stiglitz, eds, *Escaping the Resource Curse* (New York: Columbia University Press, 2007).

⁸⁹ Christa Brunnschweiler & Erwin H Bulte, “The resource curse revisited and revised: A tale of paradoxes and red herrings” (2008) 55 *Journal of Environmental Economics and Management* 248 at 249. The impact of the Bank's reliance on the resource curse theory for reforming mining governance in Africa is examined further in Section 2.4.

⁹⁰ Elissaios Papyrakis, “The Resource Curse - What Have We Learned from Two Decades of Intensive Research: Introduction to the Special Issue” (2017) 53:2 *The Journal of Development Studies* 175 at 178.

⁹¹ Timothy DiMuzio, “The real resource curse and the imperialism of development” (2010) 35:1 *Suomen Antropologi* 94. DiMuzio emphasized capitalism's need for fossil fuels in his article. Arguably, his position could be expanded to include capitalism's need for mineral resources as well, particularly those used in modern electronics and other technologies. Critical Third World Approaches to International Law (TWAIL) scholarship has noted the inequity in natural resource exploitation in the Global South (see, for example Balakrishnan Rajagopal, “International Law and Its Discontents: Rethinking the Global South” (2012) 106 *Proceedings of the Annual Meeting (ASIL)* 176; and Luis Esclava & Sundhya Pahuja, “Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law” (2012) 45:2 *Law and Politics in Africa, Asia and Latin America* 195), yet there is none that conceptualizes the resource curse like DiMuzio.

critiques have yet to gain traction in development scholarship and practice, nor do they inform policy about combatting the curse.

Since Auty's theory first emerged, resource curse scholarship has concerned itself with both the economic and political symptoms of the theory. The following sections briefly discuss both groups of symptoms.

2.3.1. Economic symptoms of the resource curse

Auty's reasoning behind the resource curse focused on four economic symptoms that stunted growth in resource-rich countries: Dutch disease, commodity price volatility, declining terms of trade, and the enclave nature of the resource sector.⁹² He posited that all four symptoms could be present in a resource-rich economy and that the confluence of all four would produce more devastating results than the presence of one or two.⁹³ Studies that were conducted after Auty developed his initial hypothesis, including one in 1995 by Jeffrey Sachs and Andrew Warner, confirmed the negative relationship between these symptoms and economic growth.⁹⁴

Dutch disease is a term first used in the 1970s to describe the negative effects of the boom in natural gas exploitation on the Netherlands economy.⁹⁵ The growth in Dutch natural gas exports contributed to declines in the manufacturing and agricultural sectors as a result of the appreciation of the Dutch currency, which led to these industries being less competitive internationally.⁹⁶ The higher exchange rate that resulted from the higher flow of natural gas

⁹² Auty, *supra* note 5 at 3.

⁹³ *Ibid.*

⁹⁴ Sachs and Warner, *supra* note 7 at 4-7. Following the isolation of these four economic symptoms by Auty, other socioeconomic indicators of the resource-curse that were identified included greater income inequality between rich and poor populations (Ferreira, *supra* note 10 at 29). Since this indicator does not account for a structural deficit in the economy of a resource-rich state, it is not considered here as part of the economic symptoms of the curse.

⁹⁵ Ferreira, *supra* note 10 at 29.

⁹⁶ Collier & Goderis, *supra* note 7 at 19.

revenue almost obliterated other sectors of the Dutch economy.⁹⁷ The same patterns were identified in other countries that relied extensively on natural resource exports in the 1970s and 1980s, including Mexico, Venezuela, and Nigeria, thus making it one of the more identifiable symptoms of the resource curse.⁹⁸ To combat the negative effects of Dutch disease, economists have recommended that countries create stabilization funds comprised almost exclusively of foreign currency, and that revenue generated from resource extraction be used to diversify the economy away from an over-dependence on natural resources.⁹⁹

Like Dutch disease, the three other economic symptoms of the resource curse arise when a resource-rich country is overly dependent on resource exports and can not sustain the shocks these factors will impart on its economy. Commodity price volatility, which has historically dominated the minerals market, creates economic havoc by making the management of national budgets more difficult. Revenue forecasting becomes unpredictable as the price of a commodity can change drastically from year to year.¹⁰⁰ This is evident today as volatile mineral prices have drastically affected the budgets of mining-dependent countries like South Africa and Zambia, which have weathered declines in the prices of copper and iron ore.¹⁰¹ Along with commodity price volatility, resource-dependent states are detrimentally affected by declining terms of trade in the long-term as mineral exports accrue less value while the price of manufactured imports increases.¹⁰² Additionally, Auty observed that the “enclave nature” of resource extraction offered

⁹⁷ Auty, *supra* note 5 at 3.

⁹⁸ Sachs & Warner, *supra* note 7 at 3

⁹⁹ Ferreira, *supra* note 10 at 29.

¹⁰⁰ Auty, *supra* note 5 at 23.

¹⁰¹ Kingsley Ighobor, “Commodity prices crash hits Africa” (December 2016-March 2017), online: Africa Renewal <<https://www.un.org/africarenewal/magazine/december-2016-march-2017/commodity-prices-crash-hits-africa>>.

¹⁰² Ferreira, *supra* note 10 at 31.

minimal economic benefits due to the small number of production linkages created to local industries, and the low employment rates in the sector.¹⁰³

2.3.2. Political symptoms of the resource curse

Along with explaining the economic phenomena discussed above, the resource curse has also been used to account for the following political outcomes: weakened political institutions and rule of law;¹⁰⁴ corruption and rent-seeking behaviour¹⁰⁵ among the ruling class;¹⁰⁶ and a higher prevalence of civil conflict.¹⁰⁷ Despite the persistent link between the resource curse and these political results, the literature on the topic lacks consensus about a direct correlation between the two.¹⁰⁸

The political deficiencies affiliated with the resource curse are evident in many resource-abundant African states. Oftentimes, multiple symptoms operate in tandem in a given jurisdiction. Indeed, corruption, rent-seeking and civil conflict typically occur when political institutions and the rule of law are weakened.¹⁰⁹ Conversely, a combination of corruption, rent-seeking and civil conflict can further weaken political institutions and the rule of law. Rent-seeking and corruption may arise when higher levels of mineral revenue accrue in states where the allocation of resources and decision-making authority is centralized amongst a small group of political elites. Contemporary rent-seeking and corruption theories posit this behaviour is more

¹⁰³ Auty, *supra* note 5 at 3.

¹⁰⁴ Mehlum, Moene & Torvik, *supra* note 7 at 2; Mushtaq H Khan, “Governance and Growth Challenges in Africa” in Akbar Noman et al, eds, *Good Growth and Governance in Africa: Rethinking Development Strategies* (Oxford: Oxford University Press, 2011) 114 at 115.

¹⁰⁵ “Rent-seeking behaviour” is a form of corruption where individuals, typically in government or the civil service, seek to increase their wealth without creating wealth (Martin, *supra* note 43 at 44).

¹⁰⁶ Martin, *supra* note 43 at 38.

¹⁰⁷ Paul Collier & Anke Hoeffler, “On economic causes of war” (1998) 50:4 Oxford Economic Papers 563; Collier and Hoeffler, 2005, *supra* note 6 at 625.

¹⁰⁸ Ferreira, *supra* note 10 at 27.

¹⁰⁹ Due to the significance of institutions and the rule of law to combating the resource curse, both are discussed in greater detail in Section 2.5.

prevalent in states with weak political institutions and the rule of law, while also asserting that reduced bargaining between private actors and the state's limited reliance on individual income taxes pose a further threat to a country's political and economic stability.¹¹⁰

Compounding the threat of corruption and rent-seeking is the risk of civil conflict. Paul Collier's and Anke Hoeffler's research in the late 1990s and early 2000s asserted that resource-rich countries were more prone to violent domestic conflict than their resource-poor counterparts.¹¹¹ Collier and Hoeffler theorized that the link between resource abundance and conflict was a direct cause of weak institutions that could not respond to an elite ruling class or opportunistic rebel groups seeking to retain or obtain power by financing conflict through looted resource rents or plundered natural resources.¹¹² In Africa, there are many post-colonial instances of civil conflict fuelled and funded by natural resources: Angola, Chad, the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Liberia, Mozambique, Nigeria, Sierra Leone, Sudan and South Sudan.¹¹³ Each country experienced the lasting economic, political and social toll of conflict to various degrees, including significant loss of life and disruption to the economic and political order. Remnants of conflict are still present today in some countries, like the DRC and South Sudan, further supporting the narrative that resource abundance and civil conflict are inextricably linked.

Together, the preceding economic and political symptoms of the resource curse characterize the negative growth evidenced in mining-dependent states and support the theory

¹¹⁰ Jonathan Di John, "Is there really a resource curse? A critical survey of theory and evidence" (2011) 17 *Global Governance* 167 at 171; Nathan Jensen & Leonard Wantchekon, "Resource wealth and political regimes in Africa" (2004) 37:7 *Comparative Political Studies* 816 at 817.

¹¹¹ Collier & Hoeffler, 2005 *supra* note 6 at 625.

¹¹² *Ibid* at 626 and 631

¹¹³ Ernest Harsch, "Conflict resources: from 'curse' to blessing" (January 2007), online: Africa Renewal <<https://www.un.org/africarenewal/magazine/january-2007/conflict-resources-'curse'-blessing>>.

that mineral wealth can be a curse rather than a blessing. When it comes to explaining the relationship between mining and development in Africa, it is easy to contend that “the lack of democratic accountability and the presence of patron-client politics, extensive corruption, and a weak rule of law”¹¹⁴ contribute to mining’s mismanagement across the region. This “paradox of plenty”¹¹⁵ has perplexed development scholars and practitioners for decades, and has produced numerous academic studies and policy papers. Isolating the cause of the curse in a given country, explaining why it remains impactful and identifying feasible solutions to reverse the curse are common objectives of most of this scholarship. More often than not, investigations focus on domestic conditions, while a much smaller number considered external factors such as the state of the global political economy. One explanation that is frequently relied on to explain the domestic economic and political realities of Africa’s resource curse is the absence of “good governance.”

2.4. “Good governance”: the solution to Africa’s resource curse

In the years following the widespread adoption of the resource curse theory, development scholars and practitioners (especially adherents of the Washington Consensus approach to development)¹¹⁶ turned their attention to conceiving strategies necessary to mitigate and combat its adverse effects. This interest yielded a plethora of studies that quickly adopted and espoused “good governance” as the answer to solving the resource curse.¹¹⁷ Borrowing from Douglass

¹¹⁴ Khan, *supra* note 104 at 115.

¹¹⁵ Brunnschweiler & Bule, *supra* note 89 at 248.

¹¹⁶ Andrés Mejía Acosta, “The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources” (2013) 31 Development Policy Review S89 at S91.

¹¹⁷ Daron Acemoglu, Simon Johnson & John Alan Robinson, “The colonial origins of comparative development: an empirical investigation” (2001) 91:5 American Economic Review 1369; Easterly & Levine, *supra* note 7; Mehlum, Moene & Torvik, *supra* note 7; Collier & Goderis, *supra* note 7.

North's theory of "new institutional economics" that defined institutions as "the humanly devised constraints that structure human interaction,"¹¹⁸ good governance was equated to sound "rules of the game" (both formal and informal) that would effectively structure state regulation of resource extraction and hamper exploitative and rent-seeking behaviour.¹¹⁹ Leading reports from the World Bank include *Governance Matters* (released in 1999), and *Striking a Better Balance* (published in 2004 by the Bank's Extractive Industries Review) seemingly confirmed the positive relationship between good governance and the quality of a country's institutions.

As the negative correlation between the resource curse and a country's political institutions became indisputable in development policy circles,¹²⁰ "good" governance, by extension, became vital to the contention that "institutions matter for development."¹²¹ Armed with the persuasiveness of North's theory, development scholars and practitioners credited sound institutions for the economic success of resource-abundant states that avoided the pitfalls of the resource curse, including Canada, Australia and Norway, and Botswana, the lone example from Africa.¹²² Therefore, mineral-rich African states that sought to promote mining-based socioeconomic development were encouraged to reform the political and legal institutions that governed the sector. Indications of this approach were first made with the World Bank's 1992 *Strategy for African Mining* report (discussed above in section 2.2.3). However, it was the Bank's

¹¹⁸ North, *supra* note 13 at 23.

¹¹⁹ Daron Acemoglu, Simon Johnson & James A Robinson "An African Success Story: Botswana" (2001) MIT Department of Economics Working Paper No. 01-37; Easterly & Levine, *supra* note 7; Mehlum, Moene & Torvik, *supra* note 7; World Bank, *Striking*, *supra* note 8.

¹²⁰ The potential economic effects of the resource curse—Dutch disease; commodity price volatility; declining terms of trade; and the enclave nature of the curse—are direct results of political decisions made by governments; therefore, it is presumed "good governance" responses would alter these economic symptoms as a result of any changes made to the political ones (weakened political institutions; corruption and rent-seeking; and civil conflict).

¹²¹ Mariana Prado & Michael Trebilcock, "Path Dependence, Development, and the Dynamics of Institutional Reform" (2009) 59 University of Toronto Law Journal 341 at 342.

¹²² Mehlum, Moene & Torvik, *supra* note 7 at 1; Paul Collier, "Law and Codes for the Resource Curse" (2008) 11 Yale Hum Rts & Dev LJ 9 at 13.

2004 *Striking a Better Balance* report that firmly placed “good governance” at the centre of the reforms sought by the BWIs as a means to attract foreign investment and promote development.¹²³

Not only did good governance and institutions matter for development, but years of research on the resource curse-good governance nexus pinpointed two factors that were deemed critical to a government’s ability to promote socioeconomic growth. First, the *quality* of governance and a state’s institutions were important considerations.¹²⁴ The mere existence of relevant institutions was not enough—these institutions were expected to meet and surpass a certain threshold if the resource curse was to be avoided.¹²⁵ Second, particular types of institutions became synonymous with the good governance necessary to channel resource-based socioeconomic development. These can be broadly defined as democratic institutions.¹²⁶

Despite evidence from other regions pointing to the incongruity between democracy and development, democratic institutions became central components of good governance reforms driven by the BWIs and other donor agencies in the 1990s and early-2000s, especially in Africa.¹²⁷ In his article *Democracy and Development: Is there Institutional Incompatibility?*,¹²⁸ development scholar Adrian Leftwich examines the conflict between democracy and development. He argues that democracy and development are not compatible because the

¹²³ Christiane Arndt & Charles Oman, *Uses and Abuses of Governance Indicators* (Paris: Development Centre of the Organisation for Economic Co-Operation and Development, 2006) at 15.

¹²⁴ Hany Besada, Franklyn Lisk & Philip Martin, “Regulating Extraction in the Global South: Towards a Framework for Accountability” (2015) 2:1 *Governance in Africa* 1 at 3.

¹²⁵ Collier, *supra* note 122 at 13.

¹²⁶ Mariana Mota Prado, Mario Schapiro & Diogo R Coutinho, “The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil” (2016) 9:2 *Law and Development Review* 369.

¹²⁷ Rita Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* (London: Zed Books, 2000) at 32.

¹²⁸ Adrian Leftwich, “Democracy and Development: Is There Institutional Incompatibility?” (2005) 12:5 *Democratization* 686.

“institutional characteristics and requirements for development and for democracy pull in opposite directions.”¹²⁹ Using Joseph Stiglitz’s definition of development as “transformation of society” that occurs across social, economic, political and legal spheres,¹³⁰ Leftwich argues it occurs through a process of change that required institutions to facilitate and manage its success. For Leftwich, formal democratic institutions included: “(1) a competitive (and multiparty) political system; (2) universal adult suffrage for all citizens; (3) regularly contested, free and fair elections with secret ballots; and (4) effective public access by political parties to the electorate through the media and through generally open political campaigning.”¹³¹ Leftwich further argues that these formal electoral institutions are supplemented by institutionalized civil rights, such as “freedom of expression, association and religion; the rule of law; individual rights and autonomy.”¹³²

After providing his definitions of democratic institutions, Leftwich posits that

economic growth and development is a turbulent and transformative process, challenging (and often defeating) old interests and creating new ones. The institutional changes which it requires and generates, both in the economic and political spheres (especially where attempts are made to make growth into development) have commonly been radical and far-reaching, bringing with them cognate changes in social, cultural and ideological institutions (notably in the class structures and in the general trend to secularism). These changes, at their inception, have seldom been achieved ..., and have most commonly been associated with opposition, conflict and violence which may take religious, regional, ethnic or class-based forms.¹³³

The development process, according to Leftwich, greatly contrasts the democratic one. Although both require “strong states” to ensure their effectiveness, Leftwich argues the effective democratic state differs from the state required for development because it

presupposes a particular kind of consensual competitive politics that generates and sustains the legitimacy of the state. It must allow and encourage the fullest possible range of interests and

¹²⁹ *Ibid* at 689.

¹³⁰ *Ibid* at 692.

¹³¹ *Ibid* at 695.

¹³² *Ibid* at 695.

¹³³ *Ibid* at 694.

preferences...to jostle and argue for advantage, to strike deals, form coalitions and accept compromises, within the formal rules of the game and in relation to the state.

Similarly, law and development scholars Mariana Prado, Mario Schapiro and Diogo Coutinho argue that the conflict between democracy and socioeconomic development lies in the incongruity between the processes necessary to achieve either apparatus.¹³⁴ Democratic processes, they assert, are slower due to the accountability mechanisms such as checks and balances, electoral competition, and attending to competing interests. Development policies, on the other hand, are most effective when they can quickly adapt to changing circumstances, and are not hindered by competing or divergent interests.¹³⁵ Prado, Schapiro, and Coutinho argue further that the form of legitimacy sought in a democratic regime is fundamentally different from the developmental state and may potentially conflict. Legitimacy in democratic regimes is procedural and seeks to ensure fairness and equity in its processes. Alternatively, the developmental state's legitimacy is acquired from the developmental objectives it achieves, whether they be economic (in the form of higher Gross Domestic Product (GDP)), or social (such as increased access to education and health).¹³⁶

To assess democratic institutions within a state, Prado, Schapiro and Coutinho offer their “thick” versus “thin” definitions of democracy:

...a thin concept is one that equates democracy with competitive and fair elections. A thick definition would also include other features, such as individual freedoms, a system of checks and balances, protection of the rights of minorities, an independent judiciary, and rule of law... most definitions of democracy will go beyond the requirement of free and fair elections, encompassing also mechanisms of checks and balances (the executive branch is controlled by the legislature) and expectations of transparency and accountability (which takes place through the judiciary and other accountability institutions), as well as forms of social participation and control.¹³⁷

¹³⁴ Prado, Schapiro, & Coutinho, *supra* note 126 at 372.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 381.

In making his case for the need for democratic institutions to promote development in Africa, prominent development scholar Omano Edigheji asserts that democracy is crucial for development to occur. If a positive correlation truly existed between authoritarianism and development, Edigheji argues that African countries would not be as underdeveloped as they are.¹³⁸ Therefore, Edigheji insists that effective African democratic developmental states must embody citizen participation and cannot simply be characterized by thin, electoral conceptions of democracy.

The debate about whether democracy is a prerequisite for development makes it clear that different systems of governance can achieve similar economic results, regardless of where a country may fall on the thick-thin democratic spectrum. However, mainstream development scholarship and policy in the 1990s and early 2000s insisted development would not take place with the requisite democratic institutions. As a result of this position, neoliberal constructions of the role for law continued to be emphasized in mining governance. Policymakers were more concerned with ensuring the right institutions and laws were in place, and little consideration was given to their functions. This conflict between legal *form* versus *function* is considered in greater detail in section 2.5. The emphasis on legal form in good governance discourse is also considered, with particular focus on its interpretation in African mining. Two metrics—the RGI and EITI—that reinforce this preference are also examined.¹³⁹

¹³⁸ Omano Edigheji, *A Democratic Developmental State in Africa? A concept paper* (Johannesburg: Centre for Policy Studies, 2005) at 14.

¹³⁹ Principles of good mining governance are described as “transnational” because they were developed by international institutions who attempted to see these norms transplanted into domestic law. David Szablowski conceptualized the World Bank’s involvement in community mining conflicts in Peru as a “transnational legal system”. This notion is adopted here to describe the transnational nature of norms that shape understandings of the role for law in mining governance (David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Oxford: Hart Publishing, 2007) at 2).

2.5. Law and “good governance” in African mining

Law and legal institutions are critical to shaping how mining governance can promote socioeconomic development. Law, as a component of the formal “rules of the game,” informs mining’s policy-making arena and helps structure the various ways in which the sector could contribute to socioeconomic development.¹⁴⁰ However, understandings of the role of law in mining governance, and its related impact on development, has changed little since neoliberal Washington Consensus policies were promulgated in the 1980s and 1990s. Even as mineral-rich African states have attempted to reverse this “nightwatchman” model of minerals management and engaged in new forms of state activism over the past 15 years,¹⁴¹ “good governance” principles have yet to evolve. Today, the lens that monitors and evaluates African state involvement in mining—through indicators and qualitative standards like the RGI and the EITI—remains grounded in neoliberal conceptions of law and legal institutions in “good” natural resource governance. Laws that permit direct state involvement in mining and can contribute to socioeconomic development are discounted in favour of the state’s role as the facilitator of private investment and “producer friendly” institutions.¹⁴² Despite new laws that have facilitated greater state activism in African resource extraction, how good mining governance is evaluated obscures an understanding of the *functions* of law in favour of its *form*. Section 2.5.1 identifies and discusses orthodox transnational legal norms that constituted mining governance over the past thirty years. The metrics that promulgate and reinforce these norms are explored in section

¹⁴⁰ Katharina Pistor & Curtis J Milhaupt, *Law and capitalism: what corporate crises reveal about legal systems and economic development around the world* (Chicago: University of Chicago Press, 2008) at 17.

¹⁴¹ Details of this retreat from neoliberalism are discussed further in Chapter Three.

¹⁴² Mehlum, Moene & Torvik, *supra* note 7 at 12; Pistor & Milhaupt, *supra* note 140 at 17.

2.5.2. Finally, section 2.6 examines how the traditional approach to mining governance constrains the potential role for law in promoting socioeconomic development.

2.5.1. Transnational legal norms in mining governance

Once good governance and sound institutions triumphed as the antidote to the resource curse, attention turned to the legal norms necessitated to actualize sound mineral management. Since African governments were criticized as poor managers of their mineral wealth, a combination of transnational legal norms evolved from a group of influential external stakeholders—including foreign donor governments, the BWIs, transnational civil society groups and multinational corporations—to assess mining governance on the continent.¹⁴³ The objectives of this transnational movement were threefold: first, to improve governance by empowering domestic stakeholders (notably citizens and civil society) to hold governments accountable; second, to track government progress using “multi-stakeholder monitoring bodies;”¹⁴⁴ and third, to actively promote these norms in transnational policy circles. Ultimately, transparency, accountability and the rule of law¹⁴⁵ were viewed as necessary preconditions for mining to support socioeconomic development in any way.¹⁴⁶

a. Transparency and accountability

Transparency and accountability are fundamental objectives of this specific conception of mining governance: if transparency is appropriately done, accountability would naturally

¹⁴³ Bonnie Campbell, “Regulation of the Extractive Sector: Issues Raised by the Revision of Mining Regimes in Africa” presented at the “Rethinking Extractive Industry: Regulation, Dispossession, and Emerging Claims” Conference, York University (March 2009) at 21 [Campbell, “Regulation”].

¹⁴⁴ Acosta, *supra* note 116 at S91.

¹⁴⁵ These three norms are the most commonly identified principles of good mining governance. Anti-corruption is also often grouped with the three norms mentioned here; however, it is not isolated here as a distinct norm, but rather is subsumed under all three since it is a desired result of all three norms.

¹⁴⁶ Acosta, *supra* note 116 at S91.

follow.¹⁴⁷ Transparency is a simple term that encompasses a complex range of obligations. It is the “most broadly recommended policy response”¹⁴⁸ to the resource rich-governance poor curse. In this context, transparency refers to the public disclosure of payments made to national governments by extractives corporations.¹⁴⁹ To be most effective, data disclosure should be relevant, timely, accessible, and accurate. While the source can vary (either governments or corporations), its purpose is the same in every instance: to enable accountability.¹⁵⁰ Within the mining governance context, accountability is the process, or processes, through which citizens and civil society assess the decisions made by governments.¹⁵¹ Accountability may be enacted both socially and politically through a combination of formal and informal mechanisms. For example, democratic institutions like a free press, elections and parliament are formal mechanisms of political accountability. Informally, social media is becoming a more commonly used forum to call attention to government and corporate transgressions. Participation and consultation in mining (discussed further in Chapter Three) are another form of accountability that is not yet widely recognized as a component of “good” mining governance, despite being regarded as a human right by many international organizations.¹⁵²

¹⁴⁷ UNECA/AU, *supra* note 22 at 45.

¹⁴⁸ Alexandra Gillies & Antoine Heuty, “Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries” (2011) 6 Yale J Int’l Aff 25 at 26.

¹⁴⁹ Besada & Martin, *supra* note 14 at 270.

¹⁵⁰ Sefton Darby, *Natural Resource Governance: New Frontiers in Transparency and Accountability*, online: Transparency & Accountability Initiative <http://www.transparency-initiative.org/archive/wp-content/uploads/2011/05/natural_resources_final1.pdf> at 9.

¹⁵¹ Gillies & Heuty, *supra* note 148 at 29.

¹⁵² The African Commission on Human and Peoples Rights, the International Labour Organization (reflected in its 1989 *Convention concerning Indigenous and Tribal Peoples in Independent Countries*) and the United Nations (as demonstrated by the *United Nations Declaration on the Rights of Indigenous Peoples*) all recognize participation and consultation as a human right.

In the early 2000s, civil society and foreign governments were instrumental in concluding multiple transnational transparency measures, including the EITI,¹⁵³ the Revenue Watch Institute (precursor to the National Resource Governance Institute (NRGI)),¹⁵⁴ Transparency International (TI),¹⁵⁵ the Kimberley Process (KP)¹⁵⁶ and Publish What You Pay (PWYP).¹⁵⁷ Of the five initiatives, only TI's origins were rooted in a broader anti-corruption movement that was not limited to mining. In fact, many national chapters in Africa, including Zambia and South Africa, are focused on combatting corruption generally, rather than exclusively in mining.¹⁵⁸ Since it began 25 years ago, mining transparency has been taken up by individual TI national chapters in the Global North, including TI Canada and TI Australia, which have established projects like “Mining for Sustainable Development” and “Preventing Corruption in Mining.”¹⁵⁹

The other four transparency schemes—EITI, NRGI, KP and PWYP—all began around the same time, in the early 2000s when the international good governance policy arena narrowed its focus on measures to combat the resource curse. The KP was the first adopter of a multilateral regime, the Kimberley Process Certification Scheme (KPCS), that aimed at embedding a transparency mechanism in the diamonds trade in order to eliminate conflict diamonds. The KPCS is a voluntary mechanism that requires participating states to implement national legislation and institutions intended to certify any exported or imported diamonds as conflict-free in a transparent way.¹⁶⁰ Much like the KP, the EITI is also a voluntary measure that established

¹⁵³ Extractives Industry Transparency Initiative, online: <<https://eiti.org/who-we-are>>.

¹⁵⁴ Natural Resource Governance Institute, online: <<https://resourcegovernance.org/about-us>>.

¹⁵⁵ Transparency International, online: <<https://www.transparency.org/about>>.

¹⁵⁶ Kimberley Process, online: <<https://www.kimberleyprocess.com/en/what-kp>>.

¹⁵⁷ Publish What You Pay, online: <<https://www.pwyp.org/about/>>.

¹⁵⁸ Transparency International, *supra* note 155.

¹⁵⁹ Transparency International Canada, online: <<http://www.transparencycanada.ca/what-we-do/our-projects/>>; Transparency International Australia, online: <<http://transparency.org.au/who-we-are/about/>>.

¹⁶⁰ KP, *supra* note 156.

guidelines to promote the “open and accountable management”¹⁶¹ of resource extraction. The EITI actively tracks and monitors the progress of implementing countries and compiles the results in a publicly accessible database. The EITI standard and evaluation process is discussed further in section 2.5.2.

Unlike the KP and EITI, the NRGi and PWYP do not provide legislative frameworks to promote mining governance. Instead, both initiatives are transnational civil society groups that lobby and advocate for improved extractives governance. As the name suggests, payments disclosure is PWYP’s exclusive focus. It originally began as a coalition of six British charities: Global Witness, Catholic Agency for Overseas Development, Oxfam Great Britain, Save the Children UK, and TI UK. The organization’s work revolves around four strategic priorities aimed at extending and implementing transparency while increasing civic participation in mining governance.¹⁶² Much of the group’s work has been in the form of reports and studies examining transparency gaps and evaluating disclosure obligations in host and home countries.¹⁶³ Like the PWYP, the NRGi publishes resources to assist countries with broader extractives governance objectives. The organization also produces a unique tool, the RGI, which measures the quality of extractives governance in 81 countries. Due to the aspirational standards the RGI espouses, it is discussed in more detail in section 2.5.2 along with the EITI standard.

In addition to these transnational transparency initiatives, disclosure legislation has been adopted in several foreign states home to transnational extractive corporations, including

¹⁶¹ EITI, *supra* note 153.

¹⁶² PWYP, *supra* note 157.

¹⁶³ “Host” and “home” states is terminology commonly used to refer to the two classes of states engaged in mining. Mines are located in “host states” and are operated by corporations incorporated in a “home state” or jurisdiction.

Canada,¹⁶⁴ Great Britain,¹⁶⁵ and the United States.¹⁶⁶ The legislation generally requires the disclosure of payments over a minimum amount made to governments in the process of completing mining operations. For example, in Canada, the *Extractive Sector Transparency Measures Act*, which has been in force since June 2015, requires Canadian companies engaged in the commercial development of minerals (as well as oil and gas) to report any payments of at least CAD 100,000 made to governments or government entities.¹⁶⁷ The reports, which must be filed with the federal ministry Natural Resources Canada, are publicly available. Currently, in Africa, only Nigeria and Tanzania have legislation dedicated exclusively to revenue transparency. However, both the *Nigeria Extractive Industries Transparency Initiative Act, 2007* and the *Tanzania Extractive Industries (Transparency and Accountability) Act, 2015* only govern payments made in the oil and gas sector. No African country has dedicated transparency legislation governing mining. Some, like Senegal¹⁶⁸ and the Democratic Republic of Congo,¹⁶⁹ include transparency obligations in their mining codes. The effect of transparency legislation in practice (whether or not it appears in a separate statute) has yet to be investigated in critical law and development or international legal scholarship.

Despite the efforts of multiple transparency initiatives and laws, the impact and effectiveness of transnational transparency mechanisms remain unsettled. Alexandra Gillies and Antoine Heuty examined the effect of transparency initiatives in resource-rich countries in their

¹⁶⁴ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376 [ESTMA].

¹⁶⁵ The *Reports on Payments to Governments Regulations 2014* implements the mandatory disclosure requirements imposed by Chapter 10 of the European Union Accounting and Transparency Directive.

¹⁶⁶ *Foreign Corrupt Practices Act*, 15 U.S.C. §§ 78dd-1 (1977).

¹⁶⁷ ESTMA, *supra* note 164, s 9(2).

¹⁶⁸ *Code Minier*, Loi 2016-32.

¹⁶⁹ *Code Minier*, Loi n 007/2002.

article, “Does Transparency Work?”¹⁷⁰ They argued that while “[t]ransparency has emerged as the most broadly recommended policy response to the poor governance records in resource-rich states and their damaging developmental effects...the impact of transparency has fallen short of the broad positive changes lauded as possible by its proponents.”¹⁷¹ The authors offer two explanations for this shortcoming. First, transparency’s impact is difficult to measure. According to Gillies and Heuty, “[m]ethodological challenges prevent its accurate observation, and work in this area requires a more politically-nuanced and explicitly-stated causal chain between the disclosure of information and improved development outcomes.”¹⁷² Second, existing transparency initiatives are not designed to produce “a demonstrable and transformative impact” on their desired outcome to strengthen governance, foster accountability and promote socioeconomic development. In particular, Gillies and Heuty contend that the “externally-driven” nature of transparency initiatives “affects both the intent and character of their implementation.”¹⁷³ In other words, transnational transparency norms utilize a cookie-cutter approach that neglects local conditions and development needs.

Gillies and Heuty argued further that the high expectations associated with transparency initiatives led to a “misalignment” between the initiatives and their expected impact. Despite this simple objective, the expectations associated with transparency are much loftier. A 2010 literature review of transparency initiatives conducted by the Institute of Development Studies (and summarized by Gillies and Heuty) captured some of their desired outcomes: improved public services; re-direction of resources to poor neighbourhoods...reducing clientelism;

¹⁷⁰ Gillies & Heuty, *supra* note 148.

¹⁷¹ *Ibid* at 26.

¹⁷² *Ibid*.

¹⁷³ *Ibid* at 26-27.

enhanced democratic representation; less leakage in public expenditure; public participation; trust; improved decision making; better public understanding of decision making; fulfillment of socioeconomic rights...; less corruption; improved public financial management; improved business environment; empower the public; empower reformers; empower local voices; better budget utilization and better delivery of services; increased state or institutional responsiveness; new democratic spaces for citizen engagement.¹⁷⁴

As this list demonstrates, accountability is one of the primary goals of implementing transparency. In broad terms, accountability is meant to enable participatory governance processes that embrace underrepresented stakeholders like citizens and civil society.¹⁷⁵ Accountability mechanisms can include either formal, established institutionalized processes (including access to information, consultations in environmental and social impact assessments, free and fair elections and freedom of the press), or may consist of informal sites of contestation such as public opinion.¹⁷⁶ What ideal combination of accountability mechanisms should be in place in mining-dependent countries is surely context-specific; however, a more comprehensive examination is not currently available in mining governance literature.¹⁷⁷

b. Rule of Law

The need for the rule of law in mining governance enjoys greater consensus than transparency and accountability. To its proponents, the rule of law refers to “a legal order

¹⁷⁴ *Ibid* at 28.

¹⁷⁵ UNECA/AU, *supra* note 22 at 45.

¹⁷⁶ Leftwich, *supra* note 128 at 695.

¹⁷⁷ My research uncovered descriptions of various accountability measures and what minimum standards are required for them to be effective.

consisting of predictable, enforceable and efficient rules”¹⁷⁸ that is applied to all persons, institutions, and government entities equally. One of the most fundamental components is an independent and credible judiciary. The rule of law’s incorporation into mining governance mirrored the principle’s prominent place in mid-1990s development discourse.¹⁷⁹ In fact, the rule of law’s treatment in good governance discourse shared many of the objectives of development’s law reform movement. That debate¹⁸⁰ saw the rule of law become “not only...a tool of development policy, but as an objective for development policy in its own right.”¹⁸¹ The rule of law has similarly served a dual purpose in good mining governance: first, as a necessary means to achieve good governance goals; and second, as a goal of mining governance itself. This is apparent from the equal emphasis placed on the efficacy of mining laws to mitigate the resource curse (with a focus on the themes of anti-corruption¹⁸² and attracting foreign investors)¹⁸³ and on law reform as a distinct aim of mining governance initiatives.¹⁸⁴

Optimal rule of law institutions in mining-dependent states should be “shaped by factors specific to given societies, including history, culture, political traditions and institutional

¹⁷⁸ Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development” in David Trubek & Alvaro Santos, eds, *The new law and economic development: a critical appraisal* (New York: Cambridge University Press, 2006) 253 at 253.

¹⁷⁹ David Trubek & Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M Trubek and Alvaro Santos, eds, *The new law and economic development: a critical appraisal* (New York: Cambridge University Press, 2006) 1 at 1.

¹⁸⁰ See for example Santos, *supra* note 178; David M Trubek, “The Political Economy of the Rule of Law: The New Developmental State” (2009) 1 *Hague Journal on the Rule of Law* 28; and Adrian di Giovanni, “Making the Link between Development’s Regulation through Law and Law’s Promotion through Development” (2016) 8 *Hague Journal on the Rule of Law* 101.

¹⁸¹ Trubek & Santos, *supra* note 179 at 1.

¹⁸² David Kennedy, “‘Laws and Developments’” in *Law and Development: Facing Complexity in the 21st Century*, John Hatchard & Amanda Perry-Kessaris, eds, (London: Cavendish Publishing Limited, 2003) 17 at 23.

¹⁸³ David Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in *The new law and economic development: a critical appraisal*, David M Trubek & Alvaro Santos, eds, (New York: Cambridge University Press, 2006) 74 at 89 [Trubek, “Rule of Law”].

¹⁸⁴ Butler, *supra* note 3 at 139.

cultures.”¹⁸⁵ However, this was not the case over the past two decades that good mining governance has been promulgated, much like what occurred in development practice from the 1990s to the mid-2000s. The parallels between the treatment of rule of law in development practice and good governance are so considerable that it is also helpful to adopt some of the critiques from law and development scholarship, particularly in the absence of anything similar in the mining governance policy arena. David Trubek offered an assessment of what he described as the “first phase” of rule of law reform in development assistance that aptly describes the principle’s treatment in mainstream mining governance:

In addition to neoformalism and a focus on the administration of justice, there was great emphasis on contract and property...a strong belief in the possibility of legal transplantation, a willingness to conduct reforms at once in all parts and levels of the legal order, and a view that there was one model of “the rule of law” that made sense for all countries. Further, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted.¹⁸⁶

Much like in development practice, invocations of the rule of law in mining governance seemed to “justify a set of inherent limits on institutional arrangements and policy priorities.”¹⁸⁷ By extension, as law and development scholar Kerry Rittich argued in the development context, “[t]he salience of the rule of law [in good governance] seems directly related to the presumption that the state is dysfunctional.”¹⁸⁸ The two standard-bearers of “good” mining governance—the RGI and EITI (discussed further in section 2.5.2)—adhere to this position.

Unlike transparency and accountability initiatives, transnational mining governance discourse has yet to define desirable rule of law principles, such as just laws and independent

¹⁸⁵ Michael J Trebilcock & Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Northampton, MS: Edward Elgar Publishing, Inc 2008) at 12.

¹⁸⁶ Trubek, “Rule of Law”, *supra* note 183 at 86.

¹⁸⁷ Kerry Rittich, “Functionalism and Formalism: Their Latest Incarnations in Development and Governance Debates” (2005) 55:3 UTLJ 853 at 866 [Rittich, “Functionalism”].

¹⁸⁸ *Ibid.*

dispute resolution; instead, the “rule of law” is subsumed in existing transparency movements, like the RGI and EITI. Outside of mining governance, individual state performance is regularly measured in such global indices as the Worldwide Governance Indicators produced by the World Bank, the World Justice Project’s Rule of Law Index and the Ibrahim Index of African Governance published annually by the Mo Ibrahim Foundation.¹⁸⁹

2.5.2. Reinforcing “good” mining governance: the Resource Governance Index and the Extractive Industries Transparency Initiative

Accompanying the rise of transnational “good governance” legal norms in mining was the creation of two metrics used to monitor and evaluate state performance¹⁹⁰ in extractives management: the RGI and the EITI. Unlike other governance indicators, these two metrics were designed to measure states’ progress in implementing transparency and accountability initiatives in oil, gas and minerals production.¹⁹¹ By doing so, these metrics provide practical illustrations of transnational good governance norms. Additionally, the RGI and EITI reinforce these norms as the standard for mining governance and the model to achieve better development outcomes.¹⁹² Section 2.6 then considers critiques of these metrics, including the limitations of measuring governance and the formalistic conceptualization of the role for law that each metric promulgates.

¹⁸⁹ Worldwide Governance Indicators, online: World Bank Group <<http://info.worldbank.org/governance/wgi/#home>>; Rule of Law Index, online: World Justice Project <<http://data.worldjusticeproject.org/#>>; Ibrahim Index of African Governance, online: Mo Ibrahim Foundation <<http://iiag.online>>. Both the World Justice Project and Mo Ibrahim Foundation are independent international non-profit organizations that work to advance the rule of law and governance. The Mo Ibrahim Foundation was founded by Mohammed Ibrahim, a wealthy Sudanese-British businessman.

¹⁹⁰ Campbell, “Regulation”, *supra* note 143 at 21.

¹⁹¹ Acosta, *supra* note 116 at S89, S 93.

¹⁹² Kevin E Davis, Benedict Kingsbury & Sally Engle Merry, “Indicators as a Technology of Global Governance”, International Law and Justice Working Papers, IILJ Working Paper 2010/2 Rev (revised August 2011) at 11.

a. Resource Governance Index

The RGI began during the midst of the early 2000s movement for more active responses to extractives governance concerns.¹⁹³ It was founded by the Revenue Watch Institute, the predecessor of the NRGI, which was an offshoot of the transnational civil society group, Open Society Foundation (OSF).¹⁹⁴ The OSF is one of the world's largest philanthropic non-governmental organizations committed to promoting democracy and government accountability in the Global South. What began as George Soros's act of charity is now the second-largest private philanthropy organization in the United States.¹⁹⁵ Today, the NRGI is a transnational civil society group that operates independently of the OSF. While it continues to receive funding from them, the NRGI also receives grants from other leading philanthropies, including the Ford Foundation, the Bill & Melinda Gates Foundation and the William & Flora Hewlett Foundation, as well as donations from the governments of Australia, Norway, Switzerland, Great Britain and the United States.¹⁹⁶ The NRGI is currently led by former World Bank economist and founder of the Worldwide Governance Indicators, Daniel Kaufman (he is also a member of the EITI international board).¹⁹⁷

Since its creation, the RGI has been a critical component of the NRGI's mission to "[help] people...realize the benefits of their countries' endowments of oil, gas and minerals... through technical advice, advocacy, applied research, policy analysis, and capacity

¹⁹³ Virginia Haufler, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World" (2010) 10:3 Global Environmental Politics 53 at 66.

¹⁹⁴ *Ibid* at 62.

¹⁹⁵ Open Society Foundation, "About Us: History", online: Open Society Foundation <<https://www.opensocietyfoundations.org/about/history>>.

¹⁹⁶ Natural Resource Governance Institute, "What We Do", online: Natural Resource Governance Institute <<https://resourcegovernance.org/about-us/what-we-do>>.

¹⁹⁷ Natural Resource Governance Institute, "Leadership Team", online: Natural Resource Governance Institute <<https://resourcegovernance.org/about-us/leadership>>.

development.”¹⁹⁸ In its brief history, the RGI has been published three times: first, in 2010 (under the name “Revenue Watch Index”); in 2013; and most recently in June 2017. The latest report consisted of a 149-question survey, which was compiled and completed by RGI researchers that consisted of local civil society experts, independent consultants and out-of-country experts. The RGI utilized an index of 50 indicators to evaluate the governance of the oil, gas, and mining sector in 81 countries. It was designed to mirror the NRGI’s Natural Resource Charter, a set of guiding “principles for governments and societies on how to best harness the opportunities created by extractive resources for development.”¹⁹⁹ The charter comprises 12 precepts that fall into three groups:

- Domestic foundations for resource governance, which considers the overarching local legal-institutional framework and accountability environment.
- The decision chain, covering a range of domestic policy issues ranging from discovery to getting a good deal, to revenue management and investing in development.
- International foundations for resource governance, considering the influence of extractive companies and the international community.²⁰⁰

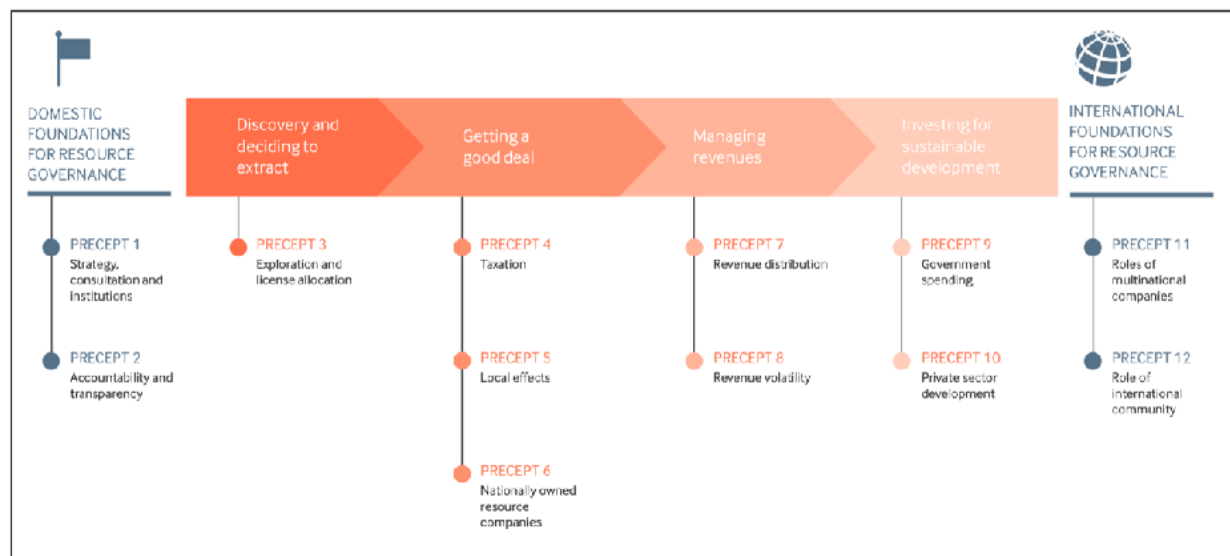
Figure 2.1 succinctly captures all twelve precepts:

¹⁹⁸ Resource Governance Index, online: Natural Resource Governance Institute <<https://www.resourcegovernanceindex.org>>.

¹⁹⁹ Natural Resource Governance Institute, “Natural Resource Charter”, online: Natural Resource Governance Institute <<https://resourcegovernance.org/approach/natural-resource-charter>>.

²⁰⁰ Natural Resource Governance Institute, “Natural Resource Charter Benchmarking Framework”, online: Natural Resource Governance Institute <https://resourcegovernance.org/sites/default/files/documents/benchmarking_framework_introduction.pdf>.

Figure 2.1 – RGI precepts



(Natural Resource Charter Benchmarking Framework: Introduction).

The RGI converted precepts 2-8 of the Natural Resource Charter into questions that are split into three components to measure: “value realization”, “revenue management” and the “enabling environment”.²⁰¹ Table 2.1 summarizes the definitions of each component:

Table 2.1 – RGI components

Component	Definition
Value realization	Measures the quality of governance around exploration, production, environmental protection, revenue collection and state-owned enterprises (SOEs) for those countries that have an SOE... These are the aspects of resource governance that together work to realize public value from a country’s oil, gas and minerals, that that protect a country’s local environment and communities.
Revenue management	Covers the aspects of governments’ revenue management that are particularly important in resource-producing countries: national budgeting, subnational resource revenue sharing and sovereign wealth funds.

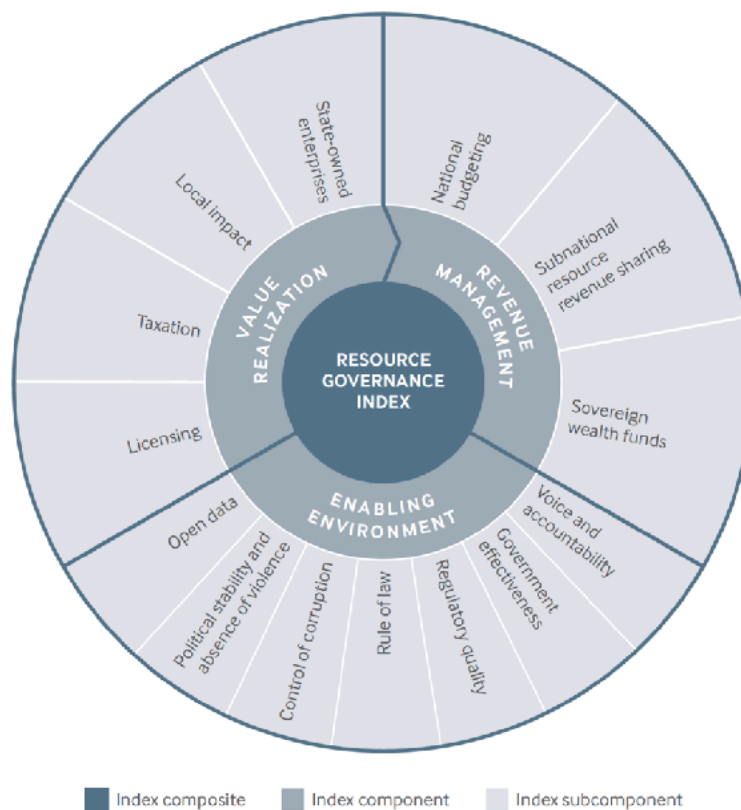
²⁰¹ 2017 Resource Governance Index: Method Paper at 3.

Enabling environment	Measures the quality of governance in the country as a whole in seven dimensions: voice and accountability, government effectiveness, regulatory quality, rule of law, corruption control, and political stability and absence of violence.
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(2017 Resource Governance Index: Method Paper).

All three components are further subdivided into the following subcomponents captured in this graphic:

Figure 2.2 – The Resource Governance Index



(2017 Resource Governance Index: Method Paper).

All three categories consist of indicators that reflect the transnational good governance norms discussed earlier in section 2.5.1. Both value realization and revenue management capture the RGI's conception of transparency, and to some extent, accountability, through the use of original questions. Enabling environment relies exclusively on data taken from external

governance indicators, including the World Bank’s Worldwide Governance Indicators, to evaluate performance in the rule of law and accountability. Included in Table 2.2 below are examples of questions related to transparency and accountability from the first two categories:

Table 2.2 – Sample RGI questions

Component	Sample Questions
Value realization	<ul style="list-style-type: none"> • Are senior public officials required to publicly disclose their financial holdings in extractive companies? • Do rules require public disclosure of beneficial owners of extractive companies? • Is the government required to publicly disclose all signed licences/contracts with extractive companies? • Is the government required to publicly disclose data on payments from extractive companies to the government?
Revenue management	<ul style="list-style-type: none"> • Do rules require that an external body periodically audit the transfers of extractive resource revenues to subnational governments? • Is the sovereign wealth fund required to publicly disclose these annual financial reports?

(2017 RGI Questionnaire).

To derive each country’s composite score, the RGI averages the scores of all three components. Each component is equally weighted, reflecting the NRGI’s belief that all three components equally contribute to the overall quality of mining governance.²⁰² The “value realization” and “revenue management” subcomponents each consisted of 133 multiple-choice questions. Each answer had a corresponding numeric value of 0, 50, or 100.

Table 2.3 illustrates how this scoring system operated by using two transparency-related law questions as examples:

²⁰² Natural Resource Governance Institute, “2017 Resource Governance Index: Method Paper”, online: Natural Resource Governance Institute <<https://resourcegovernanceindex.org/about/methodology>>.

Table 2.3 – Measuring legal transparency questions in the RGI

1.1.7 Financial interest disclosure rules (Law Indicator)

1.1.7a Public officials asset disclosure requirement					
Question	Are senior public officials required to publicly disclose their financial holdings in extractive companies?				
Answer choices	Yes, the law requires senior public officials to disclose their financial holdings in extractive companies.	Yes, a publicly documented policy requires that senior public officials disclose their financial holdings in extractive companies.	No, senior public officials are not required to publicly disclose their financial holdings in extractive companies, but they are required to disclose their financial holdings in a government authority	No, senior public officials are not required to disclose their financial holdings in extractive companies.	Not applicable/other.
Scores	100	50	20	0	

1.2.3 Company payment rules (Law Indicator)

Question	Is the government required to publicly disclose data on payments from extractive companies to the government?			
Answer choices	Yes, the law requires the government to publicly disclose data on payments from extractive companies to the government.	Yes, a publicly documented policy requires the government to publicly disclose data on payments from extractive companies to the government.	No, the government is not required to publicly disclose data on payments from extractive companies to the government.	Not applicable/other.
Scores	100	50	0	

(2017 RGI Questionnaire).

RGI's questions and measurement scheme reveal the index's narrow conception of the role of law in mining governance. Rather than evaluate the law's explicit content and impact, the RGI questionnaire merely provides a quantitative differentiation between a government having a particular law on the books or not. This has the effect of condensing complex legal regimes into simplified data systems that fail to interrogate how law may affect development outcomes. Section 2.6 considers this critique in greater detail.

b. Extractive Industries Transparency Initiative

Much like the RGI, the EITI reflects the prioritization of law's form, rather than function, in transnational mining governance. The EITI was conceived as a foreign policy proposal of the British government under Prime Minister Tony Blair at the 2002 World Summit on Sustainable Development.²⁰³ Its founding principle was that "the prudent use of natural resource wealth has the potential to provide the basis for sustainable economic growth and development"²⁰⁴ if it was managed wisely and devoid of such problems as corruption, conflict, and environmental degradation.²⁰⁵ Given this focus, the EITI is concerned solely with payments made by oil, gas, and mining companies to national governments.²⁰⁶ Despite this narrow focus on transparency, the EITI adopted a multi-stakeholder consultative process that includes civil society organizations, extractives companies, institutional investors, and partner organizations.²⁰⁷

²⁰³ "History of the EITI", online: EITI <<https://eiti.org/history>>.

²⁰⁴ Haufler, *supra* note 193 at 54.

²⁰⁵ *Ibid.*

²⁰⁶ "History of the EITI", *supra* note 203.

²⁰⁷ Mary Ella Keblusek, "Is EITI really helping global good governance? Examining the resource curse, corruption, and Nigeria's EITI implementation", online: Leadership Initiative for Transformation and Empowerment <<http://www.nidprodev.org/EITI%20-%20Nigeria%20Analysis.pdf>> at 7. EITI's website list of "institutional investors" includes the British Columbia Investment Management Corporation, the CPP Investment Board, Fidelity Investments, JP Morgan Asset Management, the Ontario Teachers' Pensions Plan, and UBS Global Asset Management. "Partner organizations" include the African Development Bank, African Union, European Union, International Monetary Fund, Organization for Economic Cooperation and Development, and the World Bank.

Almost half (24) of the 51 EITI implementing countries are in Africa.²⁰⁸ Of the 24 countries, only 10—Burkina Faso, Ghana, Liberia, Mali, Mauritania, Mozambique, Nigeria, São Tomé and Príncipe, Tanzania, and Zambia—are deemed to have made “meaningful progress” towards meeting the 2016 EITI Standard; the other 14 have yet to be assessed.

The EITI Standard is a voluntary mechanism consisting of two parts: Implementation of the EITI Standard and Governance and Management. Each includes various subcomponents. Of particular importance to considerations of the role of law is subcomponent 3.2, which outlines the mandated Legal and Institutional Framework. An overview of this framework states that

The EITI requires disclosures of information related to the rules for how the extractive sector is managed, enabling stakeholders to understand the laws and procedures for the award of exploration and production rights, the legal, regulatory and contractual framework that apply to the extractive sector, and the institutional responsibilities of the State in managing the sector. The EITI requirements related to a transparent legal framework and award of extractive industry rights include: (2.1) legal framework and fiscal regime; (2.1) license allocations (2.3) register of licenses; (2.4) contracts; (2.5) beneficial ownership; and (2.6) state-participation in the extractive sector.

At its core, the Legal and Institutional Framework identifies types of payments and ownership information that should be disclosed. Like the RGI, the EITI’s evaluation of transparency offers little by way of using laws and regulations to produce “demonstrable and transformative impact”²⁰⁹ on mining-led development. Using Zambia’s 2017 validation against the 2016 Legal and Institutional Framework standard as an illustrative example helps explain this point further:

²⁰⁸ EITI, *supra* note 153.

²⁰⁹ Gillies & Heuty, *supra* note 148 at 27.

Table 2.4 – Zambia’s First Validation (2017)

Category: Licenses and contracts	Level of Progress
Requirements and Description	(Options: No progress; Inadequate; Meaningful; Satisfactory; Beyond)
<p>Legal framework (#2.1*):</p> <p>The 2015 EITI Report describes the legal framework and fiscal regime governing the extractive industries, including the level of fiscal devolution, an overview of the relevant laws and regulations, and information on the roles and responsibilities of the relevant government agencies. There are parts of the report that refer to laws that have been replaced, such as the <i>Mines and Minerals Development Act 2008</i>.</p>	Satisfactory
<p>License allocations (#2.2):</p> <p>While the report includes an overview of the licensing process, it is uncertain to what extent the information reflects any changes resulting from the MMDA 2015. There are gaps related to the process of license transfers, licenses transferred during the reporting year, and an explanation of the technical and financial criteria for awarding of licenses.</p>	Inadequate
<p>License register (#2.3):</p> <p>Comprehensive information on the licenses held by material and non-material companies is included in the mining cadastre. Data on the date of application/ submission of bid is not available for petroleum licenses, although this is not sufficient for the requirement to be unmet.</p>	Satisfactory
<p>Policy on contract disclosure (#2.4):</p> <p>While the EITI Report explains that there are currently no active contracts in the mining sector, the references to the MMDA 2008 does not make it clear whether the information is up to date and whether there are any changes resulting from the passing of the MMDA 2015. It is also not clear from the report whether there are any possibilities for entering into contracts with the government with regards to the exploration or production of petroleum, if so, whether there are any laws or contractual provisions that would affect disclosure of contracts in the petroleum sector.</p>	Meaningful

<p>State participation (#2.6):</p> <p>The EITI Report provides an overview of state participation in the sector, including the level of ownership held by Zambia Consolidated Copper Mines – Investment Holding (ZCCM-IH) in mining companies, changes in the level of ownership and funding arrangements provided to by the ZCCM-IH to mining companies. ZCCM-IH’s annual audited financial reports are publicly available and include information on the rules and practices regarding transfer of funds between the ZCCM-IH and the state, licenses held, reserves, licenses held, the names of operating companies, royalties and dividends. There is limited information on the recently established Industrial Development Corporation (IDC) and how dividends collected from the mining sector are managed, although state asset management companies do not fall under the scope of Requirement 2.6.</p>	<p>Satisfactory</p>
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*(*The numbers correspond with the applicable EITI Standard; EITI Zambia - First Validation 2017).*

Although the EITI does not offer a quantitative ranking of its implementing member countries, it nonetheless establishes a measurable evaluation of transparency against “the global standard for the good governance of oil, gas and mineral resources.”²¹⁰ By tracking state progress and assigning a qualitative measure of that progress, the EITI operates similarly to the RGI’s quantitative indicator.

Additionally, aside from the 10 African countries that are EITI compliant, there is little information about how any of these states utilize either the RGI or the EITI. Additionally, there is no concrete information available that suggests that foreign investors or foreign governments utilize the metrics when making decisions to invest or provide development assistance. Instead, these metrics reproduce knowledge about African mining governance that perpetuate neoliberal

²¹⁰ EITI, *supra* note 153.

conceptions of weak governance, with little information about the current legal frameworks or institutions that govern mining and aim to promote socioeconomic development.

2.6. The limits of transnational norm creation and law-making

With the increasing popularity of the notion of “good governance” as the only viable solution to the “resource curse” over the past 30 years, donor governments, the BWIs and international civil society organizations have promoted normative prescriptions—transparency, accountability and the rule of law—accompanied specific legal and policy proposals designed to enact good mining governance. Through this formulation and promulgation of transnational legal norms, proponents of good governance became sites of transnational law-making and norm creation.²¹¹ As metrics designed to measure good governance in mining, the RGI and EITI engage in both the reproduction and recreation of these transnational legal norms. Each new iteration of the RGI and EITI standards offer reformulations of good governance in mining. For example, in June 2019, the EITI Standard was updated to include new contract transparency and environment reporting obligations,²¹² while the RGI, through its various iterations, offers insights into preferred institutional arrangements. Given their reproductive and recreative functions, the RGI and the EITI have become “integral to and constitutive of”²¹³ the transnational good governance project in mining.

This section examines the limits of transnational good governance law-making and norm creation, as reflected in the RGI and the EITI. The analysis focuses on three critiques: first, that

²¹¹ Szablowski, *supra* note 139 at 87.

²¹² EITI, *supra* note 153.

²¹³ Ruth Buchanan, Kimberley Byers & Kristina Mansveld, “‘What gets measured gets done’: exploring the social construction of globalized knowledge for development” in Moshe Hirsch & Andrew Lang, eds, *Research handbook on the sociology of international law* (Cheltenham, UK: Edward Elgar Publishing, 2018) 101 at 101.

the prescription of legal and policy norms, found in the RGI and EITI metrics, engages in the practice of “governing by measuring”²¹⁴ or “what gets measured gets done;”²¹⁵ second, it presumes a linear correlation between “good governance” and development that both neglects local conditions and the evolving functions of law; and last, how it constrains the role for law in governing mining-led development in Africa.

2.6.1. “Governing by measuring” or “what gets measured gets done”

The proliferation of metrics and indices to measure development outcomes, like the Millennium Development Goals, led Law and Development scholar Kerry Rittich to coin the phrase “governing by measuring” to describe the increased reliance on indicators in development practice.²¹⁶ Like a trio of scholars before her—Kevin Davis, Benedict Kingsbury and Sally Engle Merry²¹⁷—Rittich notes the worrying trend of indicators being used to frame a social phenomenon like development. Following Rittich’s analysis of the Millennium Development Goals, Ruth Buchanan, Kimberley Byers and Kristina Mansveld confirm the effect of the proliferation of indicators on development practice. Using the phrase “What gets measured gets done” (taken from the final Millennium Development Goals Report published in 2015), Buchanan, Byers and Mansveld corroborate Rittich’s hypothesis and formulate a critical sociology of development indicators that emphasize: the value-neutral creation of things that are measured;²¹⁸ their embeddedness in larger social projects;²¹⁹ how they generate reactivity by

²¹⁴ Kerry Rittich, “Governing by Measuring: The Millennium Development Goals in Global Governance” in Ruth Buchanan and Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (London: Hart Publishing, 2014) 165 [Rittich, “Governing”].

²¹⁵ Buchanan, Byers & Mansveld, *supra* note 213 at 101.

²¹⁶ Rittich, “Governing”, *supra* note 214 at 165.

²¹⁷ Davis, Kingsbury & Merry, *supra* note 192 at 5.

²¹⁸ Buchanan, Byers & Mansveld, *supra* note 213 at 108.

²¹⁹ *Ibid* at 109.

changing how governments act;²²⁰ and how they discipline governments and institutions by simplifying complex social and political decision-making and privileging the creators of indicators over “local knowledge and decision-making.”²²¹

Applying this critique to transnational good governance norm creation as represented by the RGI and EITI may seem incongruous because only the RGI is an indicator in the way that Rittich and Buchanan, Byers and Mansveld use it. The aptest definition comes from Davis, Kingsbury and Merry. They contend that despite the widespread use of global governance indicators and standards in a cross-section of different fields (human rights, development, rule of law, and corporate social responsibility),²²² there is no agreed meaning of indicator. They offer the following definition in “Indicators as a Technology of Global Governance”:

An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards.²²³

The RGI clearly fits within this definition. However, it could be argued that the EITI does as well. Although it is not a quantitative metric, the EITI is a qualitative indicator of rank-ordered data. It measures and evaluates states’ progress against a pre-defined set of transparency norms. As a result, it operates similarly to the RGI and other governance indicators.

Thus, transnational good governance norm creation, as represented in the RGI and EITI, can be said to be “governing by measuring” as it is

²²⁰ *Ibid* at 110.

²²¹ *Ibid* at 112.

²²² Sally Engle Merry, “Measuring the World: Indicators, Human Rights, and Global Governance” (2011) 52:S3 *Current Anthropology* S83 at S83.

²²³ Davis, Kingsbury & Merry, *supra* note 192 at 5. Although “standards” are not explicitly included in their definition, they operate like indicators by measuring complex social phenomena against evaluation criteria to produce rank-ordered data.

premised on the idea that identifying goals and quantifiable targets and pursuing those targets with measurable indicators; monitoring progress or regress through peer and external surveillance; diffusing ‘best practices’ from better performers to laggards; and revising those practices on the basis of cumulative gains in knowledge is often the most promising way to generate desired change.²²⁴

By promoting and measuring the adoption of transnational legal norms in Africa, the “externally-driven” nature of good mining governance further “affects both the intent and character of their implementation.”²²⁵ Davis, Kingsbury, and Merry argue that this is a problem embedded in such initiatives because they embody an “ideology [of] what a good society is, or how governance should ideally be conducted to achieve the best possible approximation of a good society.”²²⁶ Campbell argues that the implementation of good governance proposals is too focused on technical and administrative aspects of capacity building, which neglects how past neoliberal interventions in extractives sectors severely weakened local political and institutional capacity.²²⁷

Both the EITI and RGI are emblematic of transnational good governance norm creation and are further evidence of the misalignment between good governance practice and stated impact. The EITI does not explain how the public disclosure of company payments will support economic growth, encourage public debate, and enhance foreign investment. Also, while the RGI—by exposing shortcomings in its conceptualization of mining governance—aims to “facilitate disclosure and public accountability, limit arbitrary powers, curb conflicts of interest, and clarify roles and authority,”²²⁸ it is unclear as to how this will be achieved. Additionally, the inability of EITI to effectively produce results across parts of Africa where it is being implemented further

²²⁴ Rittich, “Governing”, *supra* note 214 at 175.

²²⁵ Gillies & Heuty, *supra* note 148 at 26-27.

²²⁶ Davis, Kingsbury & Merry, *supra* note 192 at 11.

²²⁷ Bonnie Campbell, “Corporate Social Responsibility and development in Africa: Redefining the roles and responsibilities of public and private actors in the mining sector” (2011) *Resources Policy* 37:2 138 at 140.

²²⁸ RGI, *supra* note 198.

illustrates how good governance standards engage superficially with complex political and economic realities.²²⁹ Without the ability to account for the distinct political and institutional environment within a country, governance metrics can distort understandings of minerals management and offer few lessons on how to improve gaps or shortcomings.

2.6.2. The causation presumption

Through the production and promulgation of transnational norms, good governance proponents assume a precise combination of laws and legal institutions as preconditions for effective minerals management and socioeconomic development. This approach is akin to a theoretical approach that has influenced understandings of the relation between law and economic development²³⁰ known as the “endowment perspective.”²³¹

Law and development theories by Max Weber, Douglass North, Hernando de Soto, Rafael La Porta and Daron Acemoglu all fall within this perspective. This approach asserts that only countries that possess optimal preconditions could support economic growth and industrialization.²³² In Weber’s case, these preconditions were a “Protestant work ethic and a rational legal system.” For North, it was institutions. For La Porta and Acemoglu, the “legal origins” of a country predetermined economic growth. While for de Soto, it was legally enforceable property rights.²³³

²²⁹ Nikhil K Dutta, “Accountability in the Generation of Governance Indicators” in Kevin E Davis et al, eds, *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford: Oxford University Press, 2012) 437 at 438.

²³⁰ Like critical law and development scholarship on the rule of law, the discipline also offers comparable critical analytical tools to comprehend how law is conceptualized in mining governance discourse.

²³¹ Pistor & Milhaupt, *supra* note 140 at 18.

²³² *Ibid.*

²³³ *Ibid* at 18-21.

Much like the endowment perspective, good governance necessitates that specific legal institutions be in place for mining to support socioeconomic development, with little consideration of the local knowledge and conditions. Some of these, including the state of the mining sector and recent interventions made by African governments to promote socioeconomic development, are discussed further in Chapter Three.

2.6.3. Hindering the role for law in the governance of mining developmentalism

Critical law and development scholarship again offers a lens to critique good governance's limiting conception of the role for law in governing mining for development. In his review of the "rule of law" in development assistance, David Trubek critiqued early law reform efforts for emphasizing "formalism" in the creation of law and legal institutions.²³⁴ In Trubek's words, this meant that "rules were developed, interpreted, and applied without careful attention to policy goals."²³⁵ Foreign laws and legal models were readily promoted and adopted with little consideration of their effect on local conditions and the country's needs.²³⁶

The same can be said about transnational good mining governance. As empirical representations of good governance, both the RGI and EITI reveal this key limitation through the measurement and evaluation of mining governance: *formalist* law and legal institutions are prioritized over *functional* law and institutions. Law is being formulated in such a way that it satisfies subjective standards of good governance with little consideration of what functions it achieves.²³⁷ The EITI framework discussed in section 2.5.2 requires member countries to adopt

²³⁴ Trubek, "Rule of Law", *supra* note 180 at 76.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ Rittich, "Functionalism", *supra* note 187 at 861. World Bank Group, *2017 World Development Report: Governance and the Law* (Washington, DC: The World Bank, 2017) at 5.

and implement a body of law deemed by the organization to be the universal standard for managing mineral wealth. Similarly, through its evaluation criteria, the RGI infers that certain laws and institutions must be in place for a country's extractives sector to be governed well. The push to see mining-dependent governments adopt and implement legislation upholding transnational good governance tenets fails to interrogate how different legal institutions may promote socioeconomic development.

Moreover, a detrimental effect of this formalist approach is the constraint placed on state function. Good governance is a highly political undertaking that presumes states lack the competence to effectively and efficiently manage resource wealth.²³⁸ This presumption is rooted in an "anti-state" bias premised on state dysfunction and susceptibility to corruption.²³⁹ The evolution of African state intervention in mining, as discussed in section 2.2, illustrated how this understanding contributed to the formation of the problem known as the resource curse and its commonly accepted solution, good governance.

2.7. Conclusion: Rethinking law and mining governance in Africa

As mineral-rich African countries seek a greater share of mining wealth, it is time to rethink the role for law in mining governance and formulate an "integrated perspective which considers the transformative role" that mining-led development could play.²⁴⁰ Good governance in mining is currently framed as a formalist approach to constrain state action via three key tenets: transparency, accountability and the rule of law. Although all three are important means to support mining-led development, they should not be the sole purpose of good mining

²³⁸ Idahosa, *supra* note 3 at 203.

²³⁹ *Ibid*; Rittich, "Functionalism" *supra* note 187 at 866.

²⁴⁰ Campbell, "Regulation", *supra* note 143 at 25.

governance. Instead, prioritizing these tenets fails to fully capture the developmental function of law and legal institutions in mining governance. Chapter Three considers how this can be done by incorporating a rights-based approach to development in the “developmental state.”

3 (Re)framing Law and Mining Governance: Incorporating Development and the Developmental State

3.1. Introduction

Chapter Two offered a critique of contemporary mining governance centred on its formalistic constraints on the role of law and states. Recognizing these limitations, Chapter Two concluded by contending that an alternative mining governance framework is needed. This chapter proposes such an alternative framework by adopting a functional human rights-based approach to development as the guiding legal norm. The framework is further contextualized by exploring the intersections between mining and relevant development and human rights concepts (the developmental state, the right to development, and the rights-based approach to development (RBAD)). It proposes the adoption, through developmental state institutions, of a rights-based approach to mining governance, through developmental state institutions that foster state participation and promotes development objectives.

As more mining-dependent Southern African states seek a greater share of mineral wealth, a rights-based approach to mining governance facilitated by mining developmental state institutions (MDSIs), could offer a means to regulate both the sector and the state's participation in it. In a 2011 report, the United Nations Economic Commission for Africa argued that much-needed economic transformation across the continent would require a developmental state.¹ This contention attempted to re-centre development in growth strategies across the continent. Mineral-rich countries are well-positioned to undertake this transformation through developmental interventions in mining. What form this transformation could take has yet to be extensively

¹ United Nations Economic Commission for Africa and the African Union, *Governing development in Africa - the role of the state in economic transformation* (Addis Ababa: UNECA, 2011) at 7 [“UNECA/AU, Governing”].

studied, since most countries labelled as “developmental states” lack significant natural resources.² Borrowing from the experiences of “successful” developmental states, this chapter intertwines orthodox and heterodox law and development scholarship to conceptualize the mining developmental state (MDS) and to construct a functional framework for a rights-based approach to mining governance that can be analyzed in the Southern African case studies.

Section 3.2 provides a historical overview of law and development and explains the relationship between law and economic development. The right to development is also situated in the field. Section 3.3 examines the developmental state, including historical examples and defining features, while considering the role of law in the developmental state. The section concludes with an assessment of the developmental state paradigm. Section 3.4 transitions to consider developmental states across Africa and the post-colonial history of the African state in development. Current mining developmental state institutions in Africa are described in section 3.5 and are used to further conceptualize the mining developmental state in line with a rights-based approach. Like in Chapter Two, this analysis covers all of Africa to identify continent-wide trends that would support a more comprehensive understanding of mining developmentalism and the developmental state that has been informed by historical and contemporary events. Section 3.6 concludes by summarizing the proposed law and mining governance framework that will be used to evaluate mining practices in Botswana, South Africa and Zambia in Chapters Four, Five and Six, respectively.

² Paul Jourdan, “The optimisation of the developmental impact of South Africa’s mineral assets for building a democratic developmental state” (2014) 26 *Mineral Economics* 107 at 108.

3.2. What is law and development?

“Law and development”³ has been simultaneously described as a “movement”⁴ comprised of “a series of projects driven primarily by funding decisions”⁵ and as “organized efforts to transform legal systems in developing countries to foster economic, political, and social development.”⁶ Accompanying this movement were a number of “academic projects”⁷ designed to study these efforts. Since the 1960s, law and development—as a field of study and practice—has consistently shifted, due to its intersections with “law, economics, and the practices of states and development agencies.”⁸ At its core, law and development has been, and remains, “concerned with the relationship between legal norms and institutions and economic, social, cultural, and political transformation.”⁹ Due to this breadth of study and practice, Kerry Rittich describes law and development as “a ‘field’ with uncertain borders constituted by varied, often isolated, and sometimes incommensurable projects, preoccupations, and perspectives.”¹⁰ This section aims to summarize two divergent approaches in law and development scholarship along with their various historical moments. The first, which is described here as “law and development ‘orthodoxy’,”¹¹ captures the majority view in the field of “what development is and

³ How “law” and “development” are defined is critical to conceptions of “law and development”. The meaning of “law” and “development” used in this dissertation was discussed in Chapter One and will not be revisited here.

⁴ Kerry Rittich, “Theorizing International Law and Development” in Anne Orford & Florian Hoffman, eds, *The Oxford Handbook of the Theory of International Law* (Oxford: OUP, 2016) 820 at 828 [Rittich, “Theorizing”].

⁵ *Ibid.*

⁶ David Trubek, “Law and Development” (2015) 13:2 *International Encyclopedia of the Social and Behavioral Sciences* 443 at 443.

⁷ *Ibid.*

⁸ David M Trubek, “Law, State, and the New Developmentalism: An Introduction”, in David M Trubek, Helena A Garcia, Diogo R Coutinho & Alvaro Santos, eds, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013) 1 at 3 [Trubek, “New Developmentalism”].

⁹ Rittich, “Theorizing”, *supra* note 4 at 826.

¹⁰ *Ibid* at 828.

¹¹ David Trubek & Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M Trubek & Alvaro Santos, eds, *The new law and economic development: a critical appraisal* (New York: Cambridge University Press, 2006) 1 at 2.

what types of legal reform it requires or implies.”¹² The second, “law and development ‘heterodoxy’,”¹³ considers an alternative approach to law and development that is grounded in human rights, including rights-based approaches to development.¹⁴ Institutions that were founded based on either or both approaches are examined in greater detail later in this chapter.

3.2.1. Law and development orthodoxy

“Development” and its companion “development assistance” emerged after the end of World War II as a political and economic mechanism to aid post-war reconstruction.¹⁵ Through the mandate of the newly created Bretton Woods Institutions (BWIs)—the World Bank and the International Monetary Fund—development and development assistance became conceptual and practical tools synonymous with the efforts of states and these institutions to support economic growth and employment.¹⁶ After Europe recovered and its colonial empires began to dismantle, newly independent countries embraced the mantle of development despite many having inherited institutions incapable of jumpstarting sustainable socioeconomic development.¹⁷ How these countries were to “achieve” development became the focus of numerous studies and theories, including the emerging field of law and development.

Although its intellectual boundaries began to be defined in the 1950s and 1960s, the theoretical origins of the law and development movement can be traced to Max Weber’s early

¹² Rittich, “Theorizing”, *supra* note 4 at 830.

¹³ *Ibid* at 831.

¹⁴ Ruth Buchanan, “A Crisis and its Afterlife: Some Reflections on ‘Scholars in Self-Estrangement’” in Gráinne de Búrca, Claire Kilpatrick & Joanne Scott, eds, *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Oxford, UK: Hart Publishing Ltd, 2014) 25 at 33.

¹⁵ Andrea Cornwall & Celestine Nyamu-Musembi, “Putting the ‘rights-based approach’ to development into perspective” (2004) 25:8 Third World Quarterly 1415 at 1421.

¹⁶ Rittich, “Theorizing”, *supra* note 4 at 820.

¹⁷ Ann Seidman et al, “Introduction” in Ann Seidman et al, eds, *Africa’s Challenge: Using Law for Good Governance and Development* (Trenton, NJ: Africa World Press Inc, 2007) at 6.

efforts to study the relationship between law and the economy during his late nineteenth-century work on the “rational legal system” as a precondition for capitalism.¹⁸ Over fifty years after Weber’s sociological analysis of the relationship between law and capitalism in Europe, in the 1960s early proponents of law and development (mainly scholars and practitioners in the Global North) resurrected Weber’s framework to help explain “underdevelopment” in the Global South. Further influenced by W.W. Rostow’s modernization theory¹⁹—the prevailing development theory at the time, which argued that development occurred in a period of successive phases of economic growth—early law and development advocates claimed that the adoption and transplantation of Western legal traditions could accelerate modernization in the developing world.²⁰ Inherent in this view was the assumption that the levels of economic progress achieved in the Global North were the desired development objective for poorer countries.²¹ Consequently, this movement supported a “top-down” approach that consisted of reforming legal institutions through Western transplants so that law was a means of achieving the developmental goals of the state.²² Local legal traditions that were considered “non-modern” were deemed incompatible with the economic reforms thought necessary to support economic growth and development.²³ In this way, early law and development orthodoxy involved an “element of external engagement”²⁴ that shaped many of the domestic law and policy-making processes in developing countries.

¹⁸ Katharina Pistor & Curtis J Milhaupt, *Law and capitalism: what corporate crises reveal about legal systems and economic development around the world* (Chicago: University of Chicago Press, 2008) at 18; David Trubek, “Max Weber on Law and the Rise of Capitalism” (1972) 3 *Wis L Rev* 720 at 721.

¹⁹ Kevin E Davis & Michael J Trebilcock, “The Relationship Between Law and Development: Optimists versus Skeptics” (2008) 56 *Am J of Comp L* 895 at 900.

²⁰ *Ibid* at 901.

²¹ David Trubek & Mark Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” (1974) 4 *Wis L Rev* 1062.

²² Davis & Trebilcock, *supra* note 19 at 901.

²³ David Trubek, “Law and development: Forty years after ‘Scholars in Self-estrangement’” (2016) 66 *UTLJ* 301 at 304.

²⁴ Rittich, “Theorizing”, *supra* note 4 at 830.

Due to the prominent idea of the role of developing states in early post-colonial economic development, the “developmental state” became critically aligned with orthodox law and development scholarship. Law and development’s embrace of the developmental state historically covers three distinct periods that are also aligned with the different moments in law and development scholarship. The first can be described as the “law of the developmental state.”²⁵ During this period, law was used as a tool of the developmental state, specifically directed at making state intervention more effective. This approach was mostly used in the 1960s and early 1970s when development economists favoured the state guiding industrial growth over the private sector.²⁶ Since private sector actors were considered less equipped to manage the demands of industrial expansion, states were regarded as better suited to carrying out development.²⁷

The second period occurred in the 1980s after doubts were raised about the developmental state’s ability to promote development. Accompanying the declining faith in the state was the rise in neoliberal economic policies that facilitated heightened market influence and independence; the state was no longer deemed the leading site of socioeconomic development.²⁸ This period became known as “law in the neoliberal market”²⁹ in law and development scholarship. Law’s role in the economy morphed during this period from a tool to advance development goals to a shield used to protect the market against unwanted state intervention.³⁰ The role of the state was limited to using law as a means to protect investor expectations and

²⁵ Trubek, “New Developmentalism”, *supra* note 8 at 5.

²⁶ Ada Ordor, “Tracking the Law and Development Continuum through Multiple Intersections” (2015) 8:2 Law and Development Review 333 at 335.

²⁷ Trubek, “New Developmentalism”, *supra* note 8 at 5.

²⁸ Ordor, *supra* note 26 at 335.

²⁹ Trubek, “New Developmentalism”, *supra* note 8 at 5.

³⁰ *Ibid.*

facilitate private business transactions.³¹ Law was wholeheartedly a part of enforcing the Washington Consensus and “good governance” agenda of BWIs discussed in Chapter Two.³²

After Washington Consensus policies failed to achieve its presumed social and economic transformation, law and development scholars rejected the “night watchman” view of the state and accepted that various market distortions and failures might require direct state intervention and corrective action.³³ This period, from the late 1990s to the present, also mirrored changing views of development that were influenced by Amartya Sen’s reconceptualization of development as freedom.³⁴ A significant outcome of the adoption of Sen’s expansive view of development was the creation of “human development”³⁵ indicators as a new methodology for tracking states’ progress.³⁶ The United Nations Development Programme’s Human Development Report, the now defunct Millennium Development Goals and their successor, the Sustainable Development Goals, were evidence of this shift. Although some efforts have been made by human rights scholars to recalibrate the role for law in realizing human development,³⁷ law and

³¹ *Ibid.*

³² See sections 2.2.3 and 2.4.

³³ Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 203 at 212 [Rittich, “Future”].

³⁴ Rittich, “Theorizing”, *supra* note 4 at 834.

³⁵ “Human development” is a widely-used term that is understood differently around the world. The United Nations Development Programme (UNDP), authors of the Human Development Reports, defines “human development” as a concept of development that centres the creation and improvement of living conditions rather than economic indicators like rates of growth and Gross Domestic Product. It consists of improving standards of living by creating conditions to enhance human abilities through education, gender equality, environmental sustainability and participation in political and community life. Data related to life expectancy, expected years of schooling and Gross National Income per capita are tabulated by the UNDP to create the Human Development Index (HDRO Outreach, “What is Human Development?”, online: United Nations Development Programme <<http://hdr.undp.org/en/content/what-human-development>>).

³⁶ Rittich, “Theorizing”, *supra* note 4 at 834.

³⁷ See, for example, Duncan French & Louis J Kotzé, eds, *Sustainable Development Goals: Law, Theory and Implementation* (Cheltenham: Edward Elgar Publishing, 2018).

development orthodoxy has yet to wholeheartedly reorient away from market-centred approaches to development.³⁸

Today, there is no prevailing theory that shapes law and development orthodoxy.³⁹ Despite the lack of consensus, the developmental state remains fundamental to law and development orthodoxy. While David Trubek, a prominent law and development figure due to his early work in the field, suggests “the consensus on which the neoliberal model was built is crumbling,”⁴⁰ he acknowledges new conceptions are emerging from state practices and development scholarship. The absence of a theoretical consensus on the role of law in the developmental state led Trubek to reconceptualize the developmental state as the “new developmental state”⁴¹ by relying on “different models of development and different roles for law.”⁴²

An overarching feature of this new developmental state is the revised relationship between the state and the private sector. No longer is the state acting as the guiding hand of the economy; neither is the private sector seeking to act unilaterally with little involvement from the state. Instead, new developmentalism acknowledges that optimal development goals will be realized if the state and the private sector collaborate. New developmentalists posit that this can include public-private partnerships and other joint efforts that originate from state promotion of industrial innovation and competitiveness.⁴³ Policies that may characterize this new developmental state include:

³⁸ Rittich, “Theorizing”, *supra* note 4 at 834.

³⁹ Ordor, *supra* note 26 at 336.

⁴⁰ Trubek, “New Developmentalism”, *supra* note 8 at 5.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid* at 9.

- “Primary reliance on the private sector as investor rather than direct state ownership [with mining sectors being a possible exception];
- Acceptance of a major role for the state in steering investment, coordinating projects and providing information...;
- Promotion of productive (rather than speculative) foreign direct investments;
- Emphasis on making private firms competitive rather than on shielding them from competition; ...[and]
- Promotion of domestic capital markets and the financial sector both to generate and to allocate resources.”⁴⁴

Law and development scholars continue to offer differing insights into what form the new developmental state can take.⁴⁵ Before the emergence of this concept, the developmental state took shape from models in East Asia. These models, and the developmental state experience in Latin American, are discussed further in section 3.3.

At its core, law and development orthodoxy is concerned with the relationship between law and *economic* development.⁴⁶ Although causal connections between orthodox law reform proposals and development “remains...elusive,”⁴⁷ its adherents strongly believe that law matters and can positively affect development goals in the Global South.⁴⁸ Heterodox law and development similarly believes in the role for law. However, law and development heterodoxy adopted an expansive definition of development that was intrinsic to human rights and the right to development.

⁴⁴ David M Trubek, “Developmental States and the Legal Order: Towards a New Political Economy of Development and Law” (2008) Univ. of Wisconsin Legal Studies Research Paper No. 1075 at 11 [Trubek, “Legal Order”].

⁴⁵ See for example Karl Botchway and Jamee Moudud’s alternative take on the “new developmental state” in “The Search for a New Developmental State” (2008) 37:3 International Journal of Political Economy 5 at 6 [Botchway & Moudud, “Search”].

⁴⁶ Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000” in David M Trubek & Alvaro Santos, eds, *The new law and economic development: a critical appraisal*, (New York: Cambridge University Press, 2006) 19.

⁴⁷ Rittich, “Theorizing”, *supra* note 4 at 829.

⁴⁸ Davis and Trebilcock, *supra* note 19 at 896.

3.2.2. Law and development heterodoxy: the right to development and the rights-based approach to development

Development and human rights were polarized discourses in the post-colonial period before Sen's work in the 1990s helped expand its understanding beyond the economic context.⁴⁹ Issa Shivji, an expert on law and development in Africa, argues that the contentious fragmentation between development and human rights was more pronounced in Africa than in other developing countries because human rights were viewed as antithetical to the development agenda taking place in the 1960s and 1970s.⁵⁰ Shivji's critique of twentieth century human rights discourse is rooted in what he contends are its Western origins and paradoxical application by reigning global superpowers. For example, he points to the *Universal Declaration of Human Rights*' prioritization of political freedoms (such as freedom of expression and religion) when it was concluded in 1948, while European colonization was ongoing, over self-determination, social and economic rights—rights that were fundamental to independence movements and former colonies.⁵¹ Recognizing this fragmentation, several newly independent countries—many from Africa—made interjections at the United Nations aimed at advancing a developmental agenda.⁵² This movement, despite its rejection of mainstream human rights discourse, used rights language and instruments to promote its agenda, beginning with the 1966 *International Covenant*

⁴⁹ Buchanan, *supra* note 14 at 34.

⁵⁰ Issa Shivji, "Human Rights and Development: A Fragmented Discourse" in Ruth Buchanan & Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (London: Hart Publishing, 2014) 49 at 53.

⁵¹ *Ibid* at 52.

⁵² *Ibid* at 54.

on *Economic, Social and Cultural Rights (ICESCR)*⁵³ and culminating the 1986 United Nations *Declaration on the Right to Development (DRTD)*.⁵⁴

The *ICESCR* marked a divergence in international human rights discourse. Due to the increasing number of post-colonial states in the United Nations system, social and economic rights were inserted for the first time, into an international sphere that had previously prioritized individual civil and political rights.⁵⁵ Foundational rights to former colonies, like the right of self-determination⁵⁶ and the right to freely dispose of natural wealth and resources,⁵⁷ were entrenched in the treaty.

Passage of the *ICESCR* also helped proponents of development discourse move ahead with efforts to formalize a normative instrument dedicated to advancing their agenda further.⁵⁸ Using human rights parlance once again, this change in international law was undertaken by galvanizing around the newly-formulated “right to development.”⁵⁹ Coined by Senegalese jurist Kéba M’Baye in 1972,⁶⁰ the right to development was defined as

1. [A]n inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions of both International

⁵³ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

⁵⁴ *Declaration on the Right to Development*, GA Res 41/128, UNGA 97th Plenary Meeting (4 December 1986) Article 1 [*DRTD*].

⁵⁵ In addition to the *Universal Declaration of Human Rights* (GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71), the *International Covenant on Civil and Political Rights* (19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) was also criticized by post-colonial states for its emphasis on individual civil and political rights rather than on collective social and economic rights (Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004) at 14).

⁵⁶ *ICESCR*, *supra* note 53 at Article 1.1.

⁵⁷ *Ibid* at Article 1.2.

⁵⁸ Eunice N Sahle, “On Kéba M’Baye and the Right to Development at 30” in Eunice N Sahle, ed, *Human Rights in Africa* (New York: Palgrave Macmillan, 2019) 231 at 231.

⁵⁹ Peter Uvin, “From the right to development to the rights-based approach: how ‘human rights’ entered development” (2007) 17:4-5 *Development in Practice* 597 at 598 [Uvin, “From”].

⁶⁰ Sahle, *supra* note 58 at 231.

Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.⁶¹

The right to development was constitutive of efforts to promote a New International Economic Order (NIEO) led by newly-independent developing countries at the United Nations in the 1970s and culminating in the *DRTD* in 1986.⁶² Given its alignment with an expansive definition of development, the origins of heterodox law and development can be traced to this NIEO and right to development movement.⁶³

In 1986—ten years after the *ICESCR* entered into force—the United Nations General Assembly passed the *DRTD*. Although the *DRTD* was intended to reflect the redistributive goals of the NIEO, some viewed it as a watered-down version of the movement’s goals.⁶⁴ Nonetheless, some fundamental principles of the NIEO movement were incorporated into the *DRTD*, including a number of global dimensions such as the need for a collective response to economic inequality.⁶⁵ In addition to urging international cooperation to promote development, the *DRTD* emphasized the role of states in ensuring development domestically. Article 8.1 reads

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure...equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income... Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.⁶⁶

Concurrent to the formulation of the *DRTD* at the United Nations was the adoption of the right to development in the emerging African human rights system. In 1981, Member States of

⁶¹ *DRTD*, *supra* note 54.

⁶² Uvin, “From”, *supra* note 59 at 598.

⁶³ Rittich, “Theorizing”, *supra* note 4 at 823.

⁶⁴ Cornwall & Nyamu-Musembi, *supra* note 15 at 1422.

⁶⁵ *Ibid.*

⁶⁶ *DRTD*, *supra* note 54.

the Organization African Unity (the predecessor of the African Union) finalized the *African Charter on Human and Peoples' Rights (AfCHPR)*,⁶⁷ which recognized, inter alia, that

Art. 21.1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

Art. 22.1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Art. 22.2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.⁶⁸

Much like the *DRTD*, the right to development in the *AfCHPR* was multifaceted and encompassed economic, social and cultural rights in addition to dominion over natural resources. Unlike the *DRTD*, however, the *AfCHPR* explicitly framed the right to development as a collective right of “all peoples.” Although the term was not defined in the *AfCHPR*, African human rights scholars and jurists, including M’Baye, have argued that describing the right as a collective one did not negate it as an individual right as well.⁶⁹

The legally binding obligation on African states to discharge the right, either individually and collectively, was also explicitly delineated in the *AfCHPR*. Member States, however, did not specify the nature of the obligation. Over 30 years later, the African Commission on Human and Peoples’ Rights, which was established by Article 30 of the *AfCHPR*, adopted the non-binding *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*.⁷⁰ The *Guidelines* explained that the *AfCHPR* imposed a combination of negative and positive duties on States parties that were best

⁶⁷ *African Charter on Human and Peoples’ Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 [*AfCHPR*].

⁶⁸ *Ibid.*

⁶⁹ Serges Djoyou Kamga, *The Right to Development in the African Human Rights System* (New York: Routledge, 2018) at 78-79.

⁷⁰ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* (adopted 24 October 2011) [*Guidelines*].

understood using the human rights “respect, protect, promote and fulfil”⁷¹ framework.⁷²

Recommendations related to the obligation to fulfil economic and social rights are particularly illuminating of the role for law and the state in ensuring development:

10. The duty to fulfil economic, social and cultural rights requires States parties to take positive steps to advance the realisation of the rights. Such measures should be comprehensive, co-ordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress. This obligation is, “a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.” The State should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment.

11. The duty to fulfil includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own. In cases where individual and communities are unable to gain access to these rights by the means at their disposal, the obligation will be, “to take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction”

12. The rights of vulnerable and disadvantaged groups should be prioritised in all programmes of social and economic development, and particular attention must be paid to vulnerable and disadvantaged groups in programmes aimed at ensuring access to appropriate services and resources.

In addition to the *Guidelines*, both the Commission and the African Court of Human Rights considered the right in a series of five cases⁷³ since 2001: *SERAC and Another v Nigeria* (*SERAC*);⁷⁴ *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda (DRC)*;⁷⁵ *Kevin Mgwanga Gumne et al v Cameroon (Gumne)*; ⁷⁶ *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya (Endorois)*;⁷⁷ and

⁷¹ The “respect, protect, promote and fulfil” framework is a fundamental component of international human rights law. The United Nations Office of the High Commissioner for Human Rights describes the framework as follows: “By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.” (UN OHCHR, online: <<https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>>).

⁷² *Guidelines*, *supra* note 70 at 11.

⁷³ A detailed discussion of each case will not be provided here. Instead, only relevant holdings will be discussed.

⁷⁴ *SERAC and Another v Nigeria*, [2001] AHRLR 60 (ACHPR 2001) [*SERAC*].

⁷⁵ *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*, Comm 227/99: 20th Annual Activity Report of the African Commission, annex IV, 111 [*DRC*].

⁷⁶ *Kevin Mgwanga Gumne et al v Cameroon*, Comm 266/2003: 26th Annual Activity Report of the African Commission, annex IV [*Gumne*].

⁷⁷ *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya (Endorois)*, [2009] AHRLR 75 (ACHPR 2009) [*Endorois*].

African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks).⁷⁸ Along with considering violations of the right to development, the Commission adjudicated violations of other rights, including the right to wealth and natural resources.⁷⁹ Key conclusions regarding the content of the right to development included:

- The right to development is directly linked to the right to freely dispose of wealth and natural resources, given that access to resources is necessary to realize economic, social and cultural development (*DRC*);⁸⁰
- A state's ability to fulfil its obligation to ensure the right to development is also linked to the right to wealth and natural resources (*DRC*);⁸¹
- Equitable sharing of resources is a component of the right to development (*Gumne*);⁸²
- Meaningful and effective participation by groups impacted by development projects is part of fulfilling the right to development (*Endorois*);⁸³
- Prior and effective consultation with Indigenous peoples and local communities regarding projects that may hinder their right to development is required to ensure the right to development (*Ogieks*).⁸⁴

The preceding articulation of the right to development in the African human rights system offers a way to meaningfully re-conceptualize mining governance in the twenty-first century. The rights-based approach to development tethers mineral wealth, land, equality, participation and

⁷⁸ *African Commission on Human and Peoples' Rights v Republic of Kenya* [2017] ACHOR 006/2012 [*Ogieks*].

⁷⁹ Serges Djoyou Kamga & Charles Manga Fombad, "A Critical Review of the Jurisprudence of the African Commission on the Right to Development" (2013) 57:2 J Afr L 196 at 206-211. Although the Commission found a violation of the right to development in *SERAC*, an analysis of the Commission's reasons was not included in the decision.

⁸⁰ *Ibid* at 206.

⁸¹ *Ibid*.

⁸² *Ibid* at 208.

⁸³ *Ibid* at 210.

⁸⁴ Kamga, *supra* note 69 at 134.

consultation to the development project in a way the orthodox approach to law and development does not. Translating this approach into the laws and policies that govern mining would thus require the elevation of the relationship between the state and its population over that of the state and pure economic interests.⁸⁵ This is not to say that a rights-based approach to mining governance cannot make use of the market to achieve its developmental goals, as economic factors are invariably a part of overcoming poverty and realizing development in Africa. Instead, high rates of economic growth and other such indicators should not be the only measure of developmental success; instead, they should be a means by which states could ensure the right to development for their peoples. Furthermore, using the RBAD to contextualize mining governance incorporates a method of accountability⁸⁶ and enforceability—as evidenced by the jurisprudence from the African Commission and Court for Human and Peoples’ Rights—that is absent from orthodox law and development approaches.

The remainder of the chapter attempts to develop a framework for a rights-based approach to mining governance that incorporates both orthodox and heterodox law and development institutions. Section 3.3⁸⁷ begins this analysis with a closer examination of the developmental state.

⁸⁵ Uvin, “From”, *supra* note 59 at 600.

⁸⁶ Cornwall & Nyamu-Musembi, *supra* note 15 at 1417.

⁸⁷ Much of sections 3.3 to 3.5 were taken from three articles and one book chapter published during the course of my doctoral studies: Sara Ghebremusse, “Good Governance and Development in Botswana - The Democracy Conundrum,” (2018) 11:2 Law and Development Review 913-938; Sara Ghebremusse, “New Directions in African Developmentalism? The Emerging Developmental State in Resource-Rich Africa” (2016) 7:1 The Journal of Sustainable Development Law and Policy 1-24; Sara Ghebremusse, “Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa” (2015) 8:2 Law and Development Review 467-502; Sara Ghebremusse, “Can free, prior and informed consent combat mining land use conflicts in Zambia?” in Amissi Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis, 2019) 313-332. Excerpts are reprinted here with permission of the editors.

3.3. The developmental state

As discussed previously, the “developmental state” at its core is committed to *economic* development because it is “a state that intervenes and guides the direction”⁸⁸ of economic growth. Chalmers Johnson’s 1982 study of Japan and its Ministry of International Trade and Industry (MITI) was the first to profile the characteristics of this state model. In his landmark study, *MITI and the Japanese Miracle*,⁸⁹ Johnson identified four key components of the developmental state: a small, efficient bureaucracy; a political environment that allows the bureaucracy to operate independently and free of intrusive interests; state intervention in the economy; and pilot institutions, such as the MITI.⁹⁰ Johnson’s study helped identify a type of state that gained prominence in the decades following World War II. Although state intervention was common among both industrialized and developing economies, the developmental state offered a way to characterize governments that went beyond intervention alone and used it as a tool to advance economic growth.

After dominating economic policymaking in the years immediately following World War II, active state intervention faced opposition as neoliberal economic policies gained popularity in the 1980s. The rise of neoliberalism coincided with the decline of the developmental state, as neoliberals argued it was not equipped to handle the economic crises that arose in the late 1970s and early 1980s. As a result, the role of the state in development took a backseat to neoliberal policies that favoured deregulation, free trade and privatization. However, today—after years of

⁸⁸ Esteban Pérez Caldentey, “The Concept and Evolution of the Developmental State” (2008) 37: International Journal of Political Economy 27 at 28.

⁸⁹ Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford: Stanford University Press, 1982).

⁹⁰ Pamela Mbabazi & Ian Taylor, “Botswana and Uganda as Developmental States(?)” in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 1 at 4.

what many scholars agree was a failure of neoliberal policies to promote development⁹¹—several developing countries are channelling the principles of the developmental state model proposed by Johnson. According to Karl Botchway and Jamee Moudud, the mediocre record of neoliberalism has revived support for state intervention and refocused attention on the role of the state in development.⁹²

3.3.1. Historical examples of the developmental state

Studies of East Asian countries dominate developmental state scholarship due to the high rates of economic growth many of these countries experienced in the latter half of the twentieth century. Japan, South Korea, Singapore, Taiwan and Hong Kong are often considered the prototypes for developing countries seeking to replicate their success. Although experiences varied in each country, an examination of two leading examples—Japan and South Korea—helps illustrate some of the features that contributed to theorizing the developmental state.

The creation of the MITI in 1949 was central to Japan’s development efforts. Faced with economic collapse following the end of World War II, the MITI was initially tasked with coordinating the “Policy Concerning Industrial Rationalization,”⁹³ which aimed to combat harmful regulations—particularly those contributing to deflation—put in place by the Supreme Commander of the Allied Powers.⁹⁴ In addition to spearheading this policy, the MITI was soon given powers under the Foreign Capital Law to negotiate the price and conditions of technology imports.⁹⁵ Within three years, the MITI’s authority was broadened to include control over

⁹¹ See for example Joseph Stiglitz, *Globalization and Its Discontents* (New York: WW Norton & Co, 2002) and Dani Rodrik, “After Neoliberalism, What?” (Harvard University, August 2002), online: <http://www.bndespar.com.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/seminario/novosrumos_Dani.pdf>.

⁹² Botchway & Moudud, “Search”, *supra* note 45 at 6.

⁹³ Caldentey, *supra* note 88 at 28.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

merchandise imports and the foreign exchange budget. As a result, a system of import control responsible for protecting domestic industry was created. The concurrent control over foreign exchange also helped foster the growth of exports.⁹⁶

After its early success, the MITI expanded its continued support of domestic industries by providing much-needed access to credit through the implementation of two connected policies. The first was the creation of the Japan Development Bank, which was initially responsible for lending to two key domestic industries: energy and metal production. The second policy expanded lending to other industries through a generous scheme that involved both the Japanese central bank and commercial banks.⁹⁷

South Korea also pursued export-oriented policies after the end of a devastating war—in this case the Korean War—in 1953.⁹⁸ Following Japan's example, South Korea created a government agency tasked with pursuing economic growth. The Economic Planning Board was conceived as part of the country's first five-year economic development plan; its mandate, like MITI's, was to implement foreign exchange policies and export subsidies favourable to domestic industries while providing preferential access to credit.⁹⁹

Central to both Japan's and South Korea's development strategies was fluidity. Economic policies were flexible and adapted to different times and conditions. In South Korea, these policies were comprised of distinct five-year plans that implemented incremental developmental policies over the length of each plan. The first two put in place after the Korean War focused on promoting self-reliance and strengthening the state's economic instruments. The third plan

⁹⁶ *Ibid.*

⁹⁷ *Ibid* at 29.

⁹⁸ Joseph Wong, "The Adaptive Developmental State in East Asia" (2004) 4 *Journal of East Asian Studies* 345-362.

⁹⁹ *Ibid* at 351.

shifted its focus to the development and export growth of key industries, specifically agriculture, and heavy and chemical industries. Later, recognizing its growth potential, the South Korean government turned to the development of the high tech industry in the 1990s.¹⁰⁰ Much like South Korea, Japan executed phased development plans, beginning with the initial focus of restoring the industrial process in the years immediately following the end of World War II, and then fostering strong export industries. Afterwards, in the 1980s, Japan supported the new, high-growth technology sector while responding to less competitive industries, such as textiles and steel production.¹⁰¹

Based on the Japanese and South Korean developmental state models, Esteban Pérez Caldentey identified three additional features that complement Johnson's original scholarship. First, interventionist policies used by the state were not confined to public ownership; instead, the developmental state used various instruments including “tax credits, breaks, subsidies, import controls, export promotion, and targeted and direct financial and credit policies instruments that belong to the realm of industrial, trade, and financial policy.”¹⁰² Second, state intervention is fluid, and “varies over time in scope and content.”¹⁰³ Third, active participation by the private sector is key to the developmental state’s success.¹⁰⁴

Despite the initial consensus regarding the state’s role in East Asian economic development, the 1997 East Asian crisis raised doubts about the efficacy of this approach.¹⁰⁵ Commentators blamed the institutional framework of the developmental state—especially the

¹⁰⁰ Caldentey, *supra* note 88 at 30.

¹⁰¹ *Ibid* at 29.

¹⁰² *Ibid* at 30.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ Thandika Mkandawire, “Thinking about developmental states in Africa” (2008) 25 Cambridge Journal of Economics 289 at 292.

close relationship between the state and business—for the poor regulatory framework and lack of transparency that instigated the crisis.¹⁰⁶

Much like East Asia, Latin America's developmental state experience was varied. Caldentey traces its origin to the first half of the nineteenth century when several Latin American states gained independence and were subsequently integrated into the global trade system. At that time, small domestic industries forced Latin American countries to rely extensively on exports for economic growth. Consequently, Latin American states used trade to achieve the dual purpose of facilitating the creation of domestic industry and generating government revenue through both tariffs and export taxes.¹⁰⁷ In the decades that followed, Latin American governments assumed a greater interventionist stance in several areas: the construction of general infrastructure (roads, railways), the protection of specific domestic industries and export sectors, and the promotion of skilled labour. Government policies used to advance these development goals included subsidies, access to credit, tariffs, and export taxes.¹⁰⁸

Latin American intervention continued in the middle of the twentieth century, when development strategy centred on state-led industrialization.¹⁰⁹ A variety of government measures were used to achieve this goal, including control over natural resource sectors, supporting nontraditional industries through various fiscal and monetary policies, and creating national development banks to improve access to cheap credit.¹¹⁰ The Latin American developmental

¹⁰⁶ Wong, *supra* note 98 at 345.

¹⁰⁷ Caldentey, *supra* note 88 at 36.

¹⁰⁸ *Ibid* at 38.

¹⁰⁹ *Ibid* at 43.

¹¹⁰ *Ibid*.

state is often associated with this period in history, wherein domestic industrialization was favoured over export promotion.¹¹¹

Unlike the experience in East Asia, Latin American developmental states were considered less successful, particularly in the wake of the 1980s debt crisis.¹¹² State intervention in the region became synonymous with inflation and wasteful spending, rather than economic growth. This negative view of state action precipitated the introduction of structural adjustment programmes, and their accompanying neoliberal economic policies in several Latin American states in the 1980s.¹¹³

More recently, law and development scholars are studying the emergence of a “new developmental state” in Brazil. Under the auspices of the Law and the New Developmental State (LANDS) project conducted by the Global Legal Studies Center at the University of Wisconsin-Madison, David Trubek and his colleagues Diogo Coutinho and Mario Shapiro researched the “new state activism” of Luiz Inácio Lula da Silva’s government.¹¹⁴ Their research revealed that Lula’s administration set Brazil on a new developmental course by instituting new industrial and social policies that promoted growth and helped reduce inequality.¹¹⁵ The authors distinguish Brazil’s “new developmentalism” from the developmental state of the 1950s–1980s,¹¹⁶ which offers added insights into evolving conceptions of the developmental state and the role for law in socioeconomic development.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid* at 48.

¹¹⁴ David Trubek, Diogo Coutinho & Mario Shapiro, “New State Activism in Brazil and the Challenge for Law” in David M Trubek et al, eds, *Law and the New Developmental State* (Cambridge: Cambridge University Press, 2013) 28 [Trubek, Coutinho & Shapiro].

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at 29.

3.3.2. Defining features of “successful” developmental states

The experiences of East Asian (and to some extent Latin American) developmental states have helped development scholars to define criteria that they believe are vital to its “success.” Thandika Mkandawire divides these features into two broad categories: ideological and structural.¹¹⁷ Mkandawire contends that this “ideology–structure nexus” distinguishes developmental states from other states. Ideologically, the developmental state is “developmentalist”: its “mission” is “that of ensuring economic development, usually interpreted to mean high rates of accumulation and industrialization.”¹¹⁸ Other developmental state scholars, such as Pamela Mbabazi and Ian Taylor, argue that this involves achieving more than high rates of growth: “a developmental state is one whose ideological underpinnings are developmental and one that *earnestly seeks* to deploy its resources to the *job* of economic development.”¹¹⁹ Structurally, the developmental state is defined by its “*capacity* to implement economic policies sagaciously and effectively,”¹²⁰ which is determined by such factors as institutions, technology, politics, and administration.¹²¹ Additional measures, such as poverty levels and human capacity, can also be used to conclude whether the state meets the structural criteria.¹²² Improvements to such areas as the day-to-day lives of the broader population can help entrench the state in society and enhance its legitimacy, thus supporting a sustainable developmental state and ensuring its

¹¹⁷ Mkandawire, *supra* note 105 at 290.

¹¹⁸ *Ibid.*

¹¹⁹ Pamela Mbabazi & Ian Taylor, “Conclusion: Developmental States and Africa in the Twenty-First Century” in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 147 at 150 (emphasis in the original) [Mbabazi & Taylor, “Conclusion”].

¹²⁰ Mkandawire, *supra* note 105 at 290 (emphasis in the original).

¹²¹ *Ibid.*

¹²² Karl Botchway & Jamee Moudud, “Neo-liberalism and the Developmental State: Consideration for the New Partnership for Africa's Development”, in Benjamin F Bobo and Hermann Sintim-Aboagye, eds, *Neo-liberalism, Interventionism and the Developmental State: Implementing the New Partnership for Africa's Development* (Trenton, NJ: Africa World Press Inc, 2012) 16 at 23 [Botchway & Moudud, “Neo-liberalism”].

success. Much of the scholarly contributions discussed here were made after Johnson's study of the MITI. This section attempts to consolidate these contributions with Johnson's into a list of four defining features of the "successful" developmental state: development-oriented political leadership, autonomous and effective bureaucracy, performance-oriented governance, and production coordination and conflict-management.¹²³ These will later be used to assess whether the three case studies—Botswana, South Africa, and Zambia—can be described as developmental states in Chapters Four, Five, and Six.

a. Development-oriented political leadership

State intervention in the economy is not exclusive to the governments of developing countries; states of different political orientations have intervened in markets throughout history. When defining developmental states, however, scholars are keenly attentive to the type of economic intervention that is taking place.¹²⁴ Although the formula is not exact—it varies from state to state—state intervention centres on the leadership of a development-oriented political base. The goals this leadership sets can elevate the state to an "entrepreneurial agent"¹²⁵ that undertakes its developmental vision.

Ideologically, the political leadership is united by similar economic and political development beliefs. In the East Asian examples previously discussed, political elites had shared a common development agenda due to a combination of political alliances and authoritarian rule.¹²⁶ There are also variances in the emergence of development-oriented political leadership.

¹²³ Peter Meyns & Charity Musamba, *The Developmental State in Africa: Problems and Prospects*, INEF Report 101/2010, online: <<https://inef.uni-due.de/cms/files/report101.pdf>> at 21.

¹²⁴ Mbabazi & Taylor, "Conclusion", *supra* note 119 at 151.

¹²⁵ Ha-Joon Chang, "The Economic Theory of the Developmental State" in Meredith Woo-Cumings, ed, *The Developmental State* (Ithaca, NY: Cornell University Press, 1999) 182 at 194.

¹²⁶ Meyns & Musamba, *supra* note 123 at 22.

In the East Asian experience, it had been attributed to a concerted response by political elites to respond to political and economic conditions (both local and international) in the post-war period, including “broad coalitional commitment, scarce resource endowment and severe security threats.”¹²⁷ Development-oriented political leadership may also emerge from a group of like-minded political elites who share similar development goals and earn the trust of the bureaucracy and private sector to carry out their agenda.¹²⁸ A non-predatory group that was generally uncorrupted and sought limited personal gains also contributed to the success of early developmental states, which suggests that the political will to guide the economy towards developmental goals is an essential feature of the successful developmental state.¹²⁹

b. An autonomous and effective bureaucracy

To realize its vision for development, the state, as an “entrepreneurial agent”, must use the necessary institutions.¹³⁰ If none exist, the developmental state can create them. Johnson’s study of the MITI identified an autonomous and effective bureaucracy as one of the successful institutions created by the Japanese developmental state. Its success can be attributed to such Weberian characteristics as meritocracy, promotional incentives, and guaranteed prestige and legitimacy.¹³¹ These features created a class of bureaucrats committed to a shared corporate-culture working in an environment that bred autonomy and isolation from political elites. Armed with this freedom, bureaucrats were able to carry out development goals using methods they

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 23.

¹³⁰ Chang, *supra* note 125 at 195.

¹³¹ Meyns & Musamba, *supra* note 123 at 23.

deemed effective, including a combination of “‘carrots’ and ‘sticks’”¹³² that shaped markets through both incentives and disciplinary measures.¹³³

c. Performance-oriented governance

Successful developmental states also possess political legitimacy that is generated from the support of the broader population. The developmental state can ensure it receives continued support by distributing the benefits of economic growth equitably.¹³⁴ Doing so entails a combination of setting certain performance standards for the market while also committing to transferring those results into actual changes in the everyday lives of the population. Using this approach helped ensure the continued political success of East Asian developmental states, as economic growth coincided with greater income equality, lower unemployment, and a reduction in poverty.¹³⁵

d. Production coordination and conflict-management

Intervening in the economy to pursue development goals was a staple feature of the developmental state exemplified by East Asian countries. To achieve these goals, states coordinated with businesses to meet certain economic benchmarks. Measures used to assist the private sector included providing subsidies, implementing protectionist measures, and creating cooperative relationships between business and financial institutions. States’ use of these measures was not undertaken blindly: it was intended to promote productivity by incentivizing the private sector and ensuring continued government support.¹³⁶

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid* at 25.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

Coordination among public and private sectors can also reduce transaction costs. Ha-Joon Chang contends the determination of investment decisions underpinning industrial policy may require knowledge of complementary projects from competing business entities.¹³⁷ Centralized coordination, which may include identifying points of overlap and cooperation, or facilitating agreements between parties, can promote more effective economic change. To encourage collaboration, states can use both financial and political resources to address gaps that hinder cooperation.¹³⁸

Resolving potential conflicts between coordinated actors is another feature of the successful developmental state.¹³⁹ The allocation of scarce resources requires making decisions that one economic actor may consider disadvantageous, and subsequently resist. Coordination can not only help counter opposition, it can also commit to mitigating or resolving any conflicts that may arise.¹⁴⁰

3.3.3. Limitations of the developmental state paradigm

The four features of the “successful” developmental state identified above are based primarily on the exceptionalism of high-growth East Asian countries of the twentieth century. The economic performance of the East Asian Tigers over the latter part of the twentieth century has produced a significant body of literature devoted to the examination and explanation of that model’s success. The consolidated features above recognize elements of the East Asian model’s politico-economic apparatus that contributed to its embedded institutional autonomy and

¹³⁷ Chang, *supra* note 125 at 193.

¹³⁸ *Ibid.*

¹³⁹ *Ibid* at 196.

¹⁴⁰ *Ibid.*

promoted economic development in several countries.¹⁴¹ Although the criteria gleaned from the literature may suggest there was a single model for success, there is ongoing debate about the contributing factors to economic growth across the East Asian Tigers.¹⁴² In fact, some scholars contend that attempting to pinpoint specific causes makes the developmental state paradigm “self-limiting” and “self-selecting.”¹⁴³ Identifying “successful” developmental state case studies in this manner is an inductive process that can limit the applicability of the paradigm to other countries. This likely explains why Southern African states, and African states generally, have rarely been labelled “developmental states”—so few have matched the success of the East Asian model. While recognizing the limitations of the East Asian paradigm, this dissertation nonetheless relies on its concepts and terminology due to the paucity of alternative frameworks in the literature.¹⁴⁴

Despite these limitations, this dissertation compares its case studies to the East Asian paradigm for two reasons: first, as a means to evaluate the model’s applicability to Southern Africa; and second, to consider what the successful mining developmental state could look like in Southern Africa. As the case studies will seek to illustrate, the “successful” developmental state is not fully present in Botswana, South Africa and Zambia in the same way it was in East Asia. To reach this conclusion, the case study chapters will analyze how each country’s past and present institutions fit the paradigm described above. This exercise is reductive because it

¹⁴¹ Ben Fine, “Beyond the Developmental State: An Introduction” in Ben Fine, Jyoti Saraswati & Daniela Tavasci, eds, *Beyond the Developmental State: Industrial Policy into the Twenty-First Century* (London: Pluto Press, 2013) 1 at 11; Peter Evans, “What will the twenty-first-century developmental state look like?” in Stephen Wing-kai Chiu & Siu-lun Wong, eds, *Repositioning the Hong Kong Government: Social Foundations and Political Challenges* (Hong Kong: Hong Kong University Press, 2012) 23 at 29.

¹⁴² Jesse Salah Ovadia & Christina Wolf, “Studying the developmental state: theory and method in research on industrial policy and state-led development in Africa” (2018) 39:6 *Third World Quarterly* 1056 at 1056.

¹⁴³ Fine, *supra* note 141 at 10.

¹⁴⁴ Ovadia & Wolf, *supra* note 142 at 1057.

neglects multiple endogenous and exogenous factors that were either impertinent to the East Asian countries or had a lesser affect. This includes such things as the state's politico-economic position and colonial legacy at independence, the minerals that have dominated the country's mining sector, the state's relationship with foreign capital, and the state's relationship with its peoples. With these concerns in mind, the efficacy of the developmental state paradigm is revisited in Chapter Seven, where the mining experiences of Botswana, South Africa and Zambia are considered to propose a potential model that is more applicable to mining-dependent Southern African countries.

3.4. Developmental states in Africa? Post-colonial African states and development

Of the nearly fifty countries in Africa, only four¹⁴⁵—Botswana, Mauritius, South Africa and Uganda—are included in discussions of African developmental states. Compared to other African states, developmental scholarship describes these four states as playing an “activist” role in their economic development.¹⁴⁶ In most instances, the scholarship concerning the developmental state in Africa centres on the question of whether the model is possible (outside of the four countries mentioned earlier). Referred to as “impossibility theorems,” some Africanist developmental state scholarship attempts to debunk these theories.¹⁴⁷ They contend the arguments are not based on the reality of Africa's historical, political, or economic climate: the developmental state existed in many parts of Africa, and still can today. This section discusses some of these counter-arguments by examining the replicability and rationale for the

¹⁴⁵ This conclusion was reached after a review of the literature canvassed for this dissertation.

¹⁴⁶ Mbabazi & Taylor, *supra* note 90 at 3.

¹⁴⁷ Mkandawire, *supra* note 105 at 309-310.

developmental state in Africa. This section begins with a historical overview of the African state in development.

3.4.1. History of the African state in development

Like East Asia and Latin America, the African state became a prominent player in development after the end of a tumultuous period in history. The end of colonialism and new-found independence thrust African governments into the centre of each states' development trajectories. Post-colonial leaders of Africa's newly independent states inherited the task of pursuing social and economic development from their colonial predecessors. As heads of the nationalist parties that dominated the post-colonial one-party state system, these leaders and their parties quickly became synonymous with the state as agents of development.¹⁴⁸ Kwame Nkrumah in Ghana, Julius Nyerere in Tanzania, and Kenneth Kuanda in Zambia are a few examples.¹⁴⁹ At independence, these leaders were faced with a weak, almost nonexistent private sector, which led many states to assume the role of the main economic actor. This responsibility extended from constructing social and economic infrastructure to owning and managing productive industries.¹⁵⁰

For some scholars, the centrality of development to this group of post-colonial leaders is sufficient to describe these states as developmentalist.¹⁵¹ For others, these leaders' records raise serious doubts about early post-colonial developmentalism in Africa.¹⁵² Although development

¹⁴⁸ Botchway & Moudud, "Neo-liberalism" *supra* note 122 at 16.

¹⁴⁹ *Ibid.*

¹⁵⁰ Meyns & Musamba, *supra* note 123 at 28.

¹⁵¹ Francis B Nyamnjoh & Ignasio M Jimu, "Success or Failure of Developmental States in Africa: Exploration of the Development Experiences in a Global Context" in Pamela Mbabazi and Ian Taylor, eds, *The Potentiality of 'Developmental States' in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 16 at 16; Mkandawire, *supra* note 105 at 291.

¹⁵² Meyns & Musamba, *supra* note 123 at 29.

was a priority for several leaders, some scholars argue that consolidating power was another objective that detracted from developmentalism. Claude Ake, for example, contends that state intervention was not used to promote development, but rather “to facilitate the appropriation of wealth by means of state power.”¹⁵³ Ake points to the early development failures across Africa—particularly in Nigeria, Liberia, Sierra Leone, and Zaire—to support this view.¹⁵⁴

Despite some of these failures of early African leaders, development remained a central priority throughout the remainder of their political careers and those of their successors. Although the “state-development nexus”¹⁵⁵ altered as growth in African economies began to decline during the period of economic hardship in the 1970s, African states remained active participants in development as neoliberalism gained prominence in the 1980s.¹⁵⁶ When the neoliberal-inspired structural adjustment programmes failed to meet expectations, even the BWIs accepted a role for the state in the development process.¹⁵⁷ However, state involvement was often predicated on the notion of “good governance” advanced by those same BWIs.¹⁵⁸

3.4.2. Replicability of and rationale for the developmental state in Africa

The mixed history of the African state in development raised doubts about the success of the East Asian developmental state model in the post-adjustment era. Some scholars argued that the developmental state was economically and culturally unique to East Asia and beyond the political and institutional capacity of African governments.¹⁵⁹ Mkandawire categorizes these

¹⁵³ Claude Ake, *Democracy and Development in Africa* (Washington, D.C.: Brookings Institution, 1996) at 6.

¹⁵⁴ *Ibid*; Meyns & Musamba, *supra* note 123 at 29.

¹⁵⁵ Howard Stein, “Rethinking African Development” in Ha-Joon Chang, ed, *Rethinking Development Economics* (London: Anthem Press, 2003) 154 at 159.

¹⁵⁶ Nyamnjoh & Jimu, *supra* note 151 at 27.

¹⁵⁷ Mkandawire, *supra* note 105 at 292.

¹⁵⁸ *Ibid*.

¹⁵⁹ Botchway & Moudud, “Neo-liberalism”, *supra* note 122 at 24.

“impossibility theses” as lack of ideology, dependence syndrome, lack of autonomy, neopatrimonialism¹⁶⁰ and rent-seeking,¹⁶¹ the lack of technical and analytical capacity, and a poor performance record.¹⁶²

Mkandawire dismisses these arguments by arguing that they are not based on African historical experiences, nor the development trajectories of successful developmental states.¹⁶³ According to Mkandawire, the climate exists in Africa for the developmental state. He contends that development has historically been a priority for African leaders, thus refuting the lack of ideology argument. He also dismisses the neo-patrimonial and rent-seeking arguments based on historical evidence. Neo-patrimonialism and rent-seeking are automatically equated with corruption and patron-clientelism, without determining whether such behaviour is advancing developmental goals or not.¹⁶⁴ Mkandawire notes that both neo-patrimonial and rent-seeking behaviour can positively impact growth through the redistribution of resources. In support of his argument, Mkandawire identifies East Asian developmental states where rents were used to help spur industrialization.¹⁶⁵

The nature of African institutions is also used to argue that the developmental state is not replicable in the region. Democratic institutions are often touted as key requirements for the success of the African developmental state. The economic success of Botswana and Mauritius—

¹⁶⁰ “Neopatrimonialism” is a commonly used term to describe political and economic governance in Africa. Mkandawire contends there are many definitions of neopatrimonialism that incorporate a range of subconcepts, including “despotism, clannish behaviour, ... tribalism, regionalism, patronage, cronyism, ... corruption, predation, [and] factionalism.” For his analysis, he treats neopatrimonialism as the bureaucratic exercise of private power; the concept has become synonymous with poor governance across Africa (Thandika Mkandawire, “Neopatrimonialism and the political economy of economic performance in Africa: critical reflections” (2015) 67:3 World Politics 1 at 2, 4).

¹⁶¹ See note 105 in Chapter Two for a definition of “rent-seeking.”

¹⁶² Mkandawire, *supra* note 105, at 294-298; Botchway and Moudud, “Neo-liberalism”, *supra* note 122 at 25.

¹⁶³ Mkandawire, *ibid* at 309.

¹⁶⁴ Botchway and Moudud, “Neo-liberalism”, *supra* note 122 at 25.

¹⁶⁵ Mkandawire, *supra* note 122 at 299.

two peaceful democracies—is used to support this assertion, in contrast to the lower, or negative, economic growth that occurred in the rest of Africa, where government institutions are considered “irredeemably greedy, corrupt and captured by rent-seekers.”¹⁶⁶ According to Botchway and Moudud, this argument overlooks how other developmental states, particularly in East Asia, succeeded without democratic institutions but rather authoritarian regimes.¹⁶⁷ Mkandawire suggests that democratic institutions in Africa should, at the very least, provide a system of “checks and balances.”¹⁶⁸ His view recognizes a need for accountability but does not imply that democracy is necessary for the African developmental state to succeed.

Despite the replicability debate, there is greater consensus in developmental state literature regarding the role this debate can play in promoting development in modern Africa. During the colonial period, African resources were misallocated as colonial institutions were enclaves and restricted production. Many of these colonial institutions remained intact after independence was secured.¹⁶⁹ In addition to inheriting extractive colonial institutions, newly independent African states were left without a civil service, a strong-centralized taxation system, or vital infrastructure.¹⁷⁰ The state structure at that time was ill-equipped to meet the development objectives of newly-independent states.¹⁷¹ Over fifty years of independence has not changed state structure in many African countries that struggled to build institutions amidst war, civil strife and a shortage of adequate resources. Today, state structure across the continent remains poor amidst what Howard Stein describes as a “developmental crisis”—African

¹⁶⁶ Meyns and Musumba, *supra* note 123 at 27; Mkandawire, *supra* note 105 at 310.

¹⁶⁷ Botchway & Moudud, “Neo-liberalism”, *supra* note 122 at 34.

¹⁶⁸ Meyns & Musumba, *supra* note 123 at 27.

¹⁶⁹ Seidman et al, *supra* note 17 at 6.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

economies are incapable of generating the conditions necessary for sustained levels of growth and improvements in the standard of living.¹⁷² Poverty, unemployment, and inequality rates remain high while several states are mired in conflict, disease, famine, and low levels of agricultural and industrial production.¹⁷³ Africa remains a “continent of paradoxes”: it possesses abundant natural resources and human capacity that a developmental state can harness to promote meaningful economic development, yet such development is currently lacking in many parts of the continent.¹⁷⁴

3.5. Conceptualizing the mining developmental state in Southern Africa using a rights-based approach to mining governance

Sections 3.3 and 3.4 explained the law and development concept of the developmental state and its place in Africa. Overwhelmingly, the developmental state is theoretically used to conceive of the state’s relationship with the economy and the promotion of economic development. Yet it need not be confined to this limited conceptualization of its institutions. As section 3.2.2 explained, socioeconomic development can also be pursued through a rights-based approach to development grounded in the human right to development. An expansive view of the developmental state can offer a way to conceptualize the role of the state and legal institutions in promoting socioeconomic development using a rights-based approach in mining-dependent countries. This section attempts to propose a mining developmental state framework for Southern African states that acts both as an aspirational model and a standard to evaluate the case studies in Chapters Four, Five and Six. The intent is that this framework is not simply used to measure

¹⁷² Stein, *supra* note 155 at 153.

¹⁷³ Nyamnjoh & Jimu, *supra* note 151 at 18.

¹⁷⁴ *Ibid.*

development and governance in Botswana, South Africa, and Zambia, similar to how the “good governance” model discussed in Chapter Two is used. Rather, it serves the dual purpose of considering the viability of a rights-based approach to mining governance using institutions formulated by Southern African states themselves to promote socioeconomic development, while also identifying any shortcomings in initiatives currently underway. Since the “resource boom”¹⁷⁵ began in the early 2000s, many Southern African governments have undertaken measures to reconstitute mining governance and frequently pointed to their development agendas to justify their actions.¹⁷⁶ Two regional frameworks articulate this new commitment: the Protocol on Mining in the Southern African Development Community (Protocol)¹⁷⁷ and the Africa Mining Vision (AMV).¹⁷⁸

3.5.1. Regional frameworks: the Protocol on Mining in the Southern African Development Community and the Africa Mining Vision

The failure of neoliberal policies to advance socioeconomic development in the 1980s and 1990s had motivated several African states to reshape their relationship with their mining sectors.¹⁷⁹ Propelled by the belief that mineral wealth is vital to generating revenue¹⁸⁰

¹⁷⁵ “Resource boom” refers to a period of dramatic increases in the prices of oil, gas or minerals that creates huge economic rents for governments (Andrew Warner, “Natural Resource Booms in the Modern Era: Is the curse still alive?” (2015 November), online: International Monetary Fund <<https://www.imf.org/external/pubs/ft/wp/2015/wp15237.pdf>> at 4. The most recent resource boom began in the early 2000s and lasted until 2014. Although mineral prices declined in 2015-2016, they have increased steadily since 2017 (World Bank, “World Bank Commodities Price Data (The Pink Sheet) (2 April 2019), online: World Bank <<http://pubdocs.worldbank.org/en/895911554230066764/CMO-Pink-Sheet-April-2019.pdf>>).

¹⁷⁶ Hany Besada & Phillippe Martin, “Mining codes in Africa: emergence of a fourth generation?” (2015) 28:2 Cambridge Review of International Affairs 263 at 264.

¹⁷⁷ Southern African Development Community (SADC), *Protocol on Mining in the Southern African Development Community* (September 1997), online: SADC <https://www.sadc.int/files/3313/5292/8366/Protocol_on_Mining.pdf>.

¹⁷⁸ African Union, *Africa Mining Vision* (February 2009), online: Africa Mining Vision <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf> [AMV].

¹⁷⁹ Besada & Martin, *supra* note 176 at 264.

¹⁸⁰ AMV, *supra* note 178.

(particularly for the African states fiscally dependent on revenues derived from mining),¹⁸¹ African governments have attempted to reconstitute mining governance over the past 20 years to ensure greater shares of mineral wealth. Although these reforms had not been fuelled by the intention to reshape mining governance using a rights-based approach to development, the principle is evident within the two frameworks discussed below. One of the earliest articulations of reshaping states' relationship with the mining industry was the Protocol on Mining in the Southern African Development Community.

a. The Protocol on Mining in the Southern African Development Community

SADC is one of Africa's many regional economic communities. First established 1980 as the Southern African Development Coordinating Conference, SADC came into being in 1992 when Member States adopted the SADC Treaty and transformed the loosely formed regional organization into a legally binding entity.¹⁸² As part of its objective to promote development, growth and poverty alleviation through regional integration, SADC Member States agreed to adopt regional standards in 1997 aimed at ensuring that successes in the mining sector would contribute to "economic development, alleviation of poverty and an improved standard and quality of life throughout the region."¹⁸³

Signed by 12 of SADC's 14 Member States (at the time)—including Botswana, South Africa and Zambia—the Protocol stipulates legally binding commitments¹⁸⁴ in a number of areas ranging from environmental protection to occupational health and safety and small scale mining.

¹⁸¹ International Monetary Fund, "Sub-Saharan Africa – Sustaining Growth amid Global Uncertainty" (2012), World Economic and Financial Surveys, online: <www.imf.org/external/pubs/ft/reo/2012/afr/eng/sreo0412.pdf>.

¹⁸² SADC, "History and Treaty", online: SADC <<https://www.sadc.int/about-sadc/overview/history-and-treaty/>>.

¹⁸³ Protocol, *supra* note 177.

¹⁸⁴ According to Article 22 of the SADC Treaty, Protocols are legally binding documents that outline commitments on a specific issue. Once the Protocol is signed and ratified, it becomes part of SADC's treaty system (*Treaty of the Southern African Development Community*, 17 August 1992 (entered into force February 28, 1998)).

Article 2 details general principles outlining the importance of mining to socioeconomic development in each Member State:

2.1. Member State recognize that a thriving mining sector can contribute to economic development, alleviation of poverty and the improvement of the standard and quality of life throughout the region.

...

2.8. Member States shall promote economic empowerment of the historically disadvantaged in the mining sector.

Additionally, Article 6 mandates that Member States promote private sector participation in mining:

6.1. Member States shall adopt policies that encourage the exploration for and commercial exploitation of mineral resources by the private sector.

6.2. Member States shall undertake to develop a mechanism that will enable the private sector's continued participation in the sector.

6.3. Member States shall strive to create a conducive environment for attracting local and foreign investment to the region and to the mining sector in particular.

Beyond these provisions, there are no other expressed commitments to governing the mining sector for development. Nonetheless, the Protocol has been the foundation for promoting increased regional cooperation on mining, including the 2004 “Harmonization of Mining Policies, Standards, Legislative and Regulatory Framework in Southern Africa” (Framework)¹⁸⁵ developed with the United Nations Economic Commission for Africa to support the Protocol's implementation. Among some of the Framework's key recommendations related to development are in the areas of taxation, mineral beneficiation, participation in ownership, and management and governance.¹⁸⁶ Unfortunately, it is unclear how either the Protocol or the Framework has

¹⁸⁵ United Nations Economic Commission for Africa and the Southern African Development Community, *Harmonization of Mining Policies, Standards, Legislative and Regulatory Framework in Southern Africa* (30 December 2004) ECA/SA/TPub/Mining/2004/03, online: SADC <https://www.sadc.int/files/8813/5825/8305/Mining_Harmonisation_Study.pdf>.

¹⁸⁶ *Ibid* at 52-55.

contributed to the formation of mining policies in SADC Member States. Regardless, both are fundamental to the mining developmental state institutions discussed below in section 3.5.2.

b. The Africa Mining Vision

Like the SADC Protocol and Framework, the AMV was developed under the auspices of the African Union because Member States recognized mining's importance to the socioeconomic development.¹⁸⁷ The AMV has been described by mining governance scholars Hany Besada and Philippe Martin as

...[advancing] a holistic framework for improving Africa's mining regimes, focused on balancing the requirements of transparency and accountability with the need to integrate mining into Africa's long-term development at the local, national and regional level. Above all, this means transforming natural resource capital and 'transient' wealth into lasting forms of capital and industrial growth, with the ultimate objective of reducing African states' economic dependence on primary resource exports.¹⁸⁸

The AMV intends to promote "transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socioeconomic development."¹⁸⁹ In his article discussing the AMV, Antonio Pedro (the Director of UNECA's Sub-regional Office for Eastern Africa) described the following four "principal opportunities" for the implementation of the AMV:

1. To optimize the capture, management, sharing and use of resource rents to improve physical, social and human capital and infrastructure...
2. The collateral use of the high-rent resource infrastructure to open up other resource potential in areas such as agriculture, forestry and tourism and to provide access to zones of economic potential with lower returns, but that cannot afford their own infrastructure;
3. To promote downstream value addition, through the use of the locational advantage of producing crude resources, with a view to establishing resource-processing industries...

¹⁸⁷ United Nations Economic Commission for Africa and the African Union, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* (United Nations Economic Commission for Africa, 2011) at 19 [UNECA/AU].

¹⁸⁸ Besada & Martin, *supra* note 176 at 273.

¹⁸⁹ AMV, *supra* note 178.

4. To promote upstream value-addition, through the use of relatively large resources sector market to develop the resource supply and inputs sector.¹⁹⁰

Although it is not legally binding, the AMV expresses states' willingness to promote long-term development by restructuring mining governance through developmental state institutions.¹⁹¹ The developmental state structure can assist mining-dependent African states in meeting the commitments outlined in the AMV. The model is not static, nor is there a blueprint that can be transplanted to every mining-rich African state.¹⁹² Instead, the model varies and can be adapted to the different conditions of each state.¹⁹³ However, the model relies extensively on economic developmental state institutions that encourage state-private sector collaboration and thus it supports tailored engagement between the state and the private sector across Africa.¹⁹⁴ The capacity of states and their extractive industries differ across Africa; therefore, the particular economic mining developmental states institutions (MDSIs) implemented should depend on a state's fiscal, political and economic position.

3.5.2. Mining developmental state institutions

The varied involvement of Southern African states in mining has led many commentators to speculate about how state involvement should be framed. The purpose of this section is twofold: first, many Southern African governments have instituted recent reforms to their mining sectors that aim to ensure increased economic benefits for the state. These reforms will be

¹⁹⁰ Antonio Pedro, "The Africa Mining Vision: Towards Shared Benefits and Economic Transformation" (2012) 1:5 Great Insights Magazine, online: <<http://ecdpm.org/great-insights/extractive-sector-for-development/the-africa-mining-vision-towards-shared-benefits-and-economic-transformation>>.

¹⁹¹ Tim Shaw, *Post-2015 Natural Resource Governance in Africa: African Agency and Transnational Initiatives to Advance Developmental States* (Ottawa: North South Institute, 2013) at 1.

¹⁹² Meyns & Musamba, *supra* note 123 at 34.

¹⁹³ Caldentey, *supra* note 88 at 30. Included in the AMV is an extensive "Tentative Framework for Action" that offers guidance on progressive implementation through a series of stages: short-term (up to five years from the date the AMV is adopted); medium-term (5-20 years); and long-term (20-50 years). Part of this graduated approach to implementation is included in the discussion about putting the mining developmental state into practice in section 3.5.2.

¹⁹⁴ Trubek, "New Developmentalism", *supra* note 8 at 13.

situated in the proposed mining developmental state (MDS) framework. Second, given that these reforms only respond to economic concerns in the RBAD, this section will also discuss an essential institution that expands the MDS beyond solely economic concerns. Before discussing these two distinct groups of MDSIs, a graduated model for implementing economic components of the MDS is examined.

a. Implementing economic mining developmental state institutions

A gradual approach to implementing economic MDSIs acknowledges the differing capacities of Southern African states. It also recognizes the importance of progressive policy implementation to further entrenchment and enhancement of the MDS. While developmental state literature offers some guidance on possible modes of implementation, its applicability is less obvious in contemporary mineral-rich Southern African states that lack the institutional frameworks embraced by resource-scarce developmental states. What follows is a tentative model for implementing economic MDSIs that is based on two broadly categorized stages of mineral development: the early stages, focused mainly on exploration, discovery and initial extraction, and the middle to later stages after some economic MDSIs have been entrenched. The proposed model is specific to mining and assumes a long resource-horizon;¹⁹⁵ states facing depleting mineral reserves encounter particular concerns that a burgeoning mineral economy does not.¹⁹⁶ The model is also not specific to a particular mineral.

¹⁹⁵ “Resource horizon” refers to the longevity of a state’s mineral sector and is based on the state’s mineral reserves (Philip Daniel et al, “Extracting Resource Revenues” (2013) 50:3 Finance and Development 19 at 19 (available online: <<http://www.imf.org/external/pubs/ft/fandd/2013/09/daniel.htm>>).

¹⁹⁶ *Ibid.*

i. Early stages: exploration, discovery and initial extraction

Attracting and incentivizing foreign investment should be a priority for Southern African states with growing extractive sectors. Since many Southern African states tend to lack the fiscal and structural resources to conduct exploration and production in these early stages, foreign extractive companies can be used to commence these extractive activities.¹⁹⁷ Once minerals are discovered, states can maintain or enhance any incentive regimes used to entice investment in order to encourage additional exploration and production. As foreign mining companies become profitable, incentives can be progressively removed to generate greater revenue for the state.¹⁹⁸ These funds can then, in turn, be redirected to meet developmental objectives, or can be used to enhance future state participation in the mining industry.

Partnering with foreign firms is one measure a mineral-rich state can use to attract investment. Since the initial costs of mining projects are high, foreign firms can potentially share these costs with the state.¹⁹⁹ In addition to encouraging foreign investment, a joint venture can act as a source of revenue for the resource-rich developmental state. For example, in post-colonial Botswana, the Khama regime entered into an agreement with De Beers, the world's largest diamond mining company, to establish a joint venture, Debswana, in which the state held a 50-percent stake.²⁰⁰ Through Debswana, the Botswanan government was able to secure a steady stream of resource revenue, which helped promote early socioeconomic development and enhanced the capacity of the state to further participate in the extractive sector.

¹⁹⁷ Evaristus Oshionebo, "Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries" (2010) 10:1 *Asper Rev of Int'l Bus and Trade Law* 1 at 1.

¹⁹⁸ Daniel et al, *supra* note 195 at 20.

¹⁹⁹ Philippe Martin, "A Closer Look at Botswana's Development: The Role of Institutions" (2008) 9 *Paterson Review* 35 at 43.

²⁰⁰ *Ibid* at 42.

Establishing a steady revenue stream can also support the operations of “pilot institutions”²⁰¹ that are tasked with directing the policy objectives of the developmental state, both inside and outside the extractive sector. These institutions should be given the “power, authority, and technical competence.”²⁰² to shape the development priorities of the state. Structuring these plans as regularly issued national development plans also fits into the progressive model proposed here, as successive plans can take into account any growth achieved in the extractive sector.²⁰³ One example of such an institution is a devoted government ministry or agency, such as Botswana’s Ministry of Finance and Development Planning.²⁰⁴ Tasking an institution with shaping the development objectives of the state can ensure any benefits accrued from mining are directed to meeting priorities outside the sector, rather than solely being re-invested in the industry.

A separate institution that can be created in the early stage of mining is a state-owned enterprise. Although this institution would operate exclusively in the mining sector, it could be structured to accrue greater benefits for the state beyond what the fiscal regime alone can provide.²⁰⁵ Through a state-owned company, the state can directly share in the financial rewards from the sale of minerals, the development of linkages to other sectors and the creation of local business opportunities by prioritizing local procurement.²⁰⁶ Such entities currently exist in several mineral-rich Southern African states. As revenues increase and capacity improves, the

²⁰¹ David Sebudubudu, “The Institutional Framework of the Developmental State in Botswana” in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 79 at 83.

²⁰² *Ibid.*

²⁰³ Meyns & Musamba, *supra* note 123 at 42.

²⁰⁴ *Ibid.*

²⁰⁵ World Bank, *Taxation and State Participation in Nigeria’s Oil and Gas Sector* (August 2004), available at <<http://documents.worldbank.org/curated/en/2004/08/5539607/taxation-state-participation-nigerias-oil-gas-sector>>.

²⁰⁶ Sara Ghebremusse, *Assessing the Petroleum Fiscal Regimes of Nigeria, Ghana, and Cameroon* (LLM Thesis, University of Toronto Faculty of Law, 2014) at 16 [unpublished].

state-owned enterprise should be tasked with a greater role in the production and beneficiation of minerals during the middle to later stages of production.²⁰⁷

With mining tax rates often set above other sectors, revenue generated once minerals are discovered can quickly become a critical source of government income. The newfound wealth can greatly support achieving development objectives; however, it can also lead to increased reliance on mineral wealth, raising the risks associated with the resource curse.²⁰⁸ In an effort to neutralize the impact of the resource curse, an MDS can structure its mining fiscal regime to accommodate its level of dependence on mineral revenue, and so mitigate any detrimental effects. How this can look depends on the state's level of dependence.²⁰⁹

Mineral-rich Southern African states with a high dependence on mining revenue can strive to maintain consistent levels of revenue while also enacting fiscal policies that can help reduce dependency long-term. These efforts can consist of both government- and firm-related measures. At the government level, the state can direct some revenue to non-mining industries, such as agriculture and manufacturing, in order to encourage economic diversification and support other exporting sectors of the economy harmed by the effects of Dutch disease. At the firm level, the state can provide either fiscal incentives or stipulate contractual provisions, or can use a combination of both, to encourage foreign firms to engage in activities that support value-added production in mining, such as greater downstream activities (which is explained further in the next section), many of which will become increasingly important in the middle to later stages of resource extraction.²¹⁰

²⁰⁷ *Ibid* at 17.

²⁰⁸ *Ibid* at 12.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid*.

ii. Middle to later stages

An MDS can increase its level of intervention based on related improvements in capacity as it continues to engage with private sector entities. At this stage in production, greater focus can be paid to harnessing increased levels of local participation in order to ensure transfer of foreign technical expertise and knowledge. The purpose of this objective is to support the development of local industry to ensure long-term growth and linkages to other local industries.²¹¹

Strengthening linkages should be an important policy objective for resource-rich developmental states in the middle to later stages of production. Undertaking such measures can help diversify the country's economy to produce spillovers to other industries and to ensure sustainable growth.²¹² These linkages are divided into three clusters: upstream, downstream and side-stream.²¹³ Each is discussed in greater detail below, in the section titled "Developing sectoral linkages."

Providing finance is one measure that can secure greater involvement by local firms.²¹⁴ Access to finance is a significant obstacle for many local firms in Southern Africa.²¹⁵ An MDS can support local firms once sufficient revenue has been generated from earlier stages. The state can provide financing to local firms either through nationally owned banks or the central bank.²¹⁶ Securing financing can assist local firms in purchasing the needed technology to compete with or act as local suppliers for foreign firms.²¹⁷

²¹¹ Jourdan, *supra* note 2 at 110, 115.

²¹² *Ibid* at 110.

²¹³ *Ibid*.

²¹⁴ Botchway & Moudud, "Search", *supra* note 45 at 11.

²¹⁵ World Bank, *Africa Development Indicators 2007: Spreading and Sustaining Growth in Africa* (Washington, DC: World Bank, 2008) at 131.

²¹⁶ *Ibid*.

²¹⁷ *Ibid* at 12.

To ensure that local firms gain industry knowledge, local content requirements (LCRs) can be stipulated in later joint-venture agreements or in national legislation.²¹⁸ These requirements can help promote meaningful employment, as well as support the development objectives of an MDS.²¹⁹ More information about local content requirements is discussed in the following section examining economic MDSIs.

b. Economic mining developmental state institutions

Two key themes link the legal reforms discussed below to the MDS framework. First, states are intervening to accrue more revenue; the recent increase in commodity prices provided an opportunity for mineral-rich states to revise fiscal regimes and amass more mining revenue. Generating more revenue can assist Southern African states in directly achieving socioeconomic development goals, which is a central tenet of the developmental state. Second, these recent legal reforms support continued state involvement in extractive industries through revised relationships with the private sector, thus enhancing the opportunity for long-term benefits that can contribute to the growth and evolution of mining industries.

i. Enhancing local participation and content

To maximize the benefits of foreign investment in extractive industries, many Southern African states have introduced “indigenization and local equity schemes,”²²⁰ or LCRs. These measures typically demand that “a certain percentage of intermediate goods used in the

²¹⁸ Thus far, Burkina Faso, Botswana, Ghana, Guinea, Liberia, Mozambique, South Africa, Tanzania and Zambia have all legislated local content requirements in mining (Organisation for Economic Co-operation and Development, *Local Content Policies in Minerals-Exporting Countries, Case Studies* (2 June 2017) TAD/TC/WP(2016)3/PART2/FINAL, online: OECD <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2016\)3/PART2/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2016)3/PART2/FINAL&docLanguage=En)>).

²¹⁹ Jesse Salah Ovadia, *Local Content and the Emergence of the Petro-Developmental State in the Gulf of Guinea* (PhD Thesis, York University Graduate Program in Political Science, 2013) at 154 [unpublished].

²²⁰ Martin Kwaku Ayisi, “The Review of Mining Laws and the Renegotiation of Mining Agreements in Africa: Recent Developments from Ghana” (2015) 16 *Journal of World Investment & Trade* 467 at 480.

production processes ... be sourced from domestic manufacturers.”²²¹ LCRs can take many forms, including

mandating foreign firms to give preferences to local suppliers in the procurement of goods and services, preferences to local labour in matters of employment and preferences to (or mandatory minimum percentages in) the use of local raw materials in production. They may also take the form of “price preferences” to domestic firms that participate in government procurement bids, “import licensing procedures designed to discourage foreign suppliers, and discretionary guidelines that both encourage domestic firms and discourage foreign firms.”²²²

There are several reasons for mineral-rich countries to adopt LCRs. Legal scholar Chilenye Nwapi contends that

[t]hey are undertaken to reduce inequalities faced by domestic companies in relation to foreign companies, increase the participation of the national industry in specific sectors of economic activity, improve national technological development, create job opportunities for nationals to improve their personal income, support economic diversification, promote intersectoral linkages and reduce overdependence on one sector by enhancing the value-creating capacity of a particular sector, and to enable domestic companies to compete regionally and internationally.²²³

Across mineral-rich African states, specific LCRs undertaken range from local employment quotas to the preferential treatment of local companies when procuring goods and services. The following table²²⁴ highlights some of these measures in five countries:

²²¹ Sherry M Stephenson, “Addressing local content requirements: Current challenges and future opportunities” (2013) 7:3 BIORES, online: <<http://www.ictsd.org/bridges-news/biores/news/addressing-local-content-requirements-current-challenges-and-future>>.

²²² Cathleen Cimino, Gary Clyde Hufbauer & Jeffrey J Schott, *A Proposed Code to Discipline Local Content Requirements*, Peterson Institute for International Economics Policy Brief No PB14-6 (February 2014), online: <<http://www.iie.com/publications/pb/pb14-6.pdf>> quoted in Chilenye Nwapi, “Defining the ‘Local’ in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries” (2015) 8:1 Law and Development Review 187 at 191.

²²³ *Ibid.*

²²⁴ a. Burkina Faso: Stéphanie Brabant, “Current Trends in Mining Law and Regulation in West Africa” (MineAfrica 4th Annual Focus on West Africa Seminar, London, October 2014) at 41.

b. Ghana: Robin Bloch and George Owusu, “Linkages in Ghana’s gold mining industry: Challenging the enclave thesis” (2012) 37 Resources Policy 434 at 437.

c. Guinea: Republic of Guinea, Ministry of Mines and Geology, “Local content”, online: Republic of Guinea <<http://mines.gov.gn/en/priorities/local-content/>>; Ana Elizabeth Bastida, “From *extractive* to *transformative* industries: paths for linkages and diversification for resource-driven development” (2014) 27:2-3 Mineral Economics 73 at 77.

d. Liberia: OECD, *supra* note 218.

e. Tanzania: *Mining (Local Content) Regulations* GN 3 (2018) made under sections 102 and 112 of the *Mining Act* (CAP. 123).

Table 3.1 – List of sample local content requirements

Country	LCRs
Burkina Faso	<p>The country's 2015 <i>Mining Code</i> introduced the following LCR obligations:</p> <ul style="list-style-type: none"> • Preference should be given to local businesses in the procurement of goods and services; • Local employees should be hired to fill senior executive positions, which includes a training program to ensure the progressive replacement of foreign staff in senior positions; and • Local labour shall be employed in low-skilled jobs.^a
Ghana	<p>Ghana's <i>Minerals and Mining Act</i> (2006) promotes local participation by:</p> <ul style="list-style-type: none"> • Reserving small-scale mining for Ghanaian citizens; • Requiring gold mining companies to give preferential treatment to locally made products; and • Mandating local labour be recruited, which includes the creation of a mandatory training program designed to ensure the progressive replacement of foreign staff by local personnel.^b
Guinea	<p>Guinea's 2011 <i>Mining Code</i> requires that:</p> <ul style="list-style-type: none"> • Foreign companies must expend a certain percentage on training and employment in local communities; • Preference must be given to local companies for the procurement of goods and services; • Feasibility studies must accompany applications for mining concessions and permits. The study must specify a plan to support building capacity of Guinean small and medium-sized enterprises, particularly those that supply goods and services to the industry. A plan for employment increased numbers of Guineans, in accordance with requirements state in the <i>Mining Code</i>, must also be included.^c
Liberia	<p>Liberia's <i>Mining and Minerals Law, 2000</i> includes the following LCRs:</p> <ul style="list-style-type: none"> • Mining companies are prohibited from employing unskilled foreign labour; • Preference should be given to employing Liberians; • Liberian employees must receive ongoing training in order to qualify for skilled, technical, administrative, financial or managerial positions.^d

Tanzania	<p>Tanzania's <i>Mining (Local Content) Regulations</i> introduced in 2018 included some of the following LCRs:</p> <ul style="list-style-type: none"> • A Tanzanian company should be given first preference in the grant of a mining license; • Foreign companies must secure a 5 percent equity participation stake of a Tanzania company in order to qualify for a mining license (the Minister of Minerals may waive this requirement); • Licensees must submit a local content plan for approval by the Mining Commission before commencing the mining project that specifies the role and responsibilities of the Tanzanian company, the equity participation of the Tanzanian company, and the strategy for technology and knowledge transfer to the Tanzanian company.^e
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The local content requirements in the three case studies, Botswana, South Africa and Zambia, will be discussed in greater detail in Chapters Four to Six.

ii. Developing sectoral linkages

The AMV identified harnessing sectoral linkages as a key area of improvement for mining governance. Since mineral endowments are finite, and prone to price volatility, integrating the industry into other areas of the national economy can provide long-term benefits to mineral-rich countries.²²⁵ Integration can occur by developing relationships between the extractives sector and other industrial sectors: upstream linkages,²²⁶ downstream linkages,²²⁷ and sidestream linkages.²²⁸ Table 3.2 defines each type and gives relevant mining examples:

²²⁵ UNECA/AU, *supra* note 187 at 101.

²²⁶ Jourdan, *supra* note 2 at 110.

²²⁷ Jourdan, *supra* note 2 at 110; Bastida, *supra* note 224 at 74; UNECA/AU, *supra* note 187 at 104.

²²⁸ UNECA/AU, *supra* note 187 at 103, 104, and 106; Jourdan, *supra* note 2 at 110; Bastida, *supra* note 224 at 74.

Table 3.2 – Definitions of sectoral linkages

Linkage	Definition	Examples
Upstream	The relationships between an industry and its suppliers. In mining, upstream linkages typically arise early in the production process, when new “deposits are identified; finance is secured; legal and permitting issues addressed; plans for development and earthworks commissioned; and labour, raw materials equipment and utilities sourced.” (UNECA/AU, at 103).	<ul style="list-style-type: none"> • Inputs manufacturing (i.e. machinery), • Engineering, and • Financial services.
Downstream	Downstream linkages connect extracted resources to value-added production processes like smelting or refining, semi-fabrication, or final product manufacturing.	<ul style="list-style-type: none"> • Value-added resources processing (i.e. mineral beneficiation).
Sidestream	Sidestream linkages are created when mining activities support growth in other industries, including “financial services, power, logistics, communications, skills and technology development.” (UNECA/A, at 106.)	<ul style="list-style-type: none"> • Construction, • Marketing, and • Transport infrastructure.

Many Southern African governments reversed their position on mandating linkages development from that in the 1980s when it was thought this requirement could deter foreign investment.²²⁹ Today, supplementary investments that support linkage creation are widespread. Many are infrastructure-focused and require certain investments in transportation networks and power grids.²³⁰ Such measures have been undertaken across Africa in the Democratic Republic

²²⁹ UNECA/AU, *supra* note 187 at 107.

²³⁰ Besada & Martin, *supra* note 176 at 276.

of the Congo, Gabon, Liberia, Mozambique, Tanzania and Zambia.²³¹ Zambia's requirements will be discussed in more detail in Chapter Six.

iii. Broader "resource nationalism"²³²

In addition to state efforts to increase local participation and strengthen sectoral linkages, Southern African states are inserting themselves in the extractives industry by increasing state interests in mining projects; reviewing and renegotiating contracts with foreign investors; and reforming fiscal regimes to ensure a greater share of mining revenue.

After the period of neoliberal structural adjustment in the 1980s and 1990s did not yield the success Southern African states were expecting, many are now asserting greater roles either directly or indirectly through state participation, including equity participation (where government acquires a stake in production), service agreements and production-sharing agreements.²³³ Additionally, several Southern African states introduced recent changes to their participatory regimes that increased the level of equity participation, installed minimum levels of equity participation, and stipulate additional levels of participation are at the discretion of the state.²³⁴ Table 3.3 summarizes some examples from six countries across the continent:²³⁵

²³¹ *Ibid.*

²³² The characterization of tightening regulation in the extractives industry as "resource nationalism" is problematic for some scholars. Martin Kwaku Ayisi provides a brief overview of this debate in his article, "The Review of Mining Laws and the Renegotiation of Mining Agreements in Africa: Recent Developments from Ghana" (*supra* note 220), and concludes that the label "can only obstruct a better understanding of why and how contemporary governments are intervening more forcefully in the sector" (at 473). This larger conceptual debate will not be discussed further here.

²³³ Evaristus Oshionebo, "Fiscal regimes for natural resource extraction: implications for Africa's development" in Francis Botchway, ed, *Natural Resource Investment and Africa's Development* (Edward Elgar Publishing, 2011) 200.

²³⁴ Stephenson, *supra* note 221 at 31.

²³⁵ i. Côte d'Ivoire: Stephenson, *supra* note 221 at 35; Ayisi, *supra* note 220 at 494.

ii. Ghana: African Mining Legislation Atlas, online: <<https://www.a-mla.org>>.

iii. Guinea: Ayisi, *supra* note 220 at 480.

iv. Mali: Stephenson, *supra* note 221 at 32.

v. Togo: Stephenson, *supra* note 221 at 32.

Table 3.3 – Resource nationalism examples

Country	Resource nationalism measures
Côte d’Ivoire	<ul style="list-style-type: none">• 10 percent state participation for zero dollars; and• Up to an additional 15 percent (unless the state is involved in exploration);• Increased royalties and tax rates.
Ghana	<ul style="list-style-type: none">• 10 percent state participation for zero dollars;• The state can acquire a share of a mining company for zero dollars upon notice from the Minister;• Increased royalties and tax rates.
Guinea	<ul style="list-style-type: none">• The state can acquire interest in a project up to a maximum shareholding of 35 percent;• 15 percent equity participation available for free upon the issuance of a mining licence for bauxite, iron ore, uranium, gold, and diamond deposits;• Increased royalties and tax rates.
Mali	<ul style="list-style-type: none">• 10 percent free participation is mandatory;• An additional 10 percent participation can be negotiated.
Togo	<ul style="list-style-type: none">• 10 percent free participation is mandatory;• An additional 20 percent participation can be negotiated.

Little research has been conducted to assess the impact of these measures on revenue generation and investment decisions. Some of these effects will be considered with respect to the three case studies, along with what the resource nationalism measures are in each country and how they compare to emerging continental trends.

3.5.3. Incorporating a rights-based approach to development in the mining developmental state

The preceding sections examined the configuration of the mining developmental state by taking a closer look at possible MDSIs. As previously mentioned, these institutions can inform the economic components of the rights-based approach to development and, relatedly, comprise institutions in the rights-based approach to mining governance. However, as the rights-based

approach to development connotes, development consists of more than just economic rights. In the mining context, concern must also be paid to social rights related to community participation in decision-making processes about the location and approval of mining projects.²³⁶ In international law, the most explicit and robust articulation of participation and consultation in mining is through the principle of free, prior and informed consent (FPIC). It is generally accepted, both under international law and in several countries, that Indigenous peoples should be consulted on decisions affecting them and their livelihoods, particularly those concerning resource extraction.²³⁷ It has been recognized under international law in the International Labour Organization's 1989 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples almost 20 years later.²³⁸

The right to participate in environmental decision-making is also recognized in international law. Grouped in a series of "procedural environmental rights" (along with access to environmental information and legal redress for environmental harm),²³⁹ this participatory right is included in Principle 10 of the 1992 Rio Declaration on Environment and Development²⁴⁰ and in the United Nations Economic Commission for Europe's *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*

²³⁶ Damilola Olawuyi, "The emergence of right-based approaches to resource governance in Africa: false start or new dawn?" (2015) 15:2 Sustainable Development Law and Policy 13 at 13.

²³⁷ James Anaya, "Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights Indigenous peoples have in lands and resources" (2005) 22:1 *Ariz J Int'l & Comp L* 7 at 7.

²³⁸ *C169 Indigenous and Tribal People Convention*, 27 June 1989, 1650 UNTS 383 (entered into force 2 September 1993) ["ILO 169"]; *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UNGAOR, 61st Sess, A/Res/61/295 (2007) [UNDRIP].

²³⁹ Penelope Simons & Lynda Collins, "Participatory rights in the Ontario mining sector: an international human rights perspective" 6:2 *JSDLP* 177 at 186.

²⁴⁰ *Rio Declaration on Environment and Development*, 12 August 1992, UN Doc A/CONF.151/26 (Vol. I), (1992) 31 ILM 874.

(Aarhus Convention).²⁴¹ Of these four aforementioned international agreements, only ILO 169 and the Aarhus Convention are legally binding; no Southern African state is a signatory to either convention, making both agreements inapplicable to the development of participation and consultation in mining.²⁴² As soft law, the other two agreements could potentially influence the interpretation and implementation of participatory decision-making in Southern Africa. However, as Pacifique Manirakiza, the former member of the African Commission on Human and People's Rights and Chairperson of the Working Group on Extractive Industries, Environment and Human Rights Violations noted, there "is a need for an African human rights perspective in the extractive industry."²⁴³ The remainder of this section considers how FPIC expresses that perspective in Africa before section 3.6 concludes the chapter.

Several Southern African countries have been reluctant to implement the right domestically, despite public support for international statements and agreements incorporating FPIC. Eleven African states voted in favour of the United Nations Declaration on the Rights of Indigenous People,²⁴⁴ while 13 are parties to the *International Covenant on Economic, Social and Cultural Rights*, which first articulated the principles on which FPIC is based. Despite this broad endorsement, no state has legislated FPIC for mining projects.²⁴⁵ Only two African states—Liberia and the Democratic Republic of the Congo—have legislated FPIC in any capacity. In Liberia, FPIC of the local community must be obtained when forest lands are impacted.

²⁴¹ The United Nations Economic Commission for Europe's *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, UNTS (entered into force 30 October 2001).

²⁴² *ILO 169*, *supra* note 238; *Aarhus Convention*, *ibid*.

²⁴³ Pacifique Manirakiza, "Towards an African Human rights Perspective on the Extractive Industry" (2013) Loy U Chicago Intl L Rev 1 at 4.

²⁴⁴ Botswana, Comoros, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe voted in favour of the Declaration (*UNDRIP*, *supra* note 238).

²⁴⁵ Ricarda Roesch, "The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa" (2016) AHRLJ 505 at 511.

Similarly, FPIC of Indigenous groups is required for development projects in the Democratic Republic of the Congo.²⁴⁶

In addition to these two country examples, FPIC has gained increased recognition from some African regional organizations since the early 2000s. For example, Article XVII (3) of the revised *African Convention on the Conservation of Nature and Natural Resources* requires that “[t]he Parties ... take the measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend.”²⁴⁷ Out of 44 signatories, only 16 Member States of the African Union have ratified the treaty.²⁴⁸

Although it has not been widely adopted across Africa, it has begun to gain traction in recent years in various regional agreements and recent case law. At its 51st Ordinary Session in 2012, the African Commission on Human and Peoples’ Rights detailed this expansive approach in its Resolution on a Human Rights-Based Approach to Natural Resources Governance.²⁴⁹ According to the Commission, the rights-based approach to mining governance should

ensure participation, including the *free, prior and informed consent* of communities, in decision making related to natural resources governance; ... [and] respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritization and scale of, and c) benefits from any development on their land or other resources, or that affects them in any substantial way.

In addition to the Commission, participation and consultation in mining was also endorsed in several soft law instruments recently concluded by the African Union, including the AMV and the AU Model Law for the Rights of Local Communities, Farmers and Breeders.²⁵⁰ In the AMV,

²⁴⁶ *Ibid* at 505, 511.

²⁴⁷ *Revised African Convention on the Conservation of Nature and Natural Resources* (adopted 7 March 2017).

²⁴⁸ Angola, Benin, Burkina Faso, Burundi, Chad, Côte d’Ivoire, Comoros, Congo, Guinea-Bissau, Libya, Lesotho, Liberia, Mali, Niger, Rwanda, and South Africa have ratified the treaty.

²⁴⁹ *Resolution on a Human Rights-Based Approach to Natural Resources Governance*, Res 224, ACHPR, 51st Sess (2 May 2012) (emphasis added).

²⁵⁰ Roesch, *supra* note 245 at 505, 510.

Member States are encouraged to “ensure broad-based, active and visible involvement of affected communities in the approval, planning, implementation, and monitoring of mining projects.”²⁵¹

Participatory rights of Indigenous or local communities were considered in two cases heard by the African Commission on Human and Peoples’ Rights: *SERAC*²⁵² and *Endorois*.²⁵³ The African Court on Human and Peoples’ Rights also recently released the 2017 decision *African Commission on Human and Peoples’ Rights v Kenya*.²⁵⁴ FPIC was not explicitly mentioned in *SERAC*, although the Commission did hold that the Nigerian government was required to conduct environmental and social impact assessments, and to grant the local community access to relevant regulatory bodies if the collective right to a satisfactory environment is to be met.²⁵⁵ Although the Commission and the Court arrived at different conclusions in *Endorois* and *Ogiek*, both bodies held that the eviction of Indigenous peoples from their ancestral lands without prior consultation was a violation of their rights under the ACHRP.²⁵⁶

As the highest standard of community participation and consultation, FPIC is instrumental to implementing a rights-based approach to mining governance in an MDS. Fundamental to any meaningful implementation of FPIC is a determination of what it entails in a given community. What would “free, prior, and informed consent look like in a remote community governed by customary law? Who may provide “consent” on behalf of that

²⁵¹ AMV, *supra* note 178 at 34.

²⁵² *SERAC*, *supra* note 74.

²⁵³ *Endorois*, *supra* note 77.

²⁵⁴ *Ogieks*, *supra* note 78.

²⁵⁵ Roesch, *supra* note 245 at 505, 509.

²⁵⁶ Roesch, *ibid*, at 519; *Ogieks*, *supra* note 78 at para 131.

community?²⁵⁷ These are all important considerations in the meaningful implementation of a rights-based approach to mining governance. FPIC has yet to be implemented in mineral-rich Southern African despite its growing prominence and adoption internationally. Consequently, all forms of community participation and consultation (including through environmental and social impact assessments) will be considered when the case studies are evaluated in Chapters Four, Five and Six.

3.6. Conclusion: (Re)framing law and governance for mining-led development in Africa

The primacy of mining and the institutions discussed in the previous two sections warrants acknowledging and distinguishing novel forms of law and governance in mining-dependent states. Since, at its core, the developmental state is concerned with state-led socioeconomic growth, it is necessary to conceptualize a new governance framework that is better suited to promoting and evaluating mining developmentalism. Section 2.6 in Chapter Two captured shortcomings in the contemporary approach to mining governance. The discussion of law, development and the developmental state in Chapter Three elucidated different forms of governance and the role for law in promoting development. In particular, section 3.5 described innovative institutions and offered a new conceptual framework, the rights-based approach to mining governance, that could facilitate community-centred mining developmentalism.

²⁵⁷ Daniel Huizenga, “Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa” (2019) 6:3 *The Extractive Industries and Society* 711 at 716.

Table 3.4 summarizes the differences between the traditional approach described in Chapter Two, and proposes three guiding principles for rethinking mining governance for development in the MDS:²⁵⁸

Table 3.4 – Principles for rethinking law and mining governance for development

Traditional approach	Principles for rethinking mining governance for development in the MDS
Is occupied with designing the right form of legal institutions. ^a	Consideration must be given not only to the form of institutions, but also to their functions . ^{a,b}
Is focused on strengthening the rule of law to ensure that good governance policies and rules are applied impersonally. ^a	The role of law matters as much as the rule of law. ^a
Adopts legal transplants imposed by exogenous entities to enforce transnational good governance norms. ^{c,d}	Legal institutions must adapt to changing local socioeconomic conditions and circumstances. ^{c,d}

Using the MDS framework explored in section 3.5, all three principles are meant to work in tandem to reframe mining developmentalism in a changing world in which African states are seeking more meaningful returns from mining. In the MDS, the role of law is to promote socioeconomic development through a unique combination of MDSIs that adapts to local conditions and circumstances. To ensure the MDS is not impeded by a focus on the form of legal institutions, it must also be attentive to their functions. During their research on the new developmental state and new state activism (NSA) in Brazil, Trubek, Coutinho and Schapiro identified four functions for law and legal institutions in the developmental state: (i)

²⁵⁸ Adapted from: ^aWorld Bank, *World Development Report 2017: Governance and the Law* (Washington, DC: World Bank, 2017) at 29; ^bDavid M Trubek, Diogo R Coutinho & Mario G Schapiro, “New State Activism in Brazil and the Challenge for Law” in David Trubek et al, eds, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013) 28 at 54; ^cMari-Lise du Preez, “Interrogating the ‘Good’ in ‘Good Governance’: Rethinking Natural Resource Governance Theory and Practice in Africa” in J Andrew Grant, WR Nadège Compaoré, and Matthew I Mitchell (eds) *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 25 at 36; and ^dPistor & Milhaupt, *supra* note 18 at 21-23.

safeguarding flexibility, (ii) stimulating orchestration, (iii) framing synergy, and (iv) ensuring legitimacy. Trubek, Coutinho and Schapiro elaborated further and described each criterion as follows:

Safeguarding flexibility means using legal norms to allow room for experimentation, promote innovation, and facilitate feedback from experiments to policy. NSA demands legal regimes that permit learning-by-doing and encourage path correction...NSA requires that some degree of flexibility and learning is ensured to implement initiatives that in most cases do not resemble preexisting recipes or strategies...

Stimulating orchestration means using law to structure state activities for effective new style industrial and social policy. This means facilitating coordination and articulation within the state—both horizontally (i.e., between entities that belong to the same bureaucratic state level) and vertically (i.e. between entities that are subject to hierarchies or belong to different state levels)...

Framing synergy involves using the law to frame public-private partnerships and ensure they are more effective than purely public or private solutions...

Ensuring legitimacy means keeping government transparent and ensuring adequate participation. NSA seems to require a regime in which it is easy for new ideas to percolate and be widely shared...²⁵⁹

Based on the success of the Brazilian experience, these four functions for law can also be used to assess the effectiveness of legal institutions in the MDS.

In the next three chapters, mining governance in Botswana, South Africa and Zambia will be evaluated using the MDS rights-based approach to mining governance proposed in this chapter. These analyses will assess: (1) whether each country is a developmental state, using the criteria set out above in section 3.3.2; (2) the MDSIs in place in each country and their functions based on the Trubek, Coutinho and Schapiro framework; and (3) the rights-based approach to mining governance present in each country.

²⁵⁹ Trubek, Coutinho & Schapiro, *supra* note 258 at 55-56.

4 Botswana: the Model Mining Developmental State?¹

4.1. Introduction

Dubbed the “African miracle”² and “African success story,”³ Botswana has achieved unparalleled levels of post-colonial socioeconomic development compared to its African counterparts: growth in Gross Domestic Product (GPD) from USD \$51.5 million at independence to over USD \$18 billion in 2018; an increase in Gross National Income (GNI) per capita from estimates of USD \$100 at independence to USD \$7,750 in 2018; improved life expectancy at birth from 52.6 years at independence to 65.8 years in 2015; and a decrease in the percentage of the population living in poverty from 59 percent in 1985 to 19.3 percent in 2010.⁴ Unlike other mineral-rich states across the continent, however, Botswana’s success was achieved *despite* its mineral wealth—it is regarded as having avoided both the resource curse and poor governance that have stunted socioeconomic performance in other mineral-rich African states.⁵ Heralded for combatting the resource curse with its sound institutions and governance,⁶

¹ Many parts of this chapter are taken from three articles I published during my PhD: “Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa” (2015) 8:2 Law and Development Review 467 [Ghebremusse, “Conceptualizing”]; “Good Governance and Development in Botswana—The Democracy Conundrum” (2018) 11:2 Law and Development Review 913; and “Application of YS Lee’s General Theory of Development to Botswana” (2019) 12:2 Law and Development Review 403. They are reprinted here with permission of the editors.

² Abdi Ismail Samatar, *An African Miracle: State and Class Leadership and Colonial Legacy in Botswana Development* (Portsmouth, NH: Heinemann, 1999).

³ Daron Acemoglu, Simon Johnson & James A Robinson, “An African Success Story: Botswana” (2001) MIT Department of Economics Working Paper No. 01-37.

⁴ World Bank, “Botswana Country Profile”, online: <<https://data.worldbank.org/country/botswana>>.

⁵ Philippe Martin, “A Closer Look at Botswana’s Development: The Role of Institutions” (2008) 9 Paterson Review 35 at 36.

⁶ Acemoglu, Johnson & Robinson, *supra* note 3 at 1.

Botswana's socioeconomic success has also been attributed to developmental policies that have drawn comparisons with several East Asian developmental states.⁷

Botswana's abundant mineral wealth directly contributed to the creation and sustainability of its developmental state. With the revenue generated from mineral extraction, the country had the means to promote employment and industrialization and fund its social development goals in healthcare and education. Due to this direct correlation between Botswana's mineral wealth and its developmental state features, this chapter agrees with the near scholarly consensus that Botswana is as a developmental state.⁸ In recognition of mining's role in the creation of Botswana's developmental state, however, this chapter goes further and describes the country as a mining developmental state (MDS) following the criteria established in Chapter Three.⁹ Additionally, this chapter further examines Botswana's iteration of the developmental state by examining whether elements of the governance and institutions attributed to its success are compatible with the transnational good governance principles that are regarded as necessary for escaping the resource curse. This chapter argues that Botswana's mining developmental state does not conform with the "good governance" norms described in Chapter Two. Instead, the success of Botswana's mining developmentalism is better explained by examining its institutional apparatus using the developmental state model described in Chapter Three, and considering whether the "legal functionalities" of its mining developmental state institutions

⁷ Pamela Mbabazi & Ian Taylor, "Conclusion: Developmental States and Africa in the Twenty-First Century" in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of 'Developmental States' in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005); David Sebudubudu, "The Institutional Framework of the Developmental State in Botswana" in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of 'Developmental States' in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005).

⁸ See Emmanuel Bothale, Pamela Mbabazi, David Sebudubudu and Ian Taylor. The one exception, Ellen Hillbom, and her rationale will be examined in more detail in section 4.3.

⁹ See section 3.5.2.

(MDSIs) adhere to David Trubek, Diogo Coutinho and Mario Schapiro's framework (also outlined in Chapter Three).¹⁰

However, the success of Botswana's mining developmental state has come at the expense of some disadvantaged local communities. Botswana has given little consideration to fully implementing a rights-based approach to mining governance by mandating that mining cannot proceed without the free, prior and informed consent (FPIC) of Indigenous peoples and local communities. Indigenous peoples, particularly the Basarwa minority,¹¹ have been systemically denied land rights and excluded from participating and consulting on mining decisions. Moreover, not all Botswanans¹² have benefited equally from the wealth generated from mining. The country's high levels of income inequality and unemployment contradict its strong record of economic growth and its vast mineral wealth.¹³

To assess Botswana's characterization as a mining developmental state, this chapter is divided as follows: section 4.2 provides an overview of mining and development in Botswana from colonialism to the present; section 4.3 describes Botswana's mining developmental state, including its main mining developmental state institutions and applies the legal functionalities

¹⁰ David M Trubek, Diogo R Coutinho & Mario G Schapiro, "New State Activism in Brazil and the Challenge for Law" in David Trubek et al, eds, *Law and the New Developmental State: The Brazilian Experience in Latin American Context* (Cambridge: Cambridge University Press, 2013) 28. See section 3.6 for a brief discussion of this framework.

¹¹ Basarwa, also commonly referred to as the San, are the Indigenous hunter-gather inhabitants of Botswana who mostly reside in the Kalahari and surrounding areas (Ian Taylor & Gladys Mokhawa, "Not Forever: Botswana, Conflict Diamonds and the Bushmen" (2003) 102:407 *African Affairs* 261 at 261). An introduction to the Basarwas treatment in Botswana is provided in section 4.2.4. Further discussion of the groups mistreatment in relation to Botswana's mining sector can be found in section 4.4.

¹² According to both the Oxford and Merriam-Webster dictionaries, the correct term for nationals from Botswana is "Botswanan." The term "Batswana" is also commonly used by Botswanans. However, the direct translation of that term is "people of Tswana," suggesting that everyone in Botswana is of Tswana descent (Sitinga Kachipande, "Botswanan or Batswana? It's complicated" (August 17, 2015), online: Voices of Africa <<https://voicesofafrica.co.za/botswanan-batswana-its-complicated/>>). The term "Botswanan" is used in this dissertation to reflect Botswana's multi-ethnic society.

¹³ Amelia Cook & Jeremy Sarkin, "Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights versus Economic Development" (2010) 19 *Transnational Law & Contemporary Problems* 453 at 458.

framework to help explain Botswana's developmental state success; section 4.44 critiques the absence of a rights-based approach to mining governance in Botswana. Section 4.5 concludes the chapter.

4.2. Mining and development in Botswana from colonialism to the present

Botswana has achieved significant economic growth and development despite its low-income status when it gained independence from Great Britain in 1966. Its location between South Africa and Germany's South West Africa colony meant Bechuanaland (Botswana's colonial predecessor) mainly served as a buttress to other colonial interests in the region and was of little importance to the British Empire.¹⁴ Britain's lack of interest in the colony was evident in its minimal investment—the physical infrastructure and political administration in Bechuanaland left Botswana with neither a local economy nor an educated bureaucracy¹⁵ and only 50-60km of paved roads.¹⁶ Today, Botswana is classified as an upper-middle income country with a GDP of USD \$15.5 billion and GDP per capita of USD \$7,877.¹⁷ The annual growth rate has remained steady over the past decade, averaging 5 percent per annum.¹⁸ This section explores Botswana's transformation from a neglected thought in the British Empire to one of Africa's leading economies today.

¹⁴ Scott A Beaulier & J Robert Subrick, "The political foundations of development: the case of Botswana" (2006) 17:2 Constitutional Political Economy 103 at 108.

¹⁵ Samatar, *supra* note 2 at 68.

¹⁶ Beaulier & Subrick, *supra* note 14 at 104.

¹⁷ World Bank, "Botswana – Data", online: <<https://data.worldbank.org/country/botswana>>; Open Data for Africa, "World GDP per Capita Ranking 2017", available at: <<http://botswana.opendataforafrica.org/sijweyg/world-gdp-per-capita-ranking-2017-data-and-charts-forecast>>.

¹⁸ World Bank, "Botswana Overview", online: <<http://www.worldbank.org/en/country/botswana/overview>>.

4.2.1. Britain's neglected protectorate and its legacy: the colonial and early post-colonial periods

The first recorded peoples in the area that is today known as Botswana were the Basarwa, who settled in the region in approximately AD 500.¹⁹ Other ethnic groups soon followed. It was not until the mid-nineteenth century that political unrest in Southern Africa caused several Tswana groups to settle in the area.²⁰ The Tswana's entrenched community structures and institutions were adapted to local conditions by embracing cattle production as the main economic driver and source of wealth. These systems, which will be discussed in greater detail below, became instrumental in maintaining local hierarchies of power throughout the colonial and early post-colonial periods.²¹

To consolidate its territories in Southern Africa and counter any encroachment from the Germans to the west (in what is now modern-day Namibia) and the Boers to the south (in what became South Africa),²² Great Britain demarcated the Bechuanaland Protectorate in 1885.²³ Britain's interest in the territory as a purely strategic enclave produced a colonial administration that failed to disrupt several aspects of traditional Tswana governance. Unlike many of Britain's other African colonies, especially those with large settler populations, Bechuanaland was

¹⁹ Ladipo Adamolekun & Philip Morgan, "Pragmatic institutional design in Botswana: Salient features and an assessment" (1999) 12:7 *The International Journal of Public Sector Management* 584 at 585.

²⁰ Ellen Hillbom & Jutta Bolt, *Botswana – A Modern Economic History: An African Diamond in the Rough* (Palgrave Macmillan, 2018) at 25.

²¹ *Ibid* at 26.

²² Adamolekun & Morgan, *supra* note 19 at 587. Germany consolidated its German South West Africa colony at the 1884 Berlin Conference after it had annexed territory along the Namibian coast in the preceding year (Jan-Bart Gewald, "Namibia (German South West Africa and South West Africa)" in Dinah L Shelton, ed, *Encyclopedia of Genocide and Crimes Against Humanity* (Detroit, MI: Macmillan, 2005) vol 2 at 721). Dutch settlers in Southern Africa, known as Boers, established independent settlements after the British seized control of Cape Colony from the Dutch in the early 1800s. Viewing the Boer republics of Transvaal and the Orange Free State as a threat to its territorial control of the Cape–Rhodesia corridor, Britain colonized what became modern day Botswana ("South Africa in the 1900s (1900–1917)", online: South African History online <<https://www.sahistory.org.za/article/south-africa-1900s-1900-1917>>.)

²³ Monageng Mogalakwe & Francis Nyamnjoh, "Botswana at 50: democratic deficit, elite corruption and poverty in the midst of plenty" (2017) 35:1 *Journal of Contemporary African Studies* 1 at 1.

governed by a thin system of indirect rule that utilized traditional sites of authority, notably local chiefs and community councils, known as the *kgotla*.²⁴ Traditionally, the *kgotla* was a form of communal governance that allowed members of a community to discuss matters of concern and raise any grievances with local leaders;²⁵ it was a forum for leaders to engage directly with their community and offered a way for the community to hold leaders accountable.²⁶ Although the British interfered with the selection of chiefs beginning in 1934,²⁷ hereditary authority was upheld, which led to the ascendancy of Seretse Khama, Botswana's first president, within pre-independence governance structures and ultimately in the country's main political party. Britain's minimal interference in Botswana's customary institutions sustained traditional systems of power by entrenching the political and economic elite, primarily wealthy cattle holders.

During the early colonial period, the administration generated income through a dual scheme of labour migration and taxation.²⁸ Robust agricultural production was not feasible in Botswana due to its dry and arid climate. Nor was an extractive economy possible due to the perceived lack of natural resources in the territory. In order to pay the taxes imposed on individual households, poor Botwanans were enticed by the employment opportunities available in the mines being developed to the south in the territory that eventually became South Africa.²⁹ Beginning in the 1930s, the colonial administration sought to develop an export economy to increase sources of government revenue and to further enhance Britain's colonial ambition in the

²⁴ Adamolekun & Morgan, *supra* note 19 at 587.

²⁵ Hillbom & Bolt, *supra* note 20 at 32.

²⁶ Acemoglu, Simon & Robinson, *supra* note 3 at 23.

²⁷ Adamolekun & Morgan, *supra* note 19 at 587.

²⁸ Hillbom & Bolt, *supra* note 20 at 42.

²⁹ Ellen Hillbom, "Cattle, diamonds and institutions: Main drivers of Botswana's economic development, 1850 to present" (2014) 26 *Journal of International Development* 155 at 162.

region. Since agriculture and mining were not options, the existing cattle economy was identified as the industry that could achieve this endeavour.³⁰

Botswana's traditional cattle economy has been traced back 2,200 years.³¹ Its place as the region's principal industry was due to the abundance of available land for grazing, the minimal labour inputs necessary to maintain a herd of cattle and the high value that was placed on cattle.³² In their studies of Botswana's economic success, Abdi Ismail Samatar and Daron Acemoglu, Simon Johnson and James Robinson alleged cattle was privately held, and this form of ownership contributed significantly to the post-colonial institutions that were instrumental to the country's development.³³ Ellen Hillbom and Jutta Bolt challenged this assertion by arguing the cattle were held communally and that "it was through the sharing of property, rather than exclusion based on the private property rights structures, that elites best managed their herds while in the meantime putting their capital (cattle) to good use by investing it in the building of socioeconomic networks, controlling labour, and securing political power."³⁴

Natural sources of water were insufficient to sustain Botswana's traditional cattle economy. However, once the colonial administration set its sights on an export cattle economy, access to water was identified as the main obstacle to expansion. Soon after, colonial efforts were directed at drilling boreholes in strategic areas. Once construction was complete, boreholes were given to local elites to administer, resulting in an unequal distribution of water resources and further entrenchment of power in cattle farming elites.³⁵

³⁰ *Ibid* at 164.

³¹ Hillbom & Bolt, *supra* note 20 at 35.

³² *Ibid*.

³³ Samatar, *supra* note 2 at 69; Acemoglu, Johnson & Robinson, *supra* note 3 at 10.

³⁴ Hillbom & Bolt, *supra* note 20 at 37.

³⁵ Hillbom, *supra* note 29 at 166.

Botswana's colonial political structures were reformed in the years following World War II. These reforms were instrumental in subsequently shaping Botswana's post-colonial politics. In 1951, the colonial administration created a Joint Advisory Council that amalgamated separate local councils comprised of white settlers and Botswanans. Upon his return to Bechuanaland, Seretse Khama (the hereditary chief of the Bangwato, a Tswana-speaking community) took an active role in the Council after his exile imposed by the British for marrying a white Englishwoman was lifted in 1956.³⁶ Both Khama and his uncle, Tshekedi, renounced their claims to the Bangwato chieftainship, which further contributed to Khama's ascendancy as the head of the Bechuanaland Democratic Party's (later the Botswana Democratic Party (BDP)).

Before the formation of the BDP, the Botswana Peoples Party (BPP) was formed in 1960 by three Botswanan from traditionally marginalized communities who were migrant workers in South Africa.³⁷ Influenced by the anti-apartheid struggle that was taking shape in South Africa, these three men established the BPP as a militant party that was vehemently opposed to "colonial rule and its attendant racial discrimination."³⁸ The BPP's focus on economic injustice was popular among the rural poor. To combat the radical BPP, white settlers and colonial administrators encouraged the creation of the more moderate BDP, which was formed two years later with Khama as its leader. BDP's conservatism and Khama's popularity attracted a range of members from across the country, including civil servants, local chiefs and the working poor.³⁹

³⁶ Khama was studying in Britain when he met his wife, Ruth Williams. Their marriage angered both Khama's uncle, Tshekedi, who was the acting chief in Khama's absence, and the emerging apartheid regime in South Africa, which opposed the inter-racial marriage and led Britain to impose the ban in an effort to placate the South Africans (Acemoglu, Johnson & Robinson, *supra* note 3 at 14).

³⁷ Christian John Makgala & Mokganedi Zara Botlhomilwe, "Elite interests and political participation in Botswana, 1966-2014" (2017) 35:1 *Journal of Contemporary African Studies* 54 at 58.

³⁸ *Ibid.*

³⁹ *Ibid.*

With this widespread support, the BDP won Botswana's first elections in 1965 and formed government, with Seretse Khama as president when the country gained independence on September 30, 1966.⁴⁰

The promise of independence quickly thrust President Khama into a development-focused nation-building project, even though Botswana was poor. Samatar has detailed Botswana's "shallow financial base from which to launch a development program," as well as its "[dependence] on [Britain's] financial support to balance its annual budget."⁴¹ The shortage of employment opportunities in the country further impeded its development prospects at independence.⁴² Despite the significant obstacles the country's new leadership faced in 1966, they embarked on an ambitious development agenda that aimed to improve socioeconomic conditions. Remarking on Botswana's status at independence on its tenth anniversary, the new president Seretse Khama said

When we attained independence in 1966 we had no economic base from which to proceed with the development of our country. Our chances of survival as a viable country were almost nil but we were not discouraged nor could we ever willingly return to the old days of colonial neglect. Having accepted the challenges of independence we had no other alternative but to get down to work to make our independence a meaningful one.⁴³

Thus, "the very process of nation-building after independence took on a nature that was inspired by the fundamental task of development."⁴⁴

⁴⁰ *Ibid.*

⁴¹ Samatar, *supra* note 2 at 63.

⁴² *Ibid* at 64.

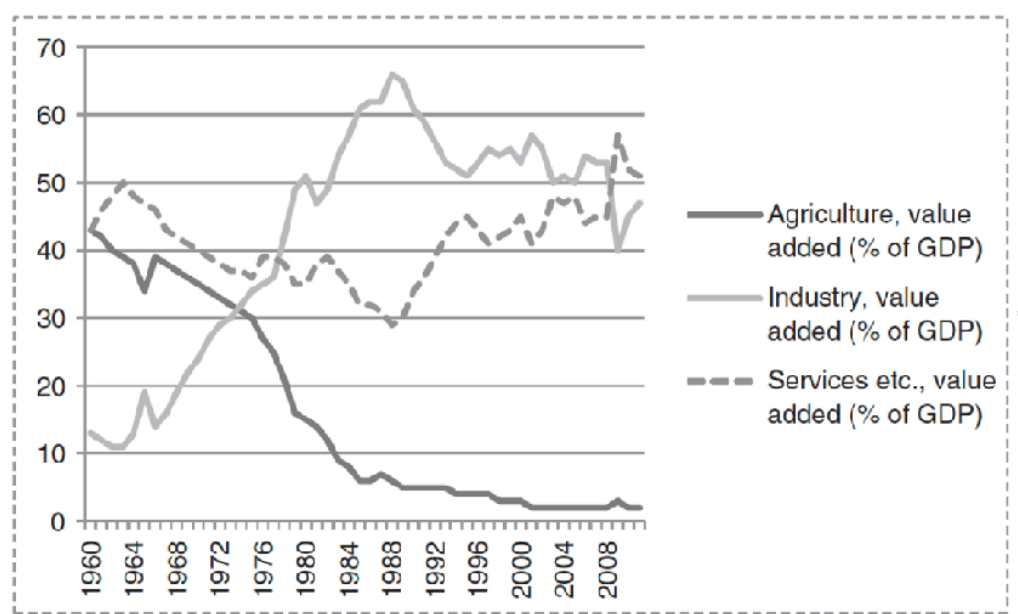
⁴³ Ian Taylor, "Botswana's Developmental State and the Politics of Legitimacy" in Graham Harrison, ed, *Global Encounters: International Political Economy, Development, and Globalization* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2005) 41 at 45 [Taylor, "Politics of Legitimacy"].

⁴⁴ *Ibid.*

4.2.2. Avoiding the “lost decade” and structural adjustment: 1980s–1990s

Unlike its African counterparts, the discovery of diamonds set Botswana on a course of economic growth throughout the late 1970s and into the 1980s and 1990s. During this period, Botswana’s economy was one of the fastest-growing in the world—outpacing even the East Asian Tigers and developmental states—with an average annual GDP growth rate of 7 percent.⁴⁵ Botswana’s extraordinary economic growth was due almost exclusively to diamonds: Figure 4.1, taken from Hillbom, illustrates the changing face of Botswana’s economy from independence into the 2000s. As the table shows, agriculture as a share of Botswana’s GDP declined steadily since diamond mining began in 1968. Over this same period, diamond mining’s share in GDP (captured under the “Industry” category) grew as agricultural value-added declined.⁴⁶

Figure 4.1 – Botswana’s “Agriculture and Industry, value added (% of GDP) 1960–2011”



(Hillbom, “Cattle, diamonds and institutions: Main drivers of Botswana’s economic development, 1850 to present” at 170).

⁴⁵ J Clark Leith, *Why Botswana Prospered* (Montreal: McGill-Queen’s UP, 2005) at 4. From 1974-1985, Botswana’s average GDP growth rate was even higher at 11 percent, making it one of the highest in the world during that time (Kenneth Good, “Democracy and development in Botswana” (2017) 35:1 *Journal of Contemporary African Studies* 113 at 115).

⁴⁶ Hillbom, *supra* note 29 at 169.

The growth in Botswana's diamond production also contributed to the country's increased reliance on diamond revenue. Ten years after the Orapa Mine was established, Debswana launched the Jwaneng Mine, which began production in 1982, in southern Botswana. Eventually nicknamed the "Prince of Mines," Jwaneng became the most productive diamond mine in the world.⁴⁷

Due to its stable economic performance, Botswana managed to avoid any interference from the Bretton Woods Institutions wishing to use the politics of conditionality to impose structural adjustment programs and expand the influence of Washington Consensus neoliberal policies. Ultimately, Botswana dodged the "lost decade" that saw the reversal of post-colonial economic progress in many other African countries.⁴⁸ However, Botswana's growth came at a cost: economic success was credited to the BDP and elites within the party as architects of the country's development, making them almost immune to critique and entrenching them in government for decades to come.⁴⁹

4.2.3. The "good governance" champions: early 2000s to the present

In the wake of Africa's lost decade and the emergence of the resource curse theory, academics began studying Botswana to better understand its success and how it escaped the curse. Development economists like J. Clark Leith (*Why Botswana Prospered*)⁵⁰ and Acemoglu, Johnson and Robinson ("An African Success Story"),⁵¹ and geographer Samatar (*An African*

⁴⁷ Peter Guest, "Inside the world's richest diamond mine" (December 3, 2015), online: CNN <<https://www.cnn.com/2015/12/03/africa/botswana-diamonds-jwaneng/index.html>>.

⁴⁸ Fadekemi Abiru, "Africa's Lost Decade" (September 25, 2018), online: The Republic <<https://www.republic.com.ng/augustseptember-2018/africas-lost-decade/>>.

⁴⁹ One vocal critic, Kenneth Good, who has consistently challenged the narrative that Botswana is an African "success story" and "miracle," described this period as "the origins of [the] elitist perambula" (Good, *supra* note 45 at 115).

⁵⁰ Leith, *supra* note 50.

⁵¹ Acemoglu, Johnson & Robinson, *supra* note 3.

Miracle)⁵² all conducted in-depth investigations into Botswana’s colonial and post-colonial history, its diamond industry and its contemporary political economy. Samatar and Acemoglu, Johnson and Robinson concluded that Botswana’s institutions—many of which survived the country’s colonial encounter with the British—and its political leadership were critical to directing diamond wealth towards meeting its development objectives.⁵³ According to Leith, these institutions spared the country from suffering the same economic and political symptoms of the resource curse—including Dutch disease, corruption, rent-seeking behaviour and civil conflict—that plagued several African countries.⁵⁴ Botswana has been the longest continuous multi-party democracy in Africa.⁵⁵ Although the BDP has dominated the country’s politics since independence, having formed the government after each election, no BDP president has sought to serve beyond the constitutional two-term limit introduced in 1997.⁵⁶ Botswana’s socioeconomic success, which is often compared to the East Asian Tigers discussed in section 3.3.1, has led other academics to unequivocally characterize Botswana as a developmental state.⁵⁷

Research from Leith, Samatar and Acemoglu made Botswana a darling of “good governance” discourse on Africa. The country was seldom a target of policy conversations related to mining transparency, accountability or the rule of law. In fact, during negotiations in

⁵² Samatar, *supra* note 2.

⁵³ *Ibid*; Acemoglu, Johnson & Robinson, *supra* note 3.

⁵⁴ See section 2.3 for a general discussion of the resource curse in Africa.

⁵⁵ Sebudubudu, *supra* note 7 at 79.

⁵⁶ “Botswana Profile – Timeline”, online: BBC <<https://www.bbc.com/news/world-africa-13041658>>. Only Botswana’s first two presidents—Seretse Khama and Quett Masire—served longer than 10 years, and their tenures were peaceful and were not marred by the coups and civil disruption that afflicted many other African rulers in the early post-colonial period. Coups d’état were common occurrences in post-colonial Africa. Several leaders, including Kwame Nkrumah in Ghana, Patrice Lumumba in the Democratic Republic of Congo, Milton Obote in Uganda, Thomas Sankara in Burkina Faso, and Abubakar Tafawa Balewa in Nigeria were overthrown in coups. Many, like Lumumba and Sankara, were also assassinated.

⁵⁷ See note 8.

2001 to finalize the Kimberley Process (KP), the main diamond mining transparency mechanism, the Government of Botswana heralded its success under the banner “Diamonds for Development” as a way to distinguish its “clean” diamonds from the conflict, or blood, diamonds that were the impetus for launching the Process.⁵⁸ Five years after the campaign was launched and Botswana was the Chair of the Process, then-president Festus Mogae further championed Botswana’s diamond-led development during an interview with former US diplomat, Richard Holbrooke, at the Council on Foreign Relations in October 2006 by highlighting: the numbers of Botswanans employed in the industry, improvements in literacy, easy access to health facilities for most citizens, increased access to clean water for rural communities and free antiretroviral therapy for HIV/AIDs patients.⁵⁹

The KP was the only transnational transparency mechanism that Botswana joined in the early 2000s as it and the Extractive Industries Transparency Initiative (EITI) became the standard-bearers of mining transparency. Despite publicly committing to joining the EITI on multiple occasions in the early 2000s,⁶⁰ Botswana has yet to do so and shows no signs of subscribing to the initiative in the near future.⁶¹ Nonetheless, Botswana’s government has made meaningful commitments to transparency and accountability in national policy, notably in *National Development Plan 11 (April 2017–March 2023)* (NDP 11).⁶² Botswana’s National Development Plans (which are discussed in greater detail below in section 4.3) outline the

⁵⁸ Taylor & Mokhawa, *supra* note 11 at 272.

⁵⁹ “Diamonds for Development” (October 10, 2006), online: Council on Foreign Relations <<https://www.cfr.org/event/diamonds-development>>.

⁶⁰ Keith Jefferis, “The role of TNCs in the extractive industry of Botswana” (2009) 18:1 *Transnational Corporations* 61 at 77.

⁶¹ EITI, “Implementation status”, online: EITI <<https://eiti.org/countries>>.

⁶² Government of Botswana, *National Development Plan 11 - Volume 1 (April 2017 - March 2023)*, online: Ministry of Finance and Economic Development <https://www.finance.gov.bw/images/NDP_11_2017-2023.pdf>.

country's national development objectives and strategies across all industries and social sectors. In NDP 11, Botswana's government detailed a commitment to promoting transparency and accountability as "a key dimension of democratic governance"⁶³ and improved citizen participation:

During NDP 11, efforts will be made to increase Government's ability and capacity to provide information about Government business across all sectors to encourage more effective and accountable institutions and better outcomes for citizens ... Citizen participation and transparency would assist citizens to inform the decision-makers, by making sure they have the necessary and accurate information to influence policy formulation, improvement of service delivery, and management of national resources for the benefit of all, including poverty eradication.⁶⁴

To achieve these objectives, Botswana's government committed to introducing two new audits: forensic and environmental audits. The forensic audits would be designed to help combat corruption and strengthen accountability in government spending, while the environmental audits would improve compliance and support achieving the sustainable development goals.⁶⁵ Thus far, there is no available public information about the implementation of these audits and other transparency and accountability measures have yet to be released by the government.

Botswana's strong mining governance record was also reflected in the 2017 Resource Governance Index (RGI), which ranked the country 18th of 89 assessments with a composite score of 61 out of a possible 100 points.⁶⁶ Compared to the previous RGI, Botswana's score increased by 14 points from 47 out of 100 points and a rank of 30 of 58 countries.⁶⁷ Botswana's high score was due to the positive assessment of its enabling environment and revenue

⁶³ *Ibid* at Section 8.85.

⁶⁴ *Ibid* at Section 8.86.

⁶⁵ *Ibid* at Section 8.87.

⁶⁶ 2017 Resource Governance Index, "Botswana", online: Natural Resource Governance Institute <<https://resourcegovernanceindex.org/country-profiles/BWA/mining>>.

⁶⁷ 2013 Resource Governance Index, "Botswana", online: Natural Resource Governance Institute <https://resourcegovernance.org/sites/default/files/country_pdfs/botswanaRGI2013.pdf>.

management, although it scored poorly in open data and licensing transparency.⁶⁸ Significant changes were made to the RGI's components from its 2013 to 2017 indices; therefore it is difficult to concretely say if the higher score was due to improvements in governance or changes to the evaluation method.

In contrast to its hesitancy to join the EITI, Botswana is a party to several regional and continental efforts to reform mining-led development prospects, in addition to a number of human rights treaties. Through the African Union, Botswana is a member of the Africa Mining Vision.⁶⁹ Botswana is also signatory to the Southern African Development Community's Protocol on Mining.⁷⁰ Additionally, Botswana is a party to the *African Charter on Human and Peoples' Rights*.⁷¹

Despite its well-regarded reputation in many international mining governance policy circles, several critics of Botswana's government are quick to pinpoint numerous flaws in the country's development record, which are discussed in greater detail in the following section.

4.2.4. Flaws in the "African success story": Botswana's development failings

One of the main critiques of Botswana's development record is its deficient and paradoxical democracy. Since its independence, Botswana has maintained strong democratic institutions that have withstood the challenges other countries have faced, including many of its SADC partners: Angola, the Democratic Republic of Congo, Mozambique, South Africa and

⁶⁸ 2017 Resource Governance Index, *supra* note 66.

⁶⁹ African Union, *Africa Mining Vision* (February 2009), online: Africa Mining Vision <http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf>.

⁷⁰ Southern African Development Community (SADC), *Protocol on Mining in the Southern African Development Community* (September 1997), online: SADC <https://www.sadc.int/files/3313/5292/8366/Protocol_on_Mining.pdf>.

⁷¹ 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 .

Zimbabwe have all experienced various forms of political conflict and unrest over the past sixty years. Botswana is regarded as one of Africa's most stable democracies, frequently ranking at the top of African democratic indicator rankings, including the Ibrahim Index of African Governance.⁷² Free and fair parliamentary elections have been held every five years since independence.⁷³ However, beyond the regular elections, there are few opportunities for Botswanans to participate in democratic processes.

Additionally, the BDP has held a monopoly on political power, having won every single election since independence with little competition from the opposition.⁷⁴ Critics have argued that the country is not a democratic developmental state, but rather an authoritarian state that suppresses public criticism and restricts participation of other political parties through covert mechanisms.⁷⁵ The BDP's stranglehold on power has been attributed to the "unity of a small dominant class"⁷⁶; its leadership continues to rule Botswana with no oversight or accountability from parliament.⁷⁷ Based on the thick-thin description of the democratic spectrum discussed in section 2.4, Botswana at best could be characterized as a "minimalist democracy"⁷⁸ that falls along the thin half of the spectrum. However, similar to some of the East Asian developmental

⁷² In the 2017 Ibrahim Index of African Governance, Botswana ranked eighth out of 54 countries for "Participation", the category that best represented democratic participation (Ibrahim Index of African Governance, online: <<http://iiag.online>>).

⁷³ Cook & Sarkin, *supra* note 13 at 461.

⁷⁴ *Ibid.*

⁷⁵ *Ibid* at 475.

⁷⁶ Samatar, *supra* note 2 at 69.

⁷⁷ Emmanuel Botlhale, "Accountability and Democracy" in Karin Alexander & Gape Kaboyakgosi, eds, *A Fine Balance: Assessing the Quality of Governance in Botswana* (Pretoria: Idasa, 2012) 53 at 55-56.

⁷⁸ Gape Kaboyakgosi & Keneilwe Marata, "Introduction" in Karin Alexander & Gape Kaboyakgosi, eds, *A Fine Balance: Assessing the Quality of Governance in Botswana* (Pretoria: Idasa, 2012) 2 at 4.

states like Singapore and South Korea, Botswana's high levels of economic growth through "authoritarian liberal" structures is often reluctantly credited to its deficient democracy.⁷⁹

Critics of Botswana's development record also point to the country's unequal distribution of wealth and the human rights abuses carried out against Indigenous communities, notably the Basarwa.⁸⁰ Despite decades of steady economic growth, Botswana's poverty and unemployment rates remain high.⁸¹ Critics argue that the country's elites disproportionately benefitted from the mining wealth generated from the government's partnership with De Beers.⁸² Although diamond revenues were consistently directed towards social and infrastructure development—Botswana did not suffer the same levels of corruption and rent-seeking present in other resource-rich African countries—critics argued the industry did little to support local communities and provide more employment opportunities.⁸³ For decades, the only available jobs in the industry were diamond extraction; the process is capital intensive, and few linkages existed at either the upstream or downstream stages of the value chain.⁸⁴ Despite recent diversification in the industry (discussed in greater detail in section 4.3.2), Botswana's unemployment rate remains around 20 percent, which is almost double the rate in countries with similar income levels.⁸⁵

⁷⁹ Ian Taylor, "As Good as it Gets? Botswana's 'Democratic Development'" (2003) 21:2 *Journal of Contemporary African Studies* 215 at 216; Kaboyakgosi & Marata, *supra* note 78 at 4.

⁸⁰ The high prevalence of HIV/AIDS in the adult population (currently 22.8 percent, which is the third highest globally behind Eswatini (Swaziland) and Lesotho ("Prevalence of HIV, total", online: World Bank <https://data.worldbank.org/indicator/sh.dyn.aids.zs?most_recent_value_desc=true>) is regarded by many observers as another blemish on Botswana's development record (Cook & Sarkin, *supra* note 13 at 485). Botswana has responded to the crisis and currently provides anti-retroviral treatment to 84 percent of people living with HIV/AIDS ("Botswana", online: UNAIDS: <https://www.unaids.org/en/regionscountries/countries/botswana>>). The Government of Botswana contends this provision would not have been possible but for its mining revenue (see "Diamonds for Development", *supra* note 59). Consideration of this aspect of Botswana's social development is outside the scope of this chapter's focus and will not be discussed in greater detail.

⁸¹ Cook & Sarkin, *supra* note 13 at 487.

⁸² *Ibid* at 464.

⁸³ *Ibid* at 480.

⁸⁴ Jefferis, *supra* note 60 at 72.

⁸⁵ Stephanie Hanson, "Botswana: An African Success Story Shows Strains" (December 19, 2007), online: Council on Foreign Relations <<https://www.cfr.org/backgrounder/botswana-african-success-story-shows-strains>>.

Further concerns with the lack of widespread benefits from mining and the effects of the government's close relationship with De Beers were raised in a 2009 report by the Bench Marks Foundation.⁸⁶ The report was critical of the environmental and community impact of diamond mining's operations, specifically criticizing the prominence of the relationship at the expense of the country's "communities, human rights, the environment and sustainable local economic development."⁸⁷ David van Wyk, the author, maintained that these concerns could only be addressed if the government took the necessary steps to "assert its own independence and responsibility not just to [De Beers], but to the people of Botswana as a whole."⁸⁸ For this to occur, investigative journalist and political activist Khadija Sharife suggests the corporate partnership that has generated so much of Botswana's growth, Debswana, must be critically restructured to ensure greater benefits from mining are directed to the country's poorest.⁸⁹ With its most recent Gini index of 53.5,⁹⁰ Botswana ranks as the fourth most unequal country in the world.⁹¹

The aforementioned development failings have disproportionately affected Botswana's marginalized Indigenous peoples who have routinely been excluded from the country's mining-led development.⁹² Botswana's Indigenous peoples are among the world's poorest, an issue that

⁸⁶ David van Wyk, "Corporate Social Responsibility in the Diamond Mining Industry in Botswana - SADC Research Report Policy Gap 5" (2009), online: Bench Marks Foundation <http://www.bench-marks.org.za/research/botswana_edit_fina_dvw.pdf>.

⁸⁷ *Ibid* at 7.

⁸⁸ *Ibid*.

⁸⁹ Khadija Sharife, "Flaws in Botswana's Diamond Industry" (2016) 33:2 World Policy Institute 77 at 81.

⁹⁰ The Gini index measures income inequality in a country by providing an indication of how income is distributed. It is measured from 0, in which everybody is equal, to 100, which reflects perfect inequality ("Glossary of Statistical Terms", online: OECD <<https://stats.oecd.org/glossary/detail.asp?ID=4842>>.)

⁹¹ "Inequality index: where are the world's most unequal countries?", online: The Guardian <<https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries>>.

⁹² Since much of this mistreatment was a direct consequence of Botswana's mining regime, more details are discussed further in section 4.4, in which the absence of a rights-based approach to Botswana's mining governance is explained.

has been directly attributed to the government's systemic efforts to exploit and plunder their resources.⁹³ The government's past mistreatment was rooted in its official position that all Botswanans are "[I]ndigenous and deserve equal treatment,"⁹⁴ despite historical records that show Botswana's Indigenous peoples pre-date the majority Tswana and have experienced discrimination and marginalization based on their status.⁹⁵ The government has only been willing to recognize the country's Indigenous peoples as marginalized minority groups that possess unique cultural and linguistic attributes.⁹⁶ Contrary to the government's position, however, Indigenous peoples in Botswana have self-identified as such, the Basarwa being the largest population.⁹⁷ Their position in Botswana society has led many international actors—including the United Nations Human Rights Council and the African Commission on Human and Peoples' Rights—to acknowledge and recognize the Basarwa as Indigenous peoples deserving of the rights afforded to Indigenous peoples under international human rights law.⁹⁸

Despite its development failings, Botswana continues to be heralded as the African miracle and success story by international and regional bodies that evaluate governance in

⁹³ Motsomi Ndala Marobela, "The State, Mining and the Community: The Case of the Basarwa of the Central Kalahari Game Reserve in Botswana" (2010) 43:1 Labour, Capital and Society 137 at 138.

⁹⁴ *Report of the African Commission's Working Group on Indigenous Populations/Communities - Republic of Botswana*, African Commission on Human and Peoples' Rights, 38th Ordinary Session (21 November - 5 December 2005) at 81 ["AfCHPR Report"].

⁹⁵ Most sources that recognize Botswana's Indigenous peoples, including academic and international sources, rely on their status as first peoples in the region along with their historical experience of discrimination and marginalization as a minority group to define their indigeneity (see Marobela, *supra* note 93; AfCHPR Report, *supra* note 94; and Anaya, *infra* note 96). As discussed in section 3.5.3, recognizing indigeneity in Africa is a complex legal and political issue.

⁹⁶ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Addendum – The situation of Indigenous peoples in Botswana*, A/HRC/15/37/Add.2, UNHRC (2 June 2010) at 1.

⁹⁷ AfCHPR Report, *supra* note 94 at 27.

⁹⁸ Anaya, *supra* note 96 and AfCHPR Report, *supra* note 94.

Africa.⁹⁹ The following section conducts an in-depth examination of the mining developmental state institutions that contributed to Botswana's success.

4.3. Botswana's mining developmental state

Academics across multiple social science disciplines have widely accepted Botswana's characterization as a developmental state.¹⁰⁰ Ellen Hillbom, an associate professor of economic history at Lund University and the author of several journal articles and books about economic development in Botswana, is the only exception. She has argued that Botswana is best understood as a "development-oriented gate-keeping state."¹⁰¹ Hillbom coined the term to distinguish Botswana's economic success—that relied on mining, lacked diversification and was institutionally dependent on a close relationship between government and wealthy elites—from the model that led growth in East Asia.¹⁰² Her use of the term "gate-keeping state" is borrowed from historian Frederick Cooper, who developed the concept in his book, *Africa Since 1940: The Past of the Present*.¹⁰³ By adopting Cooper's conceptualization of the African state, Hillbom argued that Botswana's socioeconomic development was rooted in a state structure that was extractivist and dependent on institutions that entrenched the state as the principal agent of development.¹⁰⁴ Although Hillbom attempted to offer a different model to evaluate Botswana's development, her assessment neglected the emergence of an African developmental state "that

⁹⁹ See the World Bank and Ibrahim Index of African Governance.

¹⁰⁰ Mbabazi & Taylor, *supra* note 7; Peter Meyns & Charity Musamba, "The Developmental State in Africa: Problems and Prospects" Institute for Development and Peace, University of Duisburg–Essen (INEF–Report, 101/2010); Thandika Mkandawire, "Thinking about developmental states in Africa" (2001) 25 *Cambridge Journal of Economics* 289; Ian Taylor, "Botswana as a 'Development Oriented Gate-Keeping State': A Response" (2012) 111 *African Affairs* 466.

¹⁰¹ Ellen Hillbom, "Botswana: a development-oriented gate-keeping state" (2011) 111:442 *African Affairs* 67-89 [Hillbom, "Gate-keeping"].

¹⁰² *Ibid* at 67.

¹⁰³ Frederick Cooper, *Africa Since 1940: The Past of the Present* (Cambridge: Cambridge University Press, 2002).

¹⁰⁴ Hillbom, "Gate-keeping", *supra* note 101 at 81.

seriously *attempts* to deploy its administrative and political resources to the test of economic development,”¹⁰⁵ which Thandika Mkandawire encouraged in “Thinking about developmental states in Africa.” Much like the commonly accepted developmental states of East Asia, Botswana has directed significant government resources at promoting socioeconomic development since independence, when it was one the world’s poorest countries with a per capita income of approximately USD \$80.¹⁰⁶

In my 2015 *Law and Development Review* article “Conceptualizing the Developmental State in Resource-Rich Sub-Saharan Africa,” I argued that Botswana is one of two developmental states in Africa because its post-colonial socioeconomic transformation was state-led and was attributable to the developmental state mechanisms briefly described in Chapter 3: a development-oriented political leadership willing to intervene in the economy; an autonomous and effective bureaucracy; a production-oriented private sector; and performance-oriented governance.¹⁰⁷ This section elaborates on this point further to explain Botswana’s developmental state structures in general terms, then considers Botswana’s specific mining developmental state institutions in greater detail to support my assertion that Botswana is a mining developmental state.

4.3.1. Botswana: an African developmental state

Before examining how Botswana’s developmental state conforms to the criteria described in Chapter 3, it is helpful to understand the country’s legal and political structure, which are the focus of the ensuing analysis. As discussed in Chapter 1, “law” in the context of African law and

¹⁰⁵ Mkandawire, *supra* note 100 at 291 (emphasis in the original).

¹⁰⁶ Sebudubudu, *supra* note 7 at 82.

¹⁰⁷ Ghebremusse, “Conceptualizing”, *supra* note 1 at 484.

development comprises various sources, including international and transnational law and legal norms, state law, and customary law.¹⁰⁸ In the following analysis of Botswana's mining developmental state, state law (and the contracts derived from legislative authority) are the exclusive focus for three reasons. First, Botswana adopted a Westminster democratic system similar to Great Britain's, in which the power to make law rests with two key branches of the state: parliament and the executive.¹⁰⁹ Botswana's parliament consists of a unicameral assembly that is responsible for debating and passing laws "for the peace, order, and good government of Botswana."¹¹⁰ The executive branch, made up of the president, vice-president and cabinet, also possesses constitutionally granted law-making powers.¹¹¹ Unlike some other Westminster-style democracies in the British Commonwealth, however, greater power rests with the executive to challenge laws proposed by parliament: the president can withhold signing bills, which results in their return to the assembly.¹¹² As a result of this power imbalance, Botswana's president has been a critical figure in the country's nation-building project.

Secondly, Botswana's socioeconomic development has been a state-led project since independence. The state's role has often been compared to East Asian Tigers like South Korea, Taiwan, and Singapore: the Botswana government deliberately implemented developmental institutions that guided the nation's economic growth.¹¹³ Botswana transformed from one of the world's poorest countries in 1966 to an upper-middle income country today, with a gross national

¹⁰⁸ See section 1.3.

¹⁰⁹ Beaulier & Subrick, *supra* note 14 at 109.

¹¹⁰ Constitution of Botswana, 1966, s. 86.

¹¹¹ *Ibid.*, ss. 47, 49-50.

¹¹² Beaulier & Subrick, *supra* note 14 at 109.

¹¹³ Sebudubudu, *supra* note 7 at 82.

income (GNI) per capita of USD \$6,760 in 2016.¹¹⁴ Like the East Asian Tigers, similar developmental state structures were critical to Botswana's transformation: a development-oriented political leadership willing to intervene in the economy, an autonomous and effective bureaucracy, a production-coordinated private sector, and performance-oriented governance.¹¹⁵

Third, the early relationship formed between the national government and the private sector, namely the De Beers Group, was one of the key features of Botswana's developmental state. Soon after independence, the Government of Botswana partnered with De Beers to develop the country's first diamond mine,¹¹⁶ which eventually led to the creation of Debswana.¹¹⁷ Consequently, the contracts and other legislatively authorized binding agreements that framed this public-private partnership are the third consideration in the "law" contemplated in Botswana's mining developmental state.

Despite the focus on state law, it is important to note that customary law and traditions continue to influence the law-making process in Botswana. For example, although this minimizes the dominance of elites in the BDP and the power they wield when shaping government direction, several scholars trace the broad-based participation and consensus-driven approach commonly used in Botswana's contemporary legislative process to the traditional political customs that were in place during colonial rule.¹¹⁸ Due to Britain's relatively weak colonial administration in Botswana, governance was less hierarchical and included more space

¹¹⁴ World Bank, *supra* note 4. For much of the past 20 years, Botswana's annual GNI either surpassed or was level with the average GNI for upper middle income countries as classified by the World Bank. Of course, an economic indicator such as the GNI does mask the significant wealth gap that exists in Botswana. See World Bank Data available online at <https://data.worldbank.org>.

¹¹⁵ Meyns & Musamba, *supra* note 100 at 42.

¹¹⁶ Jefferis, *supra* note 60 at 62.

¹¹⁷ *Ibid* at 65.

¹¹⁸ Beaulier & Subrick, *supra* note 14 at 109.

for traditional rulers (the chiefs) in decision-making.¹¹⁹ This practice continued after independence, with slight variations to account for the prominent role of the bureaucracy and evolving elite interests.¹²⁰ According to Scott A. Beaulier and J. Robert Subrick, the successful integration of customary practices into Botswana's modern institutions helped to explain the legitimacy and strong public support for Botswana's democratic institutions, including its political leadership.¹²¹

a. Development-oriented political leadership

Visionary leadership was decisive to setting and maintaining Botswana on its developmental course after it gained independence in 1966. A strong central government was critical for President Khama because it limited the influence of non-government actors on the decision-making process.¹²² Early on during colonial rule, the British Protectorate's administration decentralized some decision-making power to wealthy, cattle-owning chiefs in an effort to maintain a semblance of traditional authority, but ultimately created divisive, conflicting interests within the country.¹²³ To avoid perpetuating this division, the BDP adopted the methodology used by the Protectorate Administration in its final years of existence: centralized development planning.¹²⁴

Independence raised the challenge of unifying the country around a common agenda while appeasing the traditional political and economic elite without granting them any control or diminishing central government authority through their influence. President Khama's vision for a

¹¹⁹ *Ibid.*

¹²⁰ Acemoglu, Johnson & Robinson, *supra* note 3 at 3.

¹²¹ Beaulier & Subrick, *supra* note 14 at 109.

¹²² Acemoglu, Johnson & Robinson, *supra* note 3 at 15.

¹²³ Samatar, *supra* note 2 at 47.

¹²⁴ *Ibid* at 83.

strong central government respected the influence of traditional rulers but purposefully made them less powerful by not creating a constitutionally mandated role for them.¹²⁵ The Botswana constitution vested greater decision-making power with a small group of leaders—namely, the president and cabinet—who faced little to no opposition in carrying out their economic and political objectives from the legislature.¹²⁶ Despite purposefully situating power in a small sector of the state, making it potentially vulnerable to elite capture, President Khama appeased elite interests by focusing early national development planning on the concerns of rural areas, the richest at the time.¹²⁷ Identifying common interests between elites and senior government officials translated into directing collective efforts towards national development rather than self-enrichment.¹²⁸ Leith contends this was due to “mostly homogenous”¹²⁹ interests that “were based on cattle, thereby creating an overwhelming encompassing interest.”¹³⁰ Coincidentally, elites in government made use of the policy and legislative process to move the developmental project forward by providing public goods and investment in rural health, infrastructure, and education.¹³¹

To further centralize economic power in the state, President Khama proposed vesting mineral rights in the state rather than individual communities in the year before independence. He declared in the Bechuanaland Democratic Party’s 1965 Election Manifesto that “[c]onsequently leaving mineral rights vested in tribal authorities and private companies must necessarily result in uneven growth of the country’s economy, as well as deprive the Central

¹²⁵ Adamolekun & Morgan, *supra* note 19 at 588.

¹²⁶ Acemoglu, Johnson & Robinson, *supra* note 3 at 15.

¹²⁷ Martin, *supra* note 5 at 42.

¹²⁸ Meyns & Musamba, *supra* note 100 at 47.

¹²⁹ Leith, *supra* note 45 at 121.

¹³⁰ *Ibid* at 58.

¹³¹ Martin, *supra* note 5 at 42.

Government of an important source of revenue for developing the country.”¹³² This policy proposal soon became entrenched in legislation following independence in section 3(1) of the country’s first *Mines and Minerals Act, 1967*.¹³³

In addition to vesting mineral rights in the national government, President Khama’s government moved quickly to foster further benefits from potential mineral resources. Although industrial mining had not yet occurred in the country before independence, it was believed that large deposits of diamonds, copper and coal existed within Botswana.¹³⁴ The BDP sought to continue exploration efforts but lacked the human or economic resources to do so. As Samatar succinctly described, Botswana’s prospects at independence seemed dismal: it was “an impoverished society” that “lacked two main ingredients necessary to transform its economy... educated and skilled labour and immediately exploitable natural resources.”¹³⁵

President Khama and the BDP did not have to wait long to begin exploiting the country’s mining potential—to encourage mining, Botswana entered into a strategic partnership with De Beers, the world’s leading diamond mining company, soon after diamonds were discovered at Orapa in central Botswana in 1968.¹³⁶ It was only after four years of development and a USD \$33 million investment that diamonds were first extracted at the Orapa Mine.¹³⁷ Debswana generated significant revenue for the state, which was then redirected to infrastructure projects

¹³² Leith, *supra* note 45 at 60.

¹³³ *Mines and Minerals Act, 1967*.

¹³⁴ Jefferis, *supra* note 60 at 62 and 65.

¹³⁵ Samatar, *supra* note 2 at 62.

¹³⁶ The Government of Botswana and De Beers initially formed the De Beers Botswana Mining Company in 1968, with the government holding only a 15 percent stake in the venture. After more diamonds were discovered at Orapa and in the surrounding area, the government renegotiated its share to 50 percent in 1975 (Jefferis, *supra* note 60 at 65-66).

¹³⁷ Joe Nocera, “Diamonds are forever in Botswana” (August 8, 2008), online: New York Times <<https://www.nytimes.com/2008/08/09/business/worldbusiness/09nocera.html>>.

and funding for much needed social services like health and education.¹³⁸ The government's partnership with De Beers has remained a critical component of Botswana's mining developmental state.

President Khama's early commitment to social and economic development continued through the government's formalization of development planning via the National Development Plans (NDPs). Development planning was conducted at the highest levels in the Vice-President's office, where the Ministry of Finance and Development Planning (MFDP) was housed.¹³⁹ Quett Masire's leadership role in Seretse Khama's government as Vice-President, and later as his successor, was critical to sustaining the long-term success of the NDPs development and implementation process.¹⁴⁰ In addition to Vice-President Masire, the country's autonomous bureaucratic institutions were critical to shaping and implementing Botswana's development agenda.¹⁴¹

b. An autonomous and effective bureaucracy

At independence, Botswana's civil service comprised mostly of expatriate Britons who remained in the country.¹⁴² Relying on this expertise at first, Botswana's government created a meritorious bureaucracy based on a Weberian-model that avoided political interference and did not immediately indigenize.¹⁴³ Further contributing to the bureaucracy's effectiveness was their quick assimilation into the policy-making bloc and their favourable intersection with political and economic elites. This close relationship between the bureaucracy and the ruling party created

¹³⁸ Martin, *supra* note 5 at 43.

¹³⁹ Taylor, "Politics of Legitimacy", *supra* note 43 at 53.

¹⁴⁰ Leith, *supra* note 45 at 121.

¹⁴¹ Sebudubudu, *supra* note 7 at 81.

¹⁴² Meyns & Musumba, *supra* note 100 at 47.

¹⁴³ Taylor, "Politics of Legitimacy", *supra* note 43 at 45.

a civil service that become a recruitment site for senior positions in the ruling party and the state.¹⁴⁴ Although the revolving door of government and ruling party officials likely contributed to the consensus-driven approach to governance, it entrenched elites within the echelons of power in Botswana.

The national government also established centralized ministries empowered to direct development planning and minerals governance. The MFDP was mandated to carry out the government's developmental planning and became the centrepiece of Botswana's developmental state.¹⁴⁵ The Ministry's role was so critical, Samatar described it as both the "institutional nerve centre"¹⁴⁶ and "the institutional brain of the economic-planning process."¹⁴⁷ Development planning was centralized in the MFDP due to the dearth of skilled professionals capable of managing large-scale projects across the bureaucracy.¹⁴⁸ Rather than divide skilled development professionals across different ministries, the MFDP's centralized structure was an effective and efficient way to manage the government's development planning—from agriculture to health, education and housing—and also ensured a uniform developmental agenda was implemented at the most senior levels across diverse portfolios.¹⁴⁹

To develop the country's mining policies, the Department of Mines—the original agency that was eventually merged into the current Ministry of Minerals, Energy and Water Resources—was tasked with drafting Botswana's early mineral governance institutions. Among other things, the Department was responsible for developing and coordinating operational activities in the

¹⁴⁴ *Ibid* at 49.

¹⁴⁵ Meyns & Musamba, *supra* note 100 at 47.

¹⁴⁶ Samatar, *supra* note 2 at 82.

¹⁴⁷ *Ibid* at 85.

¹⁴⁸ *Ibid*,

¹⁴⁹ *Ibid* at 84.

mining sector, which included devising the governing fiscal regime that comprised the royalty rate and equity sharing option.¹⁵⁰

Complementing the civil service's work were several public sector institutions, including the Botswana Development Corporation, the Botswana Enterprise Development Unit, the National Development Bank and the Trade and Investment Promotion Agency.¹⁵¹ These entities were tasked with promoting industrialization through infrastructural development and investment, credit and service support for Botswana small business, and trade promotion within and beyond Southern Africa.¹⁵² The creation of these institutions helped ensure the effective implementation of Botswana's development policies through specialized organizations with the knowledge and capacity to support the state's agenda.

c. Performance-oriented governance

Botswana's diverse development objectives were implemented through a broad spectrum of policies across a range of areas. Despite these seemingly disparate policies, it can be argued that Botswana's range of development policies were designed and governed, at a minimum, to maximize social or economic development, both at the state and individual level. At the state level, this encompassed growth-promoting policies that addressed minerals, land and agriculture, international trade, money, exchange rates, fiscal revenues, fiscal expenditure, labour market, state-owned enterprises and industrialization.¹⁵³ At the individual level, development policies were designed to impact health, gender equality and rural poverty reduction.

¹⁵⁰ Jefferis, *supra* note 60 at 78 and 80.

¹⁵¹ Samatar, *supra* note 2 at 141, 147.

¹⁵² *Ibid* at 143.

¹⁵³ Leith, *supra* note 45 at 59, 97.

The table below summarizes some of Botswana's key state-level development policies since independence, and their anticipated outcomes:¹⁵⁴

Table 4.1 – Botswana's performance-oriented governance

Policy Area	Sample Policies	Anticipated policy outcomes
Minerals	<ul style="list-style-type: none"> • <i>Mines and Minerals Act, 1967</i>; • <i>Mines and Minerals Act, 1999</i>; • Establishing agreements directed at state-ownership in mineral extraction. 	Vested mineral rights in the state so that mineral wealth was directed to national purposes. This included using such measures as royalties, equity shares, and state ownership of extractive enterprises along the value chain (the effects of these mining specific policies are examined further in section 4.3.2).
Trade	<ul style="list-style-type: none"> • Renegotiation of the Southern African Customs Union (SACU) agreement in 1969; • Special protections for beef exports in the 1975 Lome Convention. 	Increased government revenues and access to foreign markets for key exports.
Money	<ul style="list-style-type: none"> • <i>A Monetary System for Botswana</i>, Government Paper No. 1 (1975); • Creation of the Bank of Botswana. 	Created a new currency (the pula, launched in 1976), and established the framework for monetary policy that was advantageous to domestic business and the national economy.
Labour market	<ul style="list-style-type: none"> • <i>National Policy on Incomes, Employment, Prices and Profits</i>, Government Paper No. 2 (1972); • Public sector-led skills training. 	Established a national minimum wage that varied by sector, and combat unemployment by increasing available skilled labour.

¹⁵⁴ The data summarized here is taken from Leith, *supra* note 45 at 59-101; Acemoglu, Johnson & Robinson, *supra* note 3 at 16-19; and Gervase S Maipose, "Institutional Dynamics of Sustained Rapid Economic Growth with Limited Impact on Poverty Reduction", prepared for the United Nations Research Institute for Social Development project on Poverty Reduction and Policy Regimes (Geneva, January 2008).

State-owned enterprises	<ul style="list-style-type: none"> • Creation of the National Development Bank (1965), and the Botswana Development Corporation (1970); • Creation of public enterprises providing utilities including water, electricity, telephones, and transportation. 	Supported the development of Indigenous businesses and investment, and ensure the provision of essential services without draining government revenue.
Industrialization	<ul style="list-style-type: none"> • Financial Assistance Policy (1985); • Industrial Development Policy (1996); • Citizens Entrepreneurial Development Agency; • Economic Diversification Drive (2011-2016). 	Diversified the economy beyond minerals extraction.

In addition to these growth-promoting policies, the Government of Botswana introduced policies aimed at improving the human social development outcomes of individual Botswanans. Some notable examples included the *National Policy for Rural Development*,¹⁵⁵ the *National Policy on Gender and Development*¹⁵⁶ and the *National Policy on HIV and AIDS*.¹⁵⁷ All of these policies complemented Botswana's central social development policy, the NDPs.

d. Production coordination and conflict-management

Botswana's initial priorities in this area were to "establish a coordinated institutional capability and to attract sufficient public and overseas private funds."¹⁵⁸ Four years after

¹⁵⁵ *National Policy for Rural Development*, Government Paper No. 2 (May 1973).

¹⁵⁶ *National Policy on Gender and Development*, online: <<http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Labour--Home-Affairs-MLHA/Ministers-Speeches/THE-NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT/>>.

¹⁵⁷ *National Policy on HIV and AIDS*, online: <<http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/National-AIDS-Coordinating-Agency-NACA1/Tools--Services/Services--Forms/HIV-and-AIDS-Policies/>>.

¹⁵⁸ Samatar, *supra* note 2 at 83.

independence, the MFDP was established as the centralized "institutional brain of the economic policy-making process."¹⁵⁹ The Ministry became responsible for planning, coordinating, and budgeting all development activities; designing the state's financial affairs; implementing development projects; and negotiating and liaising with aid agencies.¹⁶⁰ Under the leadership of Vice-President Quett Masire, the MFDP undertook development planning through the six-year NDPs, which addressed both social and economic development objectives.¹⁶¹ In addition to contributing to the creation and implementation of a coherent development vision for the state, the Plans allowed the government to combat internal conflict and destructive neo-patrimonial and rent-seeking behaviour by implementing a consensus-driven approach to Plan formulation.¹⁶²

Botswana's NDP remains a crucial component of the country's national production coordination. For example, Botswana's current NDP 11¹⁶³ includes objectives in five key areas: macroeconomic strategies; economy and employment; sustainable environment; governance, safety and security; and social upliftment. A summary of the current objectives is included in the following table:

¹⁵⁹ *Ibid* at 85.

¹⁶⁰ *Ibid*.

¹⁶¹ Leith, *supra* note 45 at 58.

¹⁶² Martin, *supra* note 5 at 42.

¹⁶³ *NDP 11*, *supra* note 62 at 62.

Table 4.2 – Production coordination in Botswana’s NDP 11

Areas of Focus	Key Objectives
Macroeconomic Strategies:	<ul style="list-style-type: none"> • Developing diversified sources for economic growth; • Using domestic expenditures as a source for growth and employment creation; • Expanding the export-led growth strategy; • Ensuring a conducive environment for the private sector to grow the economy and employment creation; • Securing a regulatory framework for doing business and competing globally.
Economy and Employment:	<ul style="list-style-type: none"> • Improving the quality and relevance of education and training; • Improving educational quality and skills development to promote workforce productivity; • Improving capacity in research and innovation; • Developing an entrepreneurial culture to foster manufacturing in technological industries.
Sustainable Environment:	<ul style="list-style-type: none"> • Ensuring a healthy environment for a healthy population; • Encouraging sustainable management of natural and cultural resources; • Developing climate change adaptation and mitigation strategies; • Supporting sustainable human settlements.
Governance, Safety and Security:	<ul style="list-style-type: none"> • Further enhancing citizen participation; • Promoting government transparency through the creation of two new audits; • Modernizing the courts through measures such as e-government, simplified rules of courts, and reduced litigation costs; • Promoting gender equality and women’s empowerment.
Social Upliftment:	<ul style="list-style-type: none"> • Combating rural poverty; • Supporting the development of small, medium, and micro-enterprises; • Continuing the provision of social safety nets; • Eradicating absolute poverty; • Improving access to quality health care services.

(Source: Botswana, National Development Plan 11, Volume 1 [April 2017–March 2023]).

Botswana’s state-led production coordination resulted in the achievement of one of the highest average annual growth rates in the latter part of the twentieth century (10.7 percent

between 1974 and 1992).¹⁶⁴ This economic growth continued into the twenty-first century, with average rates of 5 percent per annum over the last decade.¹⁶⁵ Annual growth in Botswana's per capita income also averaged 7 percent in the period from 1966 to 1999.¹⁶⁶ By comparison, Botswana's average annual growth in per capita income surpassed that of Chile, Indonesia, Ireland, South Korea, Singapore, and Thailand during that same period.¹⁶⁷ In addition to its successful economic development, Botswana's social development achieved favourable results in education (88.5 percent literacy rate;¹⁶⁸ universal primary education; 9 percent of GDP directed towards education funding¹⁶⁹) and health (64.5 years life expectancy at birth;¹⁷⁰ reductions in HIV prevalence rate among adults ages 15–49 from 26 percent in 2000 to 22.2 percent in 2015).¹⁷¹ Compared to the rest of Africa, Botswana's human development ranking is only surpassed by Seychelles, Mauritius, Algeria, Tunisia, and Libya.¹⁷² It is the highest-ranked Sub-Saharan African country, ahead of Gabon and South Africa in the top ten.¹⁷³ However, despite its success in promoting human development, Botswana maintains a high unemployment rate of 17.8 percent, which has stalled efforts to combat income inequality and reduce poverty.¹⁷⁴

¹⁶⁴ Samatar, *supra* note 2 at 65.

¹⁶⁵ World Bank, "Botswana Overview", online: <<http://www.worldbank.org/en/country/botswana/overview>> [World Bank, "Botswana Overview"].

¹⁶⁶ Michael Lewin, "Botswana's Success: Good Governance, Good Policies, and Good Luck", online: World Bank <<http://siteresources.worldbank.org/AFRICAEXT/Resources/258643-1271798012256/Botswana-success.pdf>> at 81.

¹⁶⁷ *Ibid* at 82.

¹⁶⁸ United Nations Development Programme, *Botswana Human Development Report*, online: <<http://hdr.undp.org/en/countries/profiles/BWA>>.

¹⁶⁹ World Bank, "Botswana Overview", *supra* note 165.

¹⁷⁰ UNDP, *supra* note 168.

¹⁷¹ *Ibid*.

¹⁷² Organization for Economic Cooperation and Development, *Africa Economic Outlook 2017: Entrepreneurship and Industrialisation*, available online <https://read.oecd-ilibrary.org/development/african-economic-outlook-2017/human-development-in-africa_aeo-2017-7-en#page1> at 112.

¹⁷³ *Ibid*.

¹⁷⁴ World Bank, "Botswana Overview", *supra* note 165.

Promoting production-oriented private investment was another central element of Botswana's developmental state. The diamond industry dominated Botswana's policy in this area, with Debswana modelling the government's position. In addition to its ownership-stake in Debswana, the Botswana government has required corporations seeking mining licenses to include a provision in their application that allows the state to purchase an equity stake in the venture.¹⁷⁵ Other than Debswana, there is no indication that the Government of Botswana has purchased ownership shares in any mining company. Additionally, in sectors that were slow to attract foreign investment after independence, the state intervened and created development-oriented state-owned enterprises (SOEs) that delivered necessary services, such as electricity, telecommunications and water.¹⁷⁶

4.3.2. Botswana's mining developmental state institutions

In the years since Botswana's first independent government implemented policies to strengthen mining developmentalism, the industry has been critical to sustaining and promoting the country's economic growth. As explored in the preceding section, Botswana has facilitated its mining developmentalism through several institutions that adhere to the developmental state paradigm described in section 3.3.2. Based on the preceding analysis, it is easy to see why Botswana is often described as Africa's only developmental state. The discussion also considered how these institutions interact with the mining industry, illustrating that the developmental state paradigm could potentially function effectively within a mining-dependent country.

¹⁷⁵ Jefferis, *supra* note 60 at 80.

¹⁷⁶ Leith, *supra* note 45 at 94.

However, as will be discussed in section 4.4 below, this paradigm does not in fact account for the inequities embedded in Botswana's developmental state, notably the systemic inequalities that continue to disadvantage Indigenous peoples and local communities in the country. Additionally, the established developmental state paradigm does not consider mining-specific institutions that can operate with the mining developmental state, including those that promote local participation and content, develop cross-sectoral linkages, and broaden resource nationalism within the sector. Due to these measures, Botswana continued to avoid economic and political symptoms of the resource curse discussed in Chapter Two and also defined several of the mining developmental state institutions discussed in Chapter Three. These initiatives are discussed further in this section.

a. Enhancing local participation and content

Botswana's dependence on skilled expatriates and foreign investors early in its mining developmental state restricted economic and business opportunities for Botswanan citizens beyond low-skilled mining jobs.¹⁷⁷ Over time, as Botswana's government increased its stake in Debswana and deliberately structured mining governance to promote socioeconomic development, more opportunities were sought to enhance economic opportunities for Botswanan citizens and businesses in the mining sector. The opportunities were unmistakable: in 2010, the mining industry was responsible for up to 50 percent of imported goods into Botswana (approximately USD \$1.27 billion).¹⁷⁸ To promote this objective, Botswana's government

¹⁷⁷ Gosego Rockfall Lekgowe, "The Trajectory of Citizen Economic Empowerment in Botswana After Fifty Years: An Endless Road of Hapless Policies" (2016) 22 University of Botswana Law Journal 138 at 138.

¹⁷⁸ World Bank, "Botswana Mining Investment and Governance Review" (August 2016), online: <<http://documents.worldbank.org/curated/en/104891476786294215/Botswana-Mining-investment-and-governance-review>> at 6.

introduced local participation and local content requirements (LCRs) in three separate legal and quasi-legal sources: the *Mines and Minerals Act, 1999* (MMA);¹⁷⁹ the 2012 Citizen Economic Empowerment Policy (CEEP);¹⁸⁰ and the Economic Diversification Drive: Medium to Long-Term Strategy, 2011-2016 (EDD).¹⁸¹ The content of Botswana's local participation requirements included preferential treatment of Botswana citizens, employment and training obligations, procurement standards and accountability mechanisms.

The MMA is the only source of legislated LCRs. Article 12 of the Act outlines the obligation for mining companies to procure materials from local business, employ Botswanan citizens and train employees.¹⁸²

12. (1). The holder of a mineral concession issued under this Act, shall, in the conduct of his operations under such concession, and in the purchase, construction and installation of facilities, give preference, to the maximum extent possible consistent with safety, efficiency and economy, to—

(a) materials and products made in Botswana; and

(b) service agencies located in Botswana and owned by Botswana citizens or bodies corporate established under the Companies Act.

(2) The holder of a mineral concession shall, in all phases of his operations, give preference in employment to citizens of Botswana to the maximum extent possible consistent with safety, efficiency and economy.

(3) The holder of a mining licence shall, in his operations, conduct training programmes in consultation with the Minister for the benefit of employees so that such employees may qualify for advancement.¹⁸³

Preference to grant minerals permits to Botswanan citizens is included in Article 53(1) of the Act, although the government can waive that requirement under Article 53(2):

¹⁷⁹ *Mines and Minerals Act, 1999*, Ch. 66:1, Vol. XIV.

¹⁸⁰ Government of Botswana, *Citizen Economic Empowerment Policy* (Government Paper No. 1 of 2012), online: <https://bbbee.typepad.com/files/microsoft-word---citizen-economic-empowerment-policy---revised-on-24052012-final_.pdf> [*Citizen Economic Empowerment Policy*].

¹⁸¹ Government of Botswana, *Economic Diversification Drive: Medium to Long-Term Strategy, 2011-2016*, online: Ministry of Trade and Industry <https://unfccc.int/files/adaptation/groups_committees/adaptation_committee/application/pdf/20151002_botswana.pdf> [*"Economic Diversification Drive"*].

¹⁸² Although the use of "shall" in the statute may imply that these obligations are "soft" (see the interpretation of Columbia Center on Sustainable Investment, "Local Content - Botswana Mining", online: Columbia University <<http://ccsi.columbia.edu/files/2014/03/Local-Content-Botswana-Mining-CCSI-Sept-2016.pdf>>), Section 45 of the Botswana *Interpretation Act* states "'shall' shall be construed as imperative and 'may' as permissive and empowering" (*Interpretation Act*, Ch. 1:4, Vol. 1).

¹⁸³ *Mines and Minerals Act*, *supra* note 179 at Art. 12.

53. (1) Subject to the provisions of subsection (2), a minerals permit to exploit industrial minerals shall not be granted to a person who is not a citizen of Botswana.

(2) The Minister may exempt any person from the provisions of subsection (1) if he is satisfied that—

(a) it is in the public interest that a minerals permit to exploit industrial minerals should be granted to such person; or

(b) the permit applied for is in respect of industrial minerals required for specific works and the applicant has given an undertaking that the minerals concerned will not be sold or otherwise disposed of for profit.¹⁸⁴

Explicit accountability measures are not included in the MMA to ensure compliance; however, Article 55(2) authorizes the responsible Minister to terminate a minerals permit if the holder ceases to be a Botswanan citizen.¹⁸⁵

Developing an economy centred around Botswanan citizens was also the focus of the CEEP, which was approved by the National Assembly in July 2012.¹⁸⁶ At the time of its passage, the Minister of Finance and Development Planning explained its rationale: “rapid economic growth and diversification without citizen empowerment could ultimately lead to a more fragile and vulnerable economy, subject to the vagaries of international markets over which the country has little or no control.”¹⁸⁷ The CEEP emerged in response to contentions that Botswanans were not equitably benefiting from the economy: Botswanans were underrepresented at senior management levels in the private sector, and non-citizens had greater access to finance.¹⁸⁸ To redress Botswanans’ economic disadvantage, the CEEP encouraged local procurement, employment and training.¹⁸⁹

Like the CEEP, the EDD was a non-mining specific policy that lacked legislative force. The EDD outlined the government’s plan to encourage economic diversification from 2011–

¹⁸⁴ *Ibid* at 53(1), 53(2).

¹⁸⁵ *Ibid* at Art. 55(2).

¹⁸⁶ Lekgowe, *supra* note 177 at 146.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Citizen Economic Empowerment Policy*, *supra* note 180 at 4.

¹⁸⁹ *Ibid* at 8 and 14.

2016 in response to growing concerns with Botswana's reliance on primary products. It was developed by a Ministerial Committee constituted by the Vice President in 2010.¹⁹⁰ Employing Botswanans and procuring goods and services from Botswanan businesses were the two main LCRs promoted in the EDD, often jointly. Employment creation was a presumed outcome of local procurement in the short-term.¹⁹¹ The EDD encourages both the public and the private sector to procure goods locally in order to "[facilitate] the development of local capacity of enterprises in Botswana."¹⁹² Since 2016, the government's economic diversification strategy has been encapsulated in NDP 11. However, express promotion of LCRs was not included in NDP 11; instead, enhanced local content and participation were components of the strategy to develop more sectoral linkages.¹⁹³

b. Developing sectoral linkages

As the EDD illustrated, the Botswana government recognized there was a need to promote economic diversification away from diamonds. The recent slowdown in the global price for rough and polished stones in 2015 and 2016, which lowered Botswana's growth forecast, also magnified the need to diversify.¹⁹⁴ Lower global demand forced Debswana to cut its 2015 production target by 3 million carats, from 23 to 20 million carats.¹⁹⁵ Botswana's dwindling reserves have also exacerbated the impact of lower global diamond prices and demand. Recent modelling estimated that the decline in Botswana's diamond reserves could cut the country's

¹⁹⁰ *Economic Diversification Drive*, *supra* note 180 at 6.

¹⁹¹ *Ibid* at 36.

¹⁹² *Ibid* at 91.

¹⁹³ *NDP 11*, *supra* note 62 at 59.

¹⁹⁴ Joshua Neicho, "Shine starts to fade on Botswana's diamond dividend" (28 January 2016), online: The Guardian <<https://www.theguardian.com/global-development/2016/jan/28/botswana-diamond-mines-tourism-transport-agriculture-karowe>>.

¹⁹⁵ "Botswana's Debswana cuts diamond production due to market downturn" (11 September 2015), online: <<http://www.reuters.com/article/botswana-diamonds-idUSL5N11H16120150911>>.

GDP per capita in half by 2027 when the effects are likely to be felt.¹⁹⁶ Creating additional sectoral linkages was prioritized in both the EDD and NDP 11.¹⁹⁷ For the mining industry, this meant developing more upstream and downstream linkages within the sector while also expanding linkages to other sectors in the economy.

The creation of new upstream linkages in diamond mining has been rare due to the established nature of the industry. Most of Botswana's diamond exploration occurred in the latter half of the twentieth century, and a majority of diamond mining takes place at mines that were built in the 1970s and 1980s.¹⁹⁸ Opportunities for upstream linkages can emerge, particularly since new prospecting and mining licences continue to be issued.¹⁹⁹ However, recent data about any upstream linkages developed from these opportunities is unavailable. Additionally, government policy over the past decade—reflected in the EDD and NDP 11—has prioritized the creation of downstream linkages, particularly mineral beneficiation. Some specific diamond-related strategies were identified in NDP 11:

- “Expansion of the Diamond Beneficiation beyond cutting and polishing and introducing alternative/additional diamond supply;
- Industrial minerals beneficiation will be promoted to enhance use of locally available raw materials for construction materials and dimension stones;
- Growing and sustaining diamond cutting and polishing through the increase of rough diamond supply and the development of Botswana Diamond Exchange in order to provide a catalyst for secondary rough trading, polished trading, space to support diamond business incubation, set up SMMEs and other diamond support services;...”²⁰⁰

Two meaningful initiatives demonstrate Botswana's successful attempt at mineral beneficiation. The first was the establishment of the Diamond Technology Park located in

¹⁹⁶ Neicho, *supra* note 194; Roman Grynberg, “And we will live like Swazis” (17 November 2014), online: Sunday Standard <<http://www.sundaystandard.info/and-we-will-live-swazis>>.

¹⁹⁷ *Economic Diversification Drive*, *supra* note 181 at 18; *NDP 11*, *supra* note 62 at 59.

¹⁹⁸ Letsema Mbayi, “Linkages in Botswana's Diamond Cutting and Polishing Industry” (March 2011) MMCP Discussion Paper No. 6 at 27.

¹⁹⁹ *Ibid* at 25.

²⁰⁰ *NDP 11*, *supra* note 62 at 59.

Gaborone. The Park incubates small-scale companies (and their spinoffs) that cut, polish and sell diamonds under the banner of the government's diamond sales corporation, Okavango Diamond Company.²⁰¹ Secondly, Botswana successfully negotiated the relocation of De Beers' rough diamonds sales operations—which handled diamonds from all of De Beers' international operations—from London to Gaborone, as discussed below.²⁰² Recent statistics indicate the efforts to encourage downstream mining have been successful: more than 3,000 polishing jobs were created (up from 500 in 2006), and polished diamond exports totalled USD \$800 million in 2013, compared to USD \$100 million in 2008.²⁰³

The creation of downstream sectoral linkages between mining and other industries has also been encouraged by Botswana's government in both the EDD and NDP 11. "Cluster developments"²⁰⁴ were conceived as a means to achieve this objective. A cluster development, unique to each industry, identified "interlinked companies, suppliers and service providers linked to [that] sector."²⁰⁵ The cluster for diamond mining, briefly described in NDP 11, identified linkages to "security, banking, tourism, [and] logistics."²⁰⁶ Although it did not specifically examine the diamond cluster, a 2017 econometric study by Kegomoditsiwe Koitsiwe and Tsuyoshi Adachi concluded significant causal linkages existed outward from diamond mining to

²⁰¹ Rob Young, "Botswana: From sleepy backwater to global mining hub" (21 August 2013), online: BBC <<http://www.bbc.co.uk/news/business-23771552>>.

²⁰² "Diamond Trading Company Botswana Sales Agreement," online: DTC Botswana <<http://www.dtcbotswana.com/about-us/sales-agreement/>>.

²⁰³ Robert Weldon & Russell Shor, "Botswana's Scintillating Moment" (2014) 50: *Gems & Gemology*, online: <<http://www.gia.edu/gems-gemology/summer-2014-weldon-botswana-scintillating-moment>>.

²⁰⁴ *Economic Diversification Drive*, *supra* note 181 at 85; *NDP 11*, *supra* note 62 at 59-60.

²⁰⁵ *Economic Diversification Drive*, *supra* note 181 at 85.

²⁰⁶ *NDP 11*, *supra* note 62 at 60.

manufacturing and services,²⁰⁷ suggesting some success in the efforts to create downstream cross-sectoral linkages.

c. Broader resource nationalism

As discussed, Botswana's first instance of resource nationalism occurred shortly after independence when it inserted itself in the diamond industry by acquiring a 15 percent stake in De Beers' Botswana's operations. Shortly after that, Botswana increased its partnership to 50 percent and Debswana was born.²⁰⁸ Partnering with De Beers secured revenues for Botswana's government without requiring any capital investment from the state. De Beers was granted the licence to explore and then construct the country's first diamond mine at Orapa.²⁰⁹ The state's close relationship with De Beers further facilitated its resource nationalism, which also assisted its position when it convinced De Beers to relocate its aggregation business in 2005. The operations were eventually moved in 2013.²¹⁰

Beyond Debswana and diamonds, the state may automatically acquire a 15 percent stake in all non-diamond mining operations under Article 40(1) of the MMA.²¹¹ Government participation in diamond mines can only occur on a case-by-case basis, as mandated by *MMA* Article 51(1):

51. (1) Notwithstanding the provisions of this Part, any application for the issue, renewal, transfer or amendment of a licence to mine diamonds shall initiate a negotiating process, in good faith, between Government and the applicant covering all technical, financial and commercial aspects of the proposed project including Government participation.²¹²

²⁰⁷ Kegomoditsiwe Koitsiwe & Tsuyoshi Adachi, "Linkages between mining and non-mining sectors in Botswana" (2017) 30:2 Mineral Economics 95 at 101.

²⁰⁸ Acemoglu, Johnson & Robinson, *supra* note 3 at 17.

²⁰⁹ Jefferis, *supra* note 60 at 65.

²¹⁰ Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, "Botswana: Downstream Linkages", online: IISD <<https://www.iisd.org/sites/default/files/publications/case-study-botswana-downstream-linkages.pdf>> at 3-4.

²¹¹ *Mines and Minerals Act*, *supra* note 179.

²¹² *Ibid.*

Other than its real and potential ownership stakes, Botswana has not implemented any of the other nationalistic mining developmental institutions described in section 3.5.2, such as renegotiating contracts with foreign investors or increasing royalty rates. This inaction suggests that Botswana has been content with its De Beers partnership. Moreover, it also signifies the government's position that diversifying the economy, rather than further relying on diamond mining, is a more worthwhile development objective at the country faces a depleting supply of diamond deposits.

4.3.3. Assessing legal functionalities in Botswana's mining developmental state

The governance record of Botswana's mining developmental state highlights the opposing sides of the "good governance"—development debate. Botswana's example questions the centrality of transnational good governance norms to combatting the resource curse. If these principles are vital to combatting the resource curse, how could Botswana's less than ideal governance model—reflected in the country's lack of EITI membership and its moderate score on the RGI's transparency index—have accomplished levels of economic development not seen in other mining-dependent states? Academics have offered various explanations: Botswana's traditional institutions; the consensus-seeking approach of the immediate post-independence governments; the broad political coalitions established after independence that placated the elite; and the development of institutional knowledge that contributed to political stability.²¹³ Given the disconnect between the good governance paradigm and the factors that contributed to Botswana's mining developmental state success, it is helpful to also evaluate the institutions

²¹³ Acemoglu, Johnson & Robinson, *supra* note 3; Leith, *supra* note 45; and Martin, *supra* note 5.

using Trubek, Coutinho and Schapiro's legal functionalities framework, which encompasses: safeguarding flexibility, stimulating orchestration, framing synergy, and ensuring legitimacy.

a. Safeguarding flexibility and framing synergy

Trubek, Coutinho and Schapiro defined safeguarding flexibility and framing synergy as legal functions that “allow room for experimentation, promote facilitation ... [and] frame public-private partnerships and ensure they are more effective than purely public or private solutions.”²¹⁴ In their discussion of Brazil, flexibility and synergy in industrial policy are discussed in tandem;²¹⁵ therefore, the same discussion approach is duplicated here. For Trubek, Coutinho and Schapiro, Brazil's collaborative public-private process—which facilitated innovation and flexible legal partnerships between the state and private actors—advanced the country's development via a new role for the state.²¹⁶ Much like Brazil, Botswana's mineral governance and development policies relied on a willingness to work closely with the private sector in innovative and flexible ways. Rather than limit its role in diamond mining, the Botswana Government under President Khama's leadership sought an equity stake in De Beers' operations, thus allowing Botswana to eventually become a joint partner in diamond mining. Through the creation of legal institutions that safeguarded the state's flexibility, Botswana was not entrenched in an unfavourable legal environment that could have limited its ability to seek greater benefits from mining. Additionally, the legal framework that governed Botswana's private-public mining partnerships framed synergies that created incentives for greater foreign investment from De Beers and enhanced public-private cooperation.

²¹⁴ Trubek, Coutinho & Schapiro, *supra* note 10 at 55-56.

²¹⁵ *Ibid* at 56.

²¹⁶ *Ibid* at 57.

Botswana's early history with De Beers further illustrates the flexibility and synergy of the country's mining developmental state. Burdened with the lack of capacity to develop newly discovered diamond reserves, the Botswana government recognized the need to partner with a foreign investor to ensure it benefited from the wealth potential they presented. However, rather than limit the state's share of the wealth to royalties and corporate taxes, the government employed available legal mechanisms to create a flexible and synergistic institution that ensured long-term economic development benefits generated from Debswana income. Flexibility and synergy were also evident in Botswana's recent collaborative efforts with De Beers. The agreement entrenched the Debswana partnership in the future of diamond extraction in Botswana and also resulted in the creation of two government of Botswana institutions committed to further garnering economic benefits in the country: the Diamond Trading Company Botswana, and the Okavango Diamond Company.²¹⁷

Additionally, the EDD and NDP 11—Botswana's main institutional mechanisms to promote local content and develop sectoral linkages in recent years—also illustrate the flexibility and synergy of contemporary mining governance and development policies. Both were drafted with pressing economic development concerns. Neither are permanent, which also allows the state to evaluate development progress and reassess needs moving forward. Moreover, the EDD and NDP prioritized enhanced opportunities for the private sector without compromising state action and limiting Botswana's potential to restructure its mining governance, or to formulate new mining developmental state institutions, to further support its socioeconomic development agenda.

²¹⁷ Diamond Trading Company Botswana, *supra* note 202.

b. Stimulating orchestration

Stimulating orchestration refers to “using law to structure state activities for effective new-style industrial and social policy” through horizontal and vertical coordination both within state infrastructure and externally.²¹⁸ Visionary leadership was decisive to the creation of state institutions capable of stimulating orchestration. Botswana’s development planning was conducted at the highest levels in the Vice-President’s office, where the Ministry of Finance and Development Planning was housed.²¹⁹ Masire’s leadership role in Khama’s government as Vice-President, and later as his successor, was key to establishing the NDPs development and implementation process.²²⁰

Botswana’s development and mining governance orchestration and coordination can be evaluated horizontally across different state institutions and vertically between the national government and specific elements in society who were partners in the country’s development. The country’s early efforts to promote consensus-building and broad-based institutional participation within government helped stimulate orchestration across departments. Since Botswana’s development project was state-centric and relied heavily on the participation of various state actors, institutional acceptance of the government’s agenda across all ministries was crucial to ensuring its effectiveness. This allowed for better coordination in the planning of development objectives, particularly the NDPs.²²¹ The preparatory process for the NDPs typically extended over multiple years and included consultations at sub-national governments at the regional and local levels, as well as municipal authorities.²²² Once broad-based compliance

²¹⁸ Trubek, Coutinho & Schapiro, *supra* note 10 at 55.

²¹⁹ Taylor, “Politics of Legitimacy”, *supra* note 43 at 53.

²²⁰ Leith, *supra* note 45 at 121.

²²¹ Adamolekun & Morgan, *supra* note 19 at 598.

²²² *Ibid.*

was achieved across government, specific coordination with private sector actors was required to ensure development-facilitating policies and legislation were effectively implemented.

Horizontal coordination across Botswana's state institutions was also evident in the government's efforts to ensure widespread support and agreement with a policy during its development process, and subsequently during the implementation phase. The practice of reaching widespread agreement across the national government is a continuation of Botswana's pre-colonial and colonial political decision-making processes. It encompasses Botswana's traditional institutions, the consensus-seeking approach to policy formulation, and the creation of broad political coalitions established after independence that placated the elite.²²³

Vertical orchestration and coordination were visible through private sector participation in the formulation and implementation of development policies. One such example is the High Level Consultative Council. Chaired by the President, the Committee includes top ministry officials and members of the private sector who meet twice a year to consult on industrial and economic development policies.²²⁴ In addition to private sector coordination achieved through consultation, the state's negotiated agreements with various businesses, particularly mineral extraction corporations, produce further acceptance of the state's development-facilitating agenda.²²⁵

c. Ensuring legitimacy

Trubek, Coutinho and Schapiro's final legal functionality, ensuring legitimacy, encompasses opportunities for "new ideas to percolate upward and be widely shared"²²⁶ through

²²³ Acemoglu, Johnson & Robinson *supra* note 3; Leith, *supra* note 45; and Martin, *supra* note 5.

²²⁴ Taylor, "Politics of Legitimacy", *supra* note 43 at 50.

²²⁵ Jefferis, *supra* note 60 at 83.

²²⁶ Trubek, Coutinho & Schapiro, *supra* note 10 at 56.

democratic and participatory processes. The degree of participation or the type of democratic institutions is not specified beyond “accountability, transparency, and participation in development policies.”²²⁷ Since the type of accountability and participation described in their Brazil project is less comprehensive than what was proposed in the rights-based approach to mining governance described in Chapter Three, the analysis in this section considers any opposition to state-led development projects and challenges to the governance framework through state capture. This includes coups d’état, and violent civil strife and conflict.

Despite of its thin democratic institutions, the Botswana mining developmental state enjoyed legitimacy through decades-long public support of its initiatives and policies. The civil wars and political instability common to other parts of Africa never occurred in Botswana. Its peace and minimal political dissent indicate reasonably broad public support and endorsement of the state’s economic and development planning.²²⁸ The government’s legitimacy was also secured through continued support for the BDP that was buttressed by the state’s mineral-fueled growth. Relying more extensively on mineral revenues limited the Government’s reliance on taxes generated from the middle and lower classes, which yielded more socioeconomic benefits for these groups, and protected them from state exploitation.²²⁹ However, of the four legal functionalities outlined by Trubek, Coutinho and Schapiro, Botswana’s institutions have not ensured legitimacy beyond basic citizen and private sector support for the state’s ongoing development agenda.

²²⁷ *Ibid.*

²²⁸ Meyns & Musamba, *supra* note 100 at 25.

²²⁹ Samatar, *supra* note 2 at 74.

Botswana's mining developmental state institutions have demonstrated legal functionalities that have enhanced the state's interventions in mining and has facilitated its economic development agenda. However, this analysis does not fully account for the rights-based approach to governance, which is critical to ensuring the pursuit of development in its holistic sense. Section 4.4, below, evaluates Botswana's performance against the rights-based model described in Chapter Three.

4.4. Diamonds for development? The absence of a rights-based approach to mining governance and its implications

There is no doubt that Botswana has achieved remarkable economic and developmental success. It has done so despite its vast mineral wealth via a combination of mining developmental state institutions that did not fit the "good governance" mold. Nonetheless, Botswana is far from an equitable society: mineral wealth continues to be unevenly distributed, with the country's Indigenous peoples bearing the brunt of this inequality. The adoption and implementation of a rights-based approach to mining governance described in Chapter Three is urgently needed if Botswana's diamonds will indeed promote development. The mistreatment of the Indigenous Basarwa peoples since independence illustrates this imperative.

As discussed in section 4.2, vesting mineral rights in the state at independence was a deliberate attempt to evade conflict and ensure the state-controlled access to the resources that ultimately drove Botswana's development. While this measure proved beneficial for the state, it denied Indigenous peoples rights to mineral resources in their communities. Doubly affecting the Basarwa was the denial of their right to land ownership through their exclusion from both the

Tribal Territories Act and the *Tribal Land Act*.²³⁰ The Basarwa were not consulted, nor did they have any recourse to challenge these discriminatory decisions. In fact, the Basarwa deny that they relinquished their mineral rights because they did not sign the *Mineral Rights in Tribal Territories Act*²³¹ like the dominant Tswana tribes.²³² Without access to land or resources, the Basarwa were immediately entrenched in an economically disadvantaged position at independence.

The Basarwa continued to inhabit the Central Kalahari Game Reserve (CKGR) after independence. Although they have lived in that region as nomadic hunter-gatherers for thousands of years, the Basarwa's home in the CKGR was officially recognized by the British colonial government in 1961 and respected by the post-colonial government.²³³ The state's tone began to change in the mid-1990s when it sought to relocate the Basarwa from the CKGR.²³⁴ While some Basarwa voluntarily relocated, many refused. The consultation process was also deemed "inadequate" by the United Nations Special Rapporteur on the rights of Indigenous peoples, who also expressed concerns with whether consent to relocate was freely given.²³⁵

After asserting that relocation was necessary to preserve wildlife in the CKGR, the government changed its position and claimed relocation was for the Basarwa's benefit: it was only through relocation that the community could gain access to clean water and fully benefit from Botswana's socioeconomic development.²³⁶ However, relocation was undertaken without

²³⁰ Anaya, *supra* note 96 at para 40.

²³¹ *Mineral Rights in Tribal Territories Act*, 1967, Ch. 66:02, Act 31.

²³² Marobela, *supra* note 93 at 145.

²³³ *Ibid* at 140.

²³⁴ Kenneth Good, *Diamonds, Dispossession and Democracy in Botswana* (Woodbridge, UK: James Currey, 2008) at 125.

²³⁵ Anaya, *supra* note 96 at paras 66-67.

²³⁶ Taylor & Mokhawa, *supra* note 11 at 277.

first attempting to expand service provision within the CKGR. In fact, many observers believed relocating the Basarwa outside the CKGR was part of an effort to exploit diamond deposits discovered near their settlements.²³⁷ After denying claims that Basarwa relocation was motivated by diamond mining for more than a decade,²³⁸ Botswana's government granted a licence to Gem Diamonds to construct the Ghaghoo Diamond Mine (previously known as the Gope Mine) in the CKGR in January 2011.²³⁹

While the lack of consultation with the Basarwa is the most egregious example of the absence of a rights-based approach to mining governance in Botswana, it is important to note that any meaningful consultation with communities affected by mining development is lacking in the current mining governance regime. Currently, only Article 11 of the *Environmental Assessment Act*²⁴⁰ permits public consultation at the states's discretion:

11. (1) The [Department of Environmental Affairs] may hold a public hearing if —
 - (a) after examining the statement, the [Department] is of the opinion that the activity is of such a nature that the public should have the opportunity to make submissions or comments at a public hearing; or
 - (b) the public concern over the activity is that the activity may have a significant adverse impact on the environment.

Consultations that have occurred were criticized by local communities for not being sufficiently inclusive of traditional institutions (namely in the case of the Basarwa) or only being procedural and not substantive considerations of a community's concerns.²⁴¹

Obstructing Botswana's adoption and implementation of a rights-based approach to mining governance is the absence of a clear source for the human rights that need protection.

²³⁷ *Ibid* at 278.

²³⁸ Survival International, "Botswana government lies exposed as diamond mine opens in Bushman land" (September 4, 2014), online: <<https://www.survivalinternational.org/news/10410>>.

²³⁹ Gem Diamonds, "Operations overview", online: <<https://www.gemdiamonds.com/operations.php>>.

²⁴⁰ *Environmental Assessment Act, 2011*, Ch. 65:07, No. 10.

²⁴¹ Anaya, *supra* note 96 at para 53.

Socioeconomic rights in Botswana are not enshrined in the Constitution.²⁴² Additionally, despite being a party to the African Charter on Human and Peoples' Rights²⁴³ and having voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),²⁴⁴ the rights protected in these international legal mechanisms must first be incorporated into Botswanan domestic law because it is a dualist state that does not automatically adopt international law into its domestic legal order.²⁴⁵ The absence of clear legal sources for implementing a rights-based approach to mining governance remains a major hindrance to Botswana's developmental agenda.

4.5. Conclusion

Botswana's developmental state makes it a governance leader among mining-dependent African states. Since independence, Botswana has consistently formulated and implemented legal institutions that utilized the country's strength—namely diamonds—to facilitate its developmental agenda. Through the use of flexible and synergistic partnerships and state coordination and orchestration, Botswana elevated its economy from one of the poorest in the world in 1966 to a middle-income country today with a growth record that rivals some of the world's leading economies. By successfully avoiding the resource curse without implementing

²⁴² Bonolo Ramadi Dinokopila, "The Justiciability of Socioeconomic Rights in Botswana" (2013) 57:1 J Afr L 108 at 109.

²⁴³ *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), entered into force 21 October 1986.

²⁴⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, A/RES/61/295 (2 October 2007).

²⁴⁵ Dinokopila, *supra* note 242 at 111. The AfCHPR and UNDRIP are the only potential sources for the rights proposed in the rights-based approach to mining governance. Botswana did not sign any other international human rights treaties that support the right to development or the participation and consultation of Indigenous peoples and local communities in development projects. However, there is ongoing debate about the status of UNDRIP under international law, particularly whether it has become customary international law. UNDRIP's status is beyond the scope of this dissertation and will not be discussed here. However, it was acknowledged in Chapter Two that free, prior and informed consent, which UNDRIP protects, is the international standard for participation and consultation of Indigenous and local communities in extractive projects. As a state that voted in favour of the United Nations General Assembly Resolution that passed UNDRIP, it can be argued that Botswana has, at the very least, recognized the importance of the rights enshrined in it.

“good governance” institutions, Botswana was regarded as the “African miracle” amongst its continental counterparts. It is the one African country that comes closest to mirroring the East Asian developmental state paradigm described in Chapter Three, while the legal functionalities of its mining developmental state institutions can be explained using Trubek, Coutinho and Schapiro’s framework. What Botswana’s conformity with these paradigms means for deepening understanding of the mining developmental state, particularly in Africa, is explored further in Chapter Seven.

Often ignored in Botswana’s success story, however, was the price that came with its growth and socioeconomic development. Inequality remains high, which further exacerbates the wealth gaps generated by diamond mining. Moreover, the mistreatment of the Basarwa people illustrates how the absence of a rights-based approach to mining governance—one that embraces participation and consultation—problematizes Botswana’s mining developmental state and its title as the African success story.

5 Mining Governance in South Africa: For Whose Development?

5.1. Introduction

Mining has been integral to South Africa's economic development since diamonds and gold were discovered, respectively, at Kimberley in 1867 and the Witwatersrand in 1885.¹ Before the end of the nineteenth century, mining was formational to the creation of new wealth and the consolidation of British and Dutch colonies into what became modern South Africa. The diamond mines at Kimberley, in particular, fortified British wealth in the region and gave rise to elite classes of wealthy businessmen, including Cecil Rhodes, and a burgeoning middle class of European expatriates.² As mining became further entrenched in South Africa's economy, it also became constitutive of the evolving racial hierarchy that engendered apartheid³ and laid the foundation for Black⁴ social, political and economic disempowerment. Over nearly five decades of white-minority rule, mining remained integral to South Africa's economy and generated levels of growth and socioeconomic development that further buttressed racial inequities in the country.⁵

¹ Bill Freund, *Twentieth-Century South Africa: A Developmental History* (Cambridge: Cambridge University Press, 2019) at 23 [Freund, *20th Century*]. Kimberley is in modern day Northern Cape Province, located in central South Africa. At the time diamonds were discovered there, Kimberley was claimed by the British as part of its Cape Colony. The Witwatersrand gold discovery occurred near present-day Johannesburg.

² Nicoli Nattrass & Jeremy Seekings, "The economy and poverty in the twentieth century" in Robert Ross, Anne Kelk Mager & Bill Nasson, eds, *The Cambridge History of South Africa, Volume 2: 1885–1994* (New York: Cambridge University Press, 2011) 518 at 518 [Nattrass & Seekings, "Economy and poverty"].

³ "Apartheid" was a system of institutionalized racism and segregation that existed in South Africa from 1948 to the early 1990s. It came into being after the election of the National Party in 1948. Further details about this regime and its impact on mining governance and South Africa's socioeconomic development are discussed in section 5.2.1.

⁴ Racial classification has had a troubled history in South Africa tracing back to colonization. In 1950, the apartheid government introduced a racial classification statute (the Population Registration Act No. 30) that divided South Africa into three main racial groups: Whites; Natives (Blacks); and Indians and Coloured people (those of mixed race). Today, the South African government continues to group the population in similar racial categories: Blacks; Whites; Coloured; and Asian (Deborah Posel, "Race as Common Sense: Racial Classification in Twentieth-Century South Africa" (2001) 44:2 *African Studies Review* 87). While South Africa's Asian and Coloured populations also suffered under apartheid, the country's Black population will be the focus of analysis due to post-apartheid efforts by the state to redress the disproportionate social, political and economic hardships experienced by this group.

⁵ Deborah Posel, "The apartheid project, 1948–1970" in Robert Ross, Anne Kelk Mager & Bill Nasson, eds, *The Cambridge History of South Africa, Volume 2: 1885–1994* (New York: Cambridge University Press, 2011) 319 at 319–320 [Posel, "Apartheid project"].

Reversing the deleterious effects of racist governance has been central to the political and developmental agenda of the ruling African National Congress (ANC) since it came to power in South Africa's first democratic elections in 1994.⁶ The first ANC government under President Nelson Mandela implemented several policies aimed at promoting Black economic empowerment generally, including the Reconstruction and Development Programme (RDP) and the Growth, Employment and Redistribution Strategy (GEAR).⁷ Correcting injustices in mining governance has also been a core part of the ANC's efforts to redress Black South Africans' historical socioeconomic disadvantage. The recently concluded Mining Charter is one measure being implemented to create more employment and ownership opportunities for Black South Africans in the mining sector.⁸ However, critics have argued that the ANC's strategy has done little to improve the economic circumstances of a broader segment of the Black population. Instead, the ANC maintained neoliberal policies that disproportionately benefitted a small elite class in the name of Black economic empowerment.⁹

As mining remains one of South Africa's wealthiest industries, it offers many opportunities to promote meaningful socioeconomic development if a rights-based approach to mining governance is adopted. South Africa continues to be a world leader in the production of precious metals (including platinum group metals),¹⁰ manganese, chrome, iron ore, diamonds

⁶ Yong-Shik Lee, *Law and Development: Theory and Practice* (New York: Routledge, 2019) at 88.

⁷ *Ibid.*

⁸ Andrew Bowman, "Black economic empowerment policy and state-business relations in South Africa: the case of mining" (2019) *Review of African Political Economy* 1 at 2.

⁹ Gavin Capps, "A bourgeois reform with social justice? The contradictions of the Minerals Development Bill and black economic empowerment in the South African platinum mining industry" (2012) 39:132 *Review of African Political Economy* 315 at 320 [Capps, "Bourgeois"]; Paul Sorenson, "Mining in South Africa: a Mature Industry?" (2011) 68:5 *International Journal of Environmental Studies* 625 at 643; Patrick Bond, "South Africa's Resource Curses and Growing Social Resistance" (2014) 65:11 *Monthly Review* 1 at 12.

¹⁰ "Platinum group metals" are six metals—iridium, osmium, palladium, platinum, rhodium and ruthenium—that are chemically and physically similar. They naturally occur together and can be found in the same ore deposits (United States Geological Survey, "Platinum-Group Metals Statistics and Information", online: USGS <<https://www.usgs.gov/centers/nmic/platinum-group-metals-statistics-and-information>>.)

and gold.¹¹ The most recent estimate for the value of the country's mineral reserves is USD \$2.5 trillion, making South Africa the world's richest country in terms of mineral wealth, ahead of Russia and Australia.¹² Although the industry contributed only 7.3 percent to South Africa's Gross Domestic Product (GDP) in 2018 (an estimated increase of 1.5 percent from 2017), it accounted for nearly a quarter of the country's exports.¹³ The value of the industry to South Africa's economy is undeniable; however, significant reform is needed for the population to equitably benefit from the nation's vast mineral wealth. This raises the pivotal question central to South Africa's current mining governance reforms: whose development agenda does it advance?¹⁴

To consider this question, this chapter limits its analysis of South Africa's mining developmental state (MDS) to its post-apartheid iteration. Some scholars—notably Bill Freund, a leading development studies professor in South Africa—have argued that the apartheid government's industrialization strategy was comparable to the developmental states of East Asia, and have thus characterized apartheid South Africa as a developmental state.¹⁵ Although apartheid South Africa's state apparatus was similar to the East Asian developmental state model, this contention further illustrates the paradigm's inability to interrogate structures that could promote economic growth and other positive indicators of economic development while also entrenching inequality and wealth disparities amongst the population. However, given the

¹¹ Sorenson, *supra* note 9 at 629.

¹² Paul Jourdan, "The optimization of the developmental impact of South Africa's mineral assets for building a democratic developmental state" (2014) 26 *Mineral Economics* 107 at 112.

¹³ Minerals Council of South Africa, "Facts and Figures", online: Minerals Council of South Africa <<https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures>>.

¹⁴ Adapted from Bonnie Campbell et al, eds, *Regulating Mining in Africa: For whose benefit?* (Uppsala: Nordiska Afrikainstitutet, 2004).

¹⁵ See Freund, *20th Century*, *supra* note 1.

inequitable distribution of wealth and the deliberate (and often violent) suppression of South Africa's non-white populations, any apartheid-era developmental state will not be considered in this chapter.¹⁶ Instead, efforts by South Africa's post-apartheid government to dismantle that racist state apparatus and create a new, redistributive developmental state will be examined. Section 5.2 provides historical context to South Africa's mining industry and the country's transition from disparate to redistributive developmentalism. South Africa's post-apartheid developmental state is described and analyzed in section 5.3, which also provides an assessment of the country's general developmental state structure and its mining developmental state institutions (MDSIs) and their functionalities. This chapter argues that despite best efforts, the mining developmental state has not been fully implemented in South Africa due to various endogenous and exogenous factors. Section 5.4 examines how South Africa's potential mining developmental state could become more than an economic engine for growth and could effectively promote socioeconomic development through the implementation of a rights-based approach to mining governance that fully adopts principles of participation and consultation. Section 5.5 concludes the chapter.

5.2. Mining and disparate developmentalism in South Africa

South Africa's history over the last 150 years has been deeply marked by racial division and inequality. Much has been written about apartheid: its emergence, the decades of oppression and violence, and its eventual demise.¹⁷ Many books have also chronicled the resistance and

¹⁶ For further discussion of this topic, see section 5.3.

¹⁷ See, for example, David M Gordon, *Apartheid in South Africa: a brief history with documents* (Boston: Bedford/St. Martin's, 2017); Lindsay Michie Eades, *The end of apartheid in South Africa* (Westport, Conn: Greenwood, Press, 1999); Saul Dubow, *Racial segregation and the origins of apartheid in South Africa, 1919-1936* (New York: St. Martin's Press, 1989); Nancy L Clark & William H Worger, *South Africa: the rise and fall of apartheid*, 3rd ed (London: Routledge, 2016).

fight for human rights during a time of gross injustice.¹⁸ Discussion of this complex history in this chapter is limited to the effects of institutionalized racism on mining governance and the implementation of socioeconomic development policies up until the end of apartheid in the early 1990s (section 5.2.1). The focus then shifts to an examination of the ANC's efforts to reverse this legacy (section 5.2.2) and a critical analysis of the challenges it presented (section 5.2.3).

5.2.1. Racial inequality and mining: from conquest to the end of apartheid

South Africa's Cape region was a strategic commercial route that connected Europe to Asia and drew European traders to the area centuries before formal colonization was established. In 1652, the Dutch East India Company took possession of the area (known as Cape Colony) that eventually became modern Cape Town. Over the next 150 years, the Dutch encroached further inland and took control over most of the southwestern tip of the region.¹⁹ The eventual arrival and conquest by British settlers in the Western Cape pushed the Dutch inland during the mid-nineteenth century and led to the creation of two independent, self-governed Boer²⁰ Republics: the Transvaal and Orange Free States.²¹ The discovery of diamonds and gold in the second half of the nineteenth century complicated peaceful relations between the British and Boers in the area. By the end of the century, the rival colonists were at war in what was a formative battle for economic control in the region and pivotal to the creation of modern South Africa.²²

¹⁸ Nelson Mandela's *Long Walk to Freedom: the autobiography of Nelson Mandela* (Boston: Little Brown, 1994) is perhaps the most well-known account of resistance over the horrors of apartheid.

¹⁹ Freund, *20th Century*, *supra* note 1 at 20.

²⁰ "Boer(s)" refers to the Dutch and German settlers in South Africa who descended from the original group that settled in the Cape Colony and then relocated to the Transvaal and Orange Free States. Their descendants are commonly referred to as Afrikaners (Encyclopaedia Britannica, "Boer: People", online: Encyclopaedia Britannica <<https://www.britannica.com/topic/Boer-people>>).

²¹ Freund, *20th Century*, *supra* note 1 at 21.

²² Shula Marks, "War and Union, 1899-1910" in Robert Ross, Anne Kelk Mager & Bill Nasson, eds, *The Cambridge History of South Africa, Volume 2: 1885-1994* (New York: Cambridge University Press, 2011) 157 at 157.

After three years of fierce fighting that also affected the African population, the war came to an end with the Boer Republic's collapse and ceding of control to the British.²³ Over the remainder of that decade, the British colonial authorities consolidated political and economic power, which proved advantageous to corporate mining interests that began monopolizing control over the industry in the decades since minerals were discovered.²⁴ In November 1910, the Union of South Africa came into being and fortified Britain's empire in Southern Africa.²⁵ At the time of Union, South Africa produced a third of the world's total gold output; two decades later, South Africa's share of global gold production rose to more than 50 percent.²⁶ In the wake of the war, Britain's expansive colonial reach in the region provided the labour and physical resources to support the growth of South Africa's mining industry. Disaffected European migrant labour was replaced with lower-paid workers from other British colonies, including Bechuanaland (colonial Botswana), Nyasaland (present-day Malawi), and Northern and Southern Rhodesia (colonial Zambia and Zimbabwe, respectively).²⁷ Over the next 30 years, mining displaced agriculture as the most important industry to South Africa's economy. Even during the Great Depression, South African mining, particularly gold, lessened the impact of the global economic crisis.²⁸

A combination of labour and land measures contributed to the entrenchment of Black economic disempowerment in the early part of the twentieth century. White labourers were

²³ *Ibid* at 164.

²⁴ *Ibid* at 167.

²⁵ Bill Freund, "South Africa: The Union Years, 1910–1948 — Political and Economic Foundations" in Robert Ross, Anne Kelk Mager & Bill Nasson, eds, *The Cambridge History of South Africa, Volume 2: 1885-1994* (New York: Cambridge University Press, 2011) 211 at 211 [Freund, "Union Years"].

²⁶ Natrass & Seekings, "Economy and poverty," *supra* note 2 at 521.

²⁷ Marks, *supra* note 22 at 168.

²⁸ Freund, "Union Years," *supra* note 25 at 219.

increasingly used to fill managerial and supervisory roles as the underground mining positions became restricted to African labour.²⁹ Cheaper African labour increased profitability, which compounded mine owners' desire to hire more Black workers such that the ratio of Black to white workers stood at 10:1 in the 1920s.³⁰ The wage gap also reflected inequities in mining: a Black labourer earned ten times less than a white employee for much of the first half of the twentieth century.³¹

African economic subjugation was further exacerbated through the passage of the discriminatory *Natives Land Act* of 1913.³² As one of the first segregationist statutes, the Act restricted Black land ownership to 7 percent of arable land while also prohibiting the sale of land between Blacks and whites.³³ The legislation also created "homelands"³⁴ where the Black population was forced to live unless they provided proof that they were employed elsewhere. Blacks were also prohibited from sharecropping on white farms.³⁵ These measures, which were supported by the mining industry, forced many young Black South Africans to work in low-paying mining jobs. Without the ability to own or farm land, the majority of the Black working class lived outside of homelands by 1936, earning a living in the mines or the service industry.³⁶

²⁹ *Ibid* at 225.

³⁰ *Ibid*.

³¹ *Ibid* at 226.

³² Posel, "Apartheid project," *supra* note 5 at 338.

³³ EM Letsoalo & MJJ Thupana, "The repeal of the land acts: the challenge of land reform policies in South Africa" (2013) 39:2 *Social Dynamics* 298 at 299.

³⁴ "Homelands," which were also called "Bantustans" during apartheid, were an administrative tool designed to segregate the Black population physically while also forcing them to become migrant labourers by prohibiting sustainable economic opportunities in those areas. Ten homelands were created: Bophuthatswana, Ciskei, Gazankulu, KaNgwane, KwaNdebele, KwaZulu, Lebowa, QwaQwa, Transkei and Venda. Blacks were expected to self-govern in these territories, thus completely denying them any relationship with the South African state (Laura Evans, "South Africa's Bantustans and the Dynamics of 'Decolonisation': Reflections on Writing Histories of the Homelands" (2012) 64:1 *South African Historical Journal* 117 at 119).

³⁵ Freund, "Union Years," *supra* note 25 at 220.

³⁶ *Ibid* at 221.

High rates of Black relocation to urban areas led the Union government to enforce segregation in new ways. In the decades leading up to the election of the National Party in 1948, which began the transition to apartheid, a series of segregationist bills were passed that included many similar elements designed to further restrict rural Black land ownership, suppress Black suffrage, control Black movement and employment in white areas, and similarly apply these measures to the Asian and Coloured populations.³⁷ When the National Party came to power in 1948, several components of the apartheid system were already in place. Many of these segregationist policies continued under apartheid, as did measures designed to maintain Black migrant labour needed to serve wealthy white employers.³⁸ One new facet of apartheid economic deprivation was the “job reservation” policy introduced in the 1950s.³⁹ Under this measure, specific jobs were designated for whites, which bolstered white working-class interests in the governing party. By the end of that decade, all Black, Asian and Coloured workers were banned from skilled work and were barred from serving in positions of authority over white employees.⁴⁰

South Africa’s mineral property system also reformed during apartheid to further eliminate any prospect of Black economic development. Some of the country’s largest PGM reserves were contained in two homelands: Bophuthatswana and Lebowa, located in the northeastern part of the country.⁴¹ To dispossess the Black population of ownership, a system of mineral property rights was put in place that relied on three key legal distinctions: mineral rights

³⁷ *Ibid* at 235.

³⁸ Posel, “Apartheid project,” *supra* note 5 at 339.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ Gavin Capps, “Victim of its own success? The platinum mining industry and the apartheid mineral property system in South Africa's political transition” (2012) 39:131 *Review of African Political Economy* 63 at 69 [Capps, “Victim”].

versus surface rights, private versus public ownership, and white versus Black.⁴² The legal distinction between mineral and surface rights emerged in South Africa as a result of different legislative and administrative reforms to the application of the common law principle that the surface land owner also owned the minerals underneath it.⁴³ Over time, conflicting interests between the state and industry produced a mineral rights regime that varied across the country. Mineral property rights eventually became a tradable title that comprised the rights to “possess, sell, use and lease specified mineral[s].”⁴⁴

The distinction between private and public ownership evolved alongside the mineral rights regime. Private ownership of minerals was recognized during colonization. After the Union came into being, the state gained ownership of more land and the minerals below it while continuing to recognize private mineral rights.⁴⁵ Thus, a dual system of public and private mineral rights ownership existed throughout the apartheid era that provided revenue to the state through direct rights ownership and royalty and tax payments from private exploitation of minerals.⁴⁶

The final legal distinction between whites and Blacks overlapped the other two. Blacks were prohibited from owning private mineral rights, which were under the exclusive domain of whites. Whites, whether they were minerals owners or surface owners and tenants, were extended additional benefits designed to encourage prospecting and mining. White surface owners were granted first rights to explore on their land and were guaranteed at least a 32 percent share of any mines that were subsequently built on it. White mineral owners were

⁴² *Ibid* at 69–70.

⁴³ *Ibid* at 69.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ *Ibid*.

guaranteed leases that provided a 25 percent stake in the profits or royalties paid to the state from mining the minerals under their control.⁴⁷ Unlike whites, mineral rights in Black homelands were held collectively in trust by the state, which denied them any access to the benefits commodified mineral rights offered.⁴⁸

Apartheid in South Africa was not only designed to suppress the country's non-white population; it was also deliberate in its efforts to create a prosperous white South Africa. Over the first 30 years of apartheid, South Africa's economy grew at an average annual rate of around five percent.⁴⁹ The government's economic policies during this period have often been compared to those of the East Asian developmental states: interventionist (particularly in agriculture and to a lesser extent in mining), guided by an independent bureaucracy that sought to coordinate the production and fiscal performance of the elite business class.⁵⁰ This position restricts evaluations of the developmental state to an economic assessment of institutions that disregards its effects on the unequal distribution of resources.⁵¹

State economic intervention in South Africa's economy continued until the end of apartheid in the early 1990s. Notably, during negotiations to transition to democratic rule, the

⁴⁷ *Ibid* at 70.

⁴⁸ *Ibid*.

⁴⁹ Terence Moll, "Did the Apartheid Economy 'Fail'?" (1991) 17:2 *Journal of Southern African Studies* 271 at 275. In this article, Moll contends there is consensus on the apartheid economy's success, although it is attributed to different causes: state policies that supported white entrepreneurship and sound economic interventions versus a deliberate system of social control (at 272).

⁵⁰ Freund, *20th Century*, *supra* note 1 at 68 and 71.

⁵¹ Although this section does not discuss the anti-apartheid movement, South Africans began the struggle against oppression long before apartheid was introduced in 1948. In 1912, the predecessor to the ANC was formed. The South African Native National Congress (SANNC) sought to unite Africans against oppression and in the pursuit of socioeconomic and political advancement (William Beinart & Peter Delius, "The Historical Context and Legacy of the Natives Land Act of 1913" (2014) 40:4 *Journal of Southern African Studies* 667 at 671). In 1923, the SANNC was transformed into the ANC, and by the 1940s the organization was leading the opposition against segregation and disempowerment. Amongst one of its defining acts was the conclusion of the 1955 Freedom Charter, which outlined the ANC's platform for a free and democratic South Africa (Sibonginkosi Mazibuko, "The Freedom Charter: the contested South African land issue" (2017) 38:2 *Third World Quarterly* 436 at 437).

National Party attempted to protect white industrial interests against what was perceived as a radical ANC agenda that was first articulated in its Freedom Charter.⁵² Passed at an ANC meeting in 1955, the Charter outlined the organization's position on mineral wealth and land distribution. These declarations became formative to the ANC's post-apartheid developmental agenda:

The People Shall Share in the Country's Wealth!

The national wealth of our country, the heritage of South Africans, shall be restored to the people;

The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole;

All other industry and trade shall be controlled to assist the wellbeing of the people;

All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions.

The Land Shall Be Shared among Those Who Work It!

Restrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger;

...

All shall have the right to occupy land wherever they choose.⁵³

Due to the fear generated by the Charter, the outgoing National Party negotiated the inclusion of protected property rights in the Constitution⁵⁴ and attempted to convince the ANC to privatize mineral rights ownership.⁵⁵ The new government disagreed and instead opted to nationalize all mineral rights (but did not go as far as nationalizing the industry, which differed from the position articulated in the Freedom Charter).⁵⁶ This measure and others comprising the ANC's post-apartheid development agenda are described in the next section.

⁵² Capps, "Victim", *supra* note 41 at 73.

⁵³ *Freedom Charter of South Africa* (adopted at the Congress of the People at Kliptown, Johannesburg, June 25–26, 1955), online: University of the Witwatersrand <http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf>.

⁵⁴ Capps, "Victim", *supra* note 41 at 73. See s. 25(1) of the *Constitution of the Republic of South Africa, 1996* [Constitution].

⁵⁵ Capps, "Victim", *supra* note 41 at 74.

⁵⁶ Paula Butler, *Colonial extractions: race and Canadian mining in contemporary Africa* (Toronto: University of Toronto Press, 2015) at 256. See s. 3(1), *Mineral and Petroleum Resources Development Act, 2002* [MPRDA].

5.2.2. Reorienting development in the new South Africa: 1994 to the present

A new era for South African politics and development began with the end of apartheid and the country's first democratic election in 1994. Under the leadership of the country's first Black president, Nelson Mandela, the ANC vowed to address social inequality and lift Black South Africans out of poverty.⁵⁷ Despite its good intentions, the ANC has struggled to fulfill this commitment: severe economic disparities remain as the bulk of South Africa's wealth continues to be held by white South Africans and a small group of non-white elites.⁵⁸ Effectively executing its development agenda—including governing the mining sector's role within it—has proved challenging for the ANC as it attempted to satisfy competing political and economic interests. On one side, industry and foreign investors opposed any potential government intervention in the economy and sought to maintain apartheid-era economic policies. On the other, Black activists (including many within the ANC) advocated for the full implementation of the ANC's 1955 Freedom Charter.⁵⁹ Key components of the ANC's development agenda over the past 25 years—from the Constitution to the 2018 Mining Charter—are described in this section. Obstacles to its full implementation are also discussed.

The 1996 Constitution⁶⁰ formed the cornerstone of the “new South Africa.”⁶¹ Comprised of 243 provisions in 14 chapters, it is one of the most progressive and advanced constitutions promoting both socioeconomic rights and civil and political rights.⁶² South Africa's constitution has received international acclaim from several jurists, including Justice Ruth Bader Ginsburg of

⁵⁷ William Beinart, *Twentieth-Century South Africa* (Oxford: Oxford University Press, 2001) at 289.

⁵⁸ Bond, *supra* note 9 at 10, 12.

⁵⁹ Butler, *supra* note 56 at 253–254

⁶⁰ Constitution, *supra* note 54.

⁶¹ TK Poee, “Law and Economic Development in South Africa: An Assessment through the General Theory of Law and Development” (2019) 12:2 Law and Development Review 377 at 378.

⁶² Lee, *supra* note 6 at 97.

the United States Supreme Court, who praised it as the model for new constitutions to follow.⁶³ Much like Canada's *Charter of Rights and Freedoms*,⁶⁴ South Africa's new Bill of Rights⁶⁵ established a liberal human rights framework in the country that set it apart from other democracies, particularly in the developing world. The Bill of Rights clearly articulated the vision for an equitable South Africa built on the principles of "dignity, equality and freedom"⁶⁶ for all South Africans, regardless of race. Unique among progressive constitutions was the inclusion of distinct environmental and property rights that sought to balance individual and collective interests, while also redressing past economic injustices:

- 24. Everyone has the right—
 - (a) to an environment that is not harmful to their health or wellbeing; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
- 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- ...
- (4) For the purposes of this section
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources;
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

⁶³ Poore, *supra* note 61 at 380.

⁶⁴ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

⁶⁵ Constitution, *supra* note 54 at Chapter 2.

⁶⁶ *Ibid* at section 7(1).

In conjunction with the new Constitution, South Africa's new government implemented a policy framework designed to improve the economic position of the country's Black majority population. The ANC's approach consisted of introducing various policies that attempted to respond to constituent concerns, yet often fell short, thus requiring that a new policy be developed. Central to many of the policies discussed in this chapter were three development objectives: economic empowerment, increased employment, and land rights. Many of the ANC's policies, such as the Reconstruction and Development Programme (RDP), were broad and applied equally to all industries. Given the importance of mining to South Africa's economy, the ANC also quickly introduced industry-specific measures designed to ensure the sector contributed to the party's development objectives. These measures, along with the ANC's general socioeconomic policy framework, are discussed further below.

The RDP, adopted in 1994, was the first articulation of the ANC's development framework. At the heart of the Programme was the recognition that human development was directly connected to the ANC's nation-building project. To that end, the RDP sought to implement the requisite social, political and economic infrastructure that would begin reversing the legacy of apartheid.⁶⁷ The ANC was bold in its plans for the RDP; as a government White Paper, it outlined the state's efforts to mobilize a citizenry that had been excluded from the country's social, political and economic development for most of the past century. While achieving this task was momentous, the ANC was aware of the paradox the country faced: "poverty and degradation exist[ed] side by side with modern cities and a developed mining,

⁶⁷ Guy Mhone, "Democratisation, Economic Liberalisation and the Quest for Sustainable Development in South Africa" in Guy Mhone & Omano Edigheji, eds, *Governance in the New South Africa: The Challenges of Globalisation* (Cape Town: University of Cape Town Press, 2003) 18 at 21.

industrial and commercial infrastructure.”⁶⁸ Central to the RDP’s mission was the goal of completing the country’s transformation by bridging the gaps between the country’s economic and racial classes was central to the RDP’s mission. It identified five priority areas that were meant to drive the immediate post-apartheid development project: meeting basic needs, developing human resources, building the economy, democratizing the state and society, and implementation.⁶⁹ Based on these priority areas, it was evident the government sought to centre state transformation and its new development project on the complementary objectives of human and economic development.⁷⁰ According to the RDP, sustainable structural transformation required such things as the elimination of barriers to full participation in the economy (such as inadequate education and training programmes) and reversing systemic inequities that favoured a small group of elites. Despite its ambitious plan, however, the RDP set few concrete targets to meet its goals (two notable exceptions were its commitments to the construction of at least one million new homes and the redistribution of 30 percent of agricultural land within five years). Instead, the RDP was a visionary document that attempted to redress the development failings that millions of ANC’s suffered during the decades of apartheid.⁷¹

While observers applauded the RDP’s vision of “egalitarian development,”⁷² critics denounced the plan’s shortcomings on implementation, particularly its inattentiveness to the political manoeuvring that would be necessary to achieve its ambitious agenda.⁷³ Missing from

⁶⁸ *White Paper on Reconstruction and Development* (Government Notice 1954 in Government Gazette 16085 of 15 November 1994) (RDP).

⁶⁹ *Ibid.*

⁷⁰ Mhone, *supra* note 67 at 21.

⁷¹ Nicoli Nattrass & Jeremy Seekings, “Democratic Institutions and Development in Post-apartheid South Africa” in Mark Robinson & Gordon White, eds, *The Democratic Developmental State: Politics and Institutional Design* (Oxford: Oxford University Press, 1998) 215 at 216 [Nattrass & Seekings, “Democratic Institutions”].

⁷² *Ibid* at 218.

⁷³ *Ibid.*

the document was any mention of “redistribution”; instead, the state’s plan for implementation focused on “restructuring” and “redirecting” government funds, which suggested the plan would be implemented in its entirety and avoid any consideration of the inevitable bargaining—between different interests, objectives and priority areas—that would be necessary to actualize the agenda.⁷⁴ Inevitably, the RDP vision was unsustainable without a meaningful strategy for implementation. Both a dedicated office and inter-ministerial cooperation failed to enact the more ambitious elements of the RDP. Progress was piecemeal and limited to areas with pre-existing capacity (such as healthcare and water provision).⁷⁵ Within two years of its proposal, the RDP was quashed and abandoned in favour of a new development framework: the Growth, Employment and Redistribution (GEAR) programme.⁷⁶

GEAR was a macroeconomic policy, developed by the Ministry of Finance, which aimed to generate economic growth and create new jobs.⁷⁷ Unlike its predecessor, GEAR presented a more conservative plan for economic transformation focused on traditional economic growth factors: growth and employment targets, export-oriented industrial development, increased competition supported by tax incentives, reduction of the exchange and inflation rates, the expansion of trade and investment flows, and fiscal conservatism.⁷⁸ Developed with the support of the World Bank and International Monetary Fund, GEAR was characterized as an endogenous structural adjustment programme.⁷⁹ By 2000, GEAR policies were to support the creation of 400,000 jobs and an economic growth target of six percent per year.⁸⁰ Like the RDP, GEAR did

⁷⁴ *Ibid.*

⁷⁵ Beinart, *supra* note 57 at 316.

⁷⁶ *Ibid* at 322.

⁷⁷ Lee, *supra* note 6 at 93; Nattrass & Seekings, “Democratic Institutions”, *supra* note 71 at 221.

⁷⁸ Lee, *ibid*; Mhone, *supra* note 67 at 23.

⁷⁹ Mhone, *ibid* at 22.

⁸⁰ *Ibid* at 24.

not receive the institutional support necessary to execute its objectives.⁸¹ By 2005, GEAR was replaced with the Accelerated and Shared Growth Initiative for South Africa, which was eventually supplanted by the National Development Plan 2030 (NDP).⁸² The NDP resurrected the RDP's vision for economic justice by outlining the same ambition to eliminate poverty and reduce inequality (this time with a specified deadline of 2030).⁸³ With the NDP, South Africa's post-apartheid development planning has come full circle. The ANC's efforts to dismantle systemic inequality over the past 25 years have not yet yielded their desired results; economic and racial inequality continue to persist in South Africa. Development has not materialized for much of the country's population.

In addition to the RDP, GEAR and NDP, the ANC introduced other development measures aimed at land reform and advancing Black economic empowerment.⁸⁴ Land reform legislation, which was enacted soon after President Mandela took office in 1994, was passed to reverse discriminatory land laws in place since the Union of South Africa was established in 1913. The *Restitution of Land Rights Act*⁸⁵ gave effect to sections 25(5)–(7) of the Constitution, which established rights to equitable access to land, tenure security and land restitution for persons or communities dispossessed of property after June 19, 1913, due to discriminatory laws.

⁸¹ Natrass & Seekings, "Democratic Institutions", *supra* note 71 at 223.

⁸² Lee, *supra* note 6 at 94.

⁸³ National Planning Commission, *National Development Plan 2030: Our future – make it work* (2011). A year before the NDP was released, the Department of Economic Development issued a separate economic policy framework titled the New Growth Path (NGP). This policy focused more on job creation and macroeconomic reforms, which were incorporated into the NDP along with other development priorities. Due to the NGP's limited focus, it is not discussed extensively here (Department of Economic Development, *The New Growth Path: Framework*).

⁸⁴ Black economic empowerment is a foundational redistributive principle of the ANC's post-apartheid development agenda that sought to alleviate the economic conditions of Black South Africans. It became institutionalized during President Thabo Mbeki's tenure (Bowman, *supra* note 8 at 224).

⁸⁵ *Restitution of Land Rights Act* 22 of 1994.

To meet these objectives, the legislation created a Land Claims Commission and a Land Claims Court to resolve land disputes brought forward by claimants seeking restitution.⁸⁶

Settling land claims during a volatile time limited the government's ability to fully restore land to those who had been dispossessed. Instead, the government adopted a market-based approach premised on "willing-seller, willing-buyer"⁸⁷ agreements: the state would assist with the purchase of land but would neither expropriate nor be the owner or buyer.⁸⁸ This approach was a stark contrast to the constitutional provisions that sanctioned expropriation in the name of land reform.⁸⁹ To this day, land reform remains unresolved in South Africa. Since the ANC adopted the "willing-seller, willing-buyer" land reform policy in 1997, only 10 percent of agricultural land has been redistributed to Black South Africans.⁹⁰ White South Africans continue to own approximately 72 percent of agricultural land, despite only making up 10 percent of the population.⁹¹ After years of criticism (and the rising popularity of the opposition Economic Freedom Fighters party), the ANC changed its position and endorsed the concept of expropriation without compensation at its 54th annual conference in December 2017.⁹² Despite its new rhetoric, the government has yet to expropriate land in the name of redistribution and restitution for poor, dispossessed South Africans. Given the racial antagonism that continues to

⁸⁶ *Ibid.*

⁸⁷ "Willing-seller, willing-buyer" arrangements refer to transactions that required the consent of both the seller and buyer. Due to the adoption of this policy, land reform in South Africa became contingent on the willingness of owners, who were almost exclusively white, to sell land (Lungisile Ntsenbeza, "This land is our land" (May 3, 2018), online: Foreign Policy <<https://foreignpolicy.com/2018/05/03/this-land-is-our-land/>>).

⁸⁸ Department of Land Affairs, *White Paper on South African Land Policy* (1997).

⁸⁹ Edward Lahiff, "'Willing buyer, willing seller': South Africa's failed experiment in market-led agrarian reform" (2007) 28:8 Third World Quarterly 1577 at 1580.

⁹⁰ Ben Cousins & Ruth Hall, "South Africa is still way behind the curve on transforming land ownership" (November 13, 2017), online: The Conversation <<https://theconversation.com/south-africa-is-still-way-behind-the-curve-on-transforming-land-ownership-87110>>.

⁹¹ Department of Rural Development & Land Reform, *Land Audit Report* (November 2017).

⁹² Ntsenbeza, *supra* note 87.

surround the issue of land ownership in South Africa,⁹³ it is difficult to contemplate how the ANC will redistribute land equitably while also maintaining the current semblance of peace and unity in the country.

Black economic empowerment was another key pillar of the ANC's development agenda. At its core, Black economic empowerment sought to increase economic participation for the majority of the country's population. It would reverse the apartheid legacy of Black economic disempowerment by expanding the Black middle class⁹⁴ via higher rates of Black business ownership and the number of Black people in management positions, improving human resources and skills development among the Black majority, and investing in enterprises owned or managed by Black people.⁹⁵ Black economic empowerment was chiefly implemented via the 2003 *Broad-Based Black Economic Empowerment Act (BBBEE)*,⁹⁶ which established a legislative framework to advance Black economic empowerment objectives. The framework included the creation of a Black Economic Empowerment Advisory Council that would advise the government on Black economic empowerment and review its progress,⁹⁷ issuing Ministerial "codes of good practice" that bound state organs and other public entities,⁹⁸ create sector-specific "transformation charters" that promoted Black economic empowerment within that industry

⁹³ Expropriating land from white owners has galvanized white supremacist groups both within South Africa and abroad, including Canada and the United States (Christopher Clark, "South Africa Confronts a Legacy of Apartheid" (May 3, 2019), online: The Atlantic <<https://www.theatlantic.com/international/archive/2019/05/land-reform-south-africa-election/586900/>>).

⁹⁴ Anri Heyns & Hanri Mostert, "Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in Poverty" (2018) 11:2 Law and Development Review 801 at 821.

⁹⁵ *Broad-Based Black Economic Empowerment Act* 53 of 2003 at s. 1.

⁹⁶ *Ibid.* For the purposes of this statute, "Black" is a generic term that includes "Africans, Coloureds and Indians" (s. 1).

⁹⁷ *Ibid* at ss. 4, 5.

⁹⁸ *Ibid* at s. 9.

(mining was included; see further discussion below), and develop a government strategy for broad-based Black economic empowerment.⁹⁹

Much like other facets of its development agenda, Black economic empowerment did not achieve the breadth of economic benefits envisaged by the ANC. Critics of its implementation contend that only an elite few (many affiliated with the ANC) benefitted from Black economic empowerment ownership deals.¹⁰⁰ In an effort to rectify this failing, the *BBBEE* was amended ten years after it was passed because “it was deemed ineffectual in tackling broader issues affecting transformation within the country.”¹⁰¹ The basic tenets of Black economic empowerment (increased Black business ownership and skills development, and investment in Black-owned enterprises) remained intact.¹⁰² Instead, the ANC sought to improve Black economic empowerment’s transformative impact on the economy by introducing new compliance reporting obligations for all government entities, public companies and educational institutions.¹⁰³ To support this mandate, the *BBBEE Amendment* replaced the Black economic empowerment Advisory Council with the Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) and strengthened its authority to include enhanced implementation and enforcement powers.

Since its creation, the B-BBEE Commission has successfully collected and released relevant data about compliance reporting. Its most recent report summarizing these findings painted a dire picture of public and private sector commitment to Black economic empowerment.

⁹⁹ *Ibid* at s. 11.

¹⁰⁰ Heyns & Mostert, *supra* note 94 at 821.

¹⁰¹ Broad-Based Black Economic Empowerment Commission, *Strategy of the Broad-Based Black Economic Empowerment Commission, 2017-2021* (2016).

¹⁰² *Broad-Based Black Economic Empowerment Amendment Act* 46 of 2013 at s. 1 [*BBBEE Amendment*].

¹⁰³ *Ibid* at s. 13G.

According to the report, only 43 percent of publicly listed companies and 10 percent of government entities submitted compliance reports. Ownership figures reported by the private sector revealed Black ownership remained limited—only two percent of the reporting companies were completely Black-owned, while approximately 50 percent had less than 25 percent Black ownership. Management control also continued to be dominated by white South Africans.¹⁰⁴ Despite attempts to actualize Black economic empowerment, institutional capacity to affect or enforce change has been limited.

Within the mining sector, the first Black economic empowerment strategy was introduced in 2004. The *Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry*¹⁰⁵ (commonly referred to as the Mining Charter) was a component of the ANC’s new mining governance framework in conjunction with the *Mineral and Petroleum Resources Development Act (MPRDA)*¹⁰⁶ introduced two years earlier. The 2004 Mining Charter was replaced with an amended charter in 2010, then again in 2016. In 2017, the government shocked the industry with another revised Charter that was strongly opposed, causing its implementation to be postponed until a court challenge to its validity was suspended in 2018.¹⁰⁷ With each iteration, the Mining Charter specified ownership and employment targets for “historically disadvantaged South Africans” (which is partly defined in the *MPRDA* as “any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took

¹⁰⁴ Broad-Based Black Economic Empowerment Commission, *National Status and Trends on Broad Based Black Economic Empowerment Report* (March 2019).

¹⁰⁵ *Broad-Based Socioeconomic Empowerment Charter for the South African Mining Industry*, GN 1639 GG 26661 (13 August 2004) [Mining Charter].

¹⁰⁶ *MPRDA*, *supra* note 56.

¹⁰⁷ Heyns & Mostert, *supra* note 94 at 803-4. The Minerals Council of South Africa (an organization representing industry) filed an application for judicial review of the 2018 Mining Charter in March 2019 to challenge certain requirements in the new charter (Felix Njini, “South African Mining Charter challenge dents Ramaphosa plans” (March 26, 2019), online: Bloomberg <<https://www.bloomberg.com/news/articles/2019-03-27/south-african-mining-companies-want-parts-of-charter-set-aside>>).

effect”)¹⁰⁸ and equity benefits for mining communities.¹⁰⁹ Again, the Mining Charter and *MPRDA* have yet to achieve expected results. Due to their significance as core institutions of South Africa’s MDS, both are examined further in section 5.3.2.

To the many South Africans hopeful that the end of apartheid would yield new opportunities, it failed to produce the anticipated transformative results. South Africa was one of the most unequal countries in the world when apartheid ended.¹¹⁰ Democratic elections brought to power a party that proclaimed its commitment to reversing inequality and actively redistributing state wealth to support disadvantaged populations.¹¹¹ Despite South Africa’s consistent record of economic success (it remains a high middle-income country with stable growth in annual GDP and GDP per capita), inequality remains rampant—and has even increased—across multiple indicators. According to a 2018 World Bank report, high rates of unemployment, consumption inequality, and overall inequality of opportunity continue to be the reality in South Africa.¹¹² These shortcomings in the ANC’s development agenda over the past 25 years are indicative of the continued dominance of both global economic interests and domestic neoliberal influence to shaping the country’s economy, and the challenges of implementing

¹⁰⁸ *MPRDA*, *supra* note 56 at s. 1. In addition to “(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect,” historically disadvantaged South Africans also includes “(b) any association, a majority of whose members are persons contemplated in (a); [and] (c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members’ interest and are able to control a majority of the members’ votes.” This definition captures all non-white South Africans, although Black South Africans have been the primary focus of the government’s broad-based socioeconomic empowerment plans.

¹⁰⁹ Mining Charter, *supra* note 105.

¹¹⁰ Nicoli Nattrass & Jeremy Seekings, *Class, Race, and Inequality in South Africa* (New Haven: Yale University Press, 2005) at 4 [Nattrass & Seekings, *Class*].

¹¹¹ *Ibid* at 3-4.

¹¹² World Bank, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018), online: The World Bank <<http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf>> at 43-46. “Inequality of opportunity” captures an individual’s “access to quality basic services, such as education, health care and essential infrastructure.” The indicator used in the report calculates this indicator using “gender, age, race, father’s occupation, and the district council at birth” (at 45).

progressive socioeconomic reforms with political institutions not yet designed to do so. Dismantling the political and economic structures of apartheid proved difficult, especially when minor reforms tended to benefit elites in the ANC.¹¹³ Surprisingly, the ANC's record has not prevented some commentators from describing South Africa as a "developmental state."¹¹⁴ While this characterization is subject to debate, the ANC's declaration at its 2007 National Conference that it was committed to constructing a developmental state may skew the conversation.¹¹⁵ Section 5.3 examines this debate in greater detail.

5.3. South Africa's mining developmental state

Despite the introduction of multiple mining developmental state institutions in South Africa since the end of apartheid, its status as a developmental state—in line with the paradigm introduced in Chapter Three—is tenuous at best.¹¹⁶ First, South Africa's developmental state lacks much of the institutional apparatus considered vital to the model's success, namely development-oriented leadership, an autonomous and effective bureaucracy, performance-oriented governance, and production coordination and conflict management. Second, South Africa's economic development in the post-apartheid era has been stunted and uneven (although it is acknowledged that equitable development has never been an established criteria of the developmental state paradigm). Concluding South Africa is not a developmental state may

¹¹³ Bond, *supra* note 9 at 10.

¹¹⁴ Andrew Lawrence, "Neoliberalism, Mineral Governance and Developmental States: South Africa in Comparative Perspective" in Jewellord Nem Singh and France Bourgouin, eds, *Resource Governance and Developmental States in the Global South: Critical International Political Economy Perspectives* (Houndmills, Basingstoke, Hampshire: Palgrave MacMillan, 2013) 40 at 40.

¹¹⁵ Omano Edigheji, "Constructing a democratic developmental state in South Africa: potentials and challenges" in Omano Edigheji, ed, *Constructing a democratic developmental state in South Africa: potentials and challenges* (Cape Town: HSRC Press, 2010) 1 at 1.

¹¹⁶ As mentioned earlier in the chapter, the analysis here focuses solely on South Africa's post-apartheid institutions even though apartheid South Africa has been characterized as a developmental state by some scholars (see Bill Freund, *supra* note 1).

inherently vindicate the descriptive value of the paradigm. However, a closer examination of factors that likely have contributed to the failings of South Africa's mining developmental state—the continued influence of corporate interests, corruption and state capture within certain ANC administrations, and strong resistance to state efforts to reform the industry—also illustrate the challenges that have hindered its full implementation.

5.3.1. South Africa: an African developmental state?

The incongruity between South Africa's developmental agenda and its institutions on the one hand and its poor record on the other fuels the debate about whether South Africa is a developmental state. Since the end of apartheid in 1994, several South African institutions illustrate the country's promise as a developmental state: the Constitution; Ministry of Finance; the RDP, GEAR, and *BBBEE*; as well as the Mining Charter and *MPRDA*. The inability to effectively implement these institutions to produce desired development results prevented South Africa from constituting a successful developmental state (in line with the East Asian model). These shortcomings, which arose as a result of institutional gaps in South Africa's efforts to constitute a developmental state, are examined further in the proceeding sections.

a. Development-oriented political leadership

The ANC's leaders have a mixed record of demonstrative development-oriented political leadership.¹¹⁷ During apartheid, the party's platform as anti-apartheid activists was rooted in the struggle for greater equality and opportunity of socioeconomic development outcomes for South Africa's racialized populations.¹¹⁸ This legacy continued when the ANC officially formed

¹¹⁷ This section provides an overview of the presidential terms of South Africa's post-apartheid leaders. It is focused on the socioeconomic development priorities of each and does not delve into the political intricacies of each presidents' term in office.

¹¹⁸ Beinart, *supra* note 57 at 155.

government in 1994, with Nelson Mandela as president. In the ensuing years, the ANC continued to demonstrate a strong commitment to development and redistribution. President Thabo Mbeki's record as President Mandela's successor was indicative of the party's continued efforts to promote socioeconomic development among the country's disadvantaged populations. Conversely, President Zuma's term in office can be described as tenuous at best due to the personal wealth and benefits he gained while in office.¹¹⁹ Meanwhile, the current president, Cyril Ramaphosa is attempting to stimulate development by simultaneously listening to the needs of Black South Africans and entrenching foreign capital in mining.¹²⁰

President Nelson Mandela symbolized the nation's hopes when he was sworn into office in 1994. His 27 years in prison epitomized the struggle against apartheid and the undying quest for freedom. As South Africa's first post-apartheid president, President Mandela was tasked with implementing the ANC's development agenda while also helping the country move past apartheid's racist legacy. At the time President Mandela took office, South Africa's economy was in dire condition. Over 15 years of sanctions had crippled many of the country's leading export sectors, including mining, which was also suffering from the fall in gold prices.¹²¹ Inflation was high (at 14 percent) and growth stagnant.¹²² Armed with the dream outlined in the 1955 Freedom Charter, President Mandela began implementing a robust development agenda. First, the Constitution and Bill of Rights ensured economic and social rights that had been previously

¹¹⁹ Bond, *supra* note 10 at 12.

¹²⁰ Cyril Ramaphosa, "Land reform in South Africa is crucial for inclusive growth" (August 22, 2018), online: Financial Times <<https://www.ft.com/content/c81543d8-a61b-11e8-926a-7342fe5e173f>>.

¹²¹ Beinart, *supra* note 57 at 323-24.

¹²² Matthew Davies, "Nelson Mandela: His economic legacy" (9 December 2013), online: BBC News <<https://www.bbc.com/news/business-23041513>>.

denied to the majority of the population. He also supported the creation of the RDP, one of the first components of the ANC's development agenda.¹²³

Despite these efforts, most of President Mandela's term (and thus his legacy) was consumed by the reconciliation project. To help South Africa come to terms with its racist past and move forward as a unified country, President Mandela was instrumental in instituting the country's Truth and Reconciliation Commission (TRC). South Africa's TRC joined a brief history of truth and reconciliation commissions (the first having started in Argentina in 1973) that grappled with healing a nation through honest testimonies about past wrongs.¹²⁴ Like others before it, South Africa's commission was formative to the country's peaceful democratic transition.¹²⁵ To a great extent, the TRC was successful in this regard: it staved off any violence that many commentators feared would erupt in South Africa when apartheid came to an end.¹²⁶ President Mandela was lauded for the moral leadership he showed as an architect of the nation-building project. Nonetheless, political reconciliation did not resolve the glaring economic disparities within South Africa's population. Most notably, the economic fortunes of Black South Africans were dire when President Mandela left office in 1999, as both unemployment and income inequality remained high.¹²⁷

President Mandela was undoubtedly an inspiring leader, which is precisely what South Africa needed at the time to bridge racial divides and unite the country. However, his focus on

¹²³ Lee, *supra* note 6 at 107.

¹²⁴ Deborah Posel, "History as Confession: The Case of the South African Truth and Reconciliation Commission" (2008) 20:1 Public Culture 119 at 120 [Posel, "History as Confession"]. The efficacy of truth and reconciliation commissions is contested, including that of South Africa's (see Posel at 120). This debate is extensive and will not be examined here.

¹²⁵ *Ibid* at 128.

¹²⁶ Beinart, *supra* note 57 at 289.

¹²⁷ *Ibid* at 314.

national reconciliation likely delayed the implementation of redistributive economic policies—for example, meaningful land reform—that could have begun to support socioeconomic development for some of South Africa’s poorest populations. Additionally, the institutional reforms necessary to administer some of the ANC’s bold policy initiatives, such as the RDP, were not put in place. Instead, President Mandela’s leadership was best described as “reconciliation-oriented” rather than “development-oriented” since his Deputy President Thabo Mbeki was responsible for much of the government’s economic agenda as he led national reconciliation efforts and also devoted his time to rebuilding South Africa’s international reputation.¹²⁸

When President Mandela did not seek a second term in 1999, Deputy President Thabo Mbeki succeeded him as party leader and president. His accession to the presidency maintained the development agenda started under President Mandela, which most recently saw the transformation of the RDP into GEAR. A few years after taking office, the TRC delivered its final report, which seemingly brought an end to the government’s official national reconciliation measure.¹²⁹ Consequently, more of the government’s resources and energy could be directed to economic transformation. Much like President Mandela, however, President Mbeki’s economic agenda was concerned with allaying the fears of foreign investors who were hearing demands for Black economic empowerment strengthen in the ANC.¹³⁰ GEAR, which was meant to be a more robust approach to redressing economic inequality in South Africa, failed to deliver as it lacked the necessary institutional backing and development vision to do so.¹³¹ Even the ANC’s hallmark

¹²⁸ *Ibid* at 303–304.

¹²⁹ Posel, “History as Confession”, *supra* note 124 at 129.

¹³⁰ Alan Hirsch, *Season of hope: economic reform under Mandela and Mbeki* (Scottsville, South Africa: University of KwaZulu-Natal Press, 2005) at 68.

¹³¹ Natrass & Seekings, “Democratic Institutions”, *supra* note 71 at 222.

initiative, *BBBEE*, was less effective due to the government's trickle-down approach that saw Black elites benefit from the measure more than the larger poorer classes. A remark by President Mbeki to a meeting of Black business elites was revealing of the government's position on Black economic empowerment; in comments about the role of the B-BBEE Commission, President Mbeki stated that their purpose was to consider "how do we promote the formation of a black bourgeoisie which will itself be committed and contribute to black economic empowerment?"¹³² Central to this position was the belief a Black middle class would contribute to the "deracialization of the economy and society"¹³³ in South Africa. Although the creation of a Black bourgeoisie was critical to dismantling parts of the apartheid-era economy, it led to the concentration of wealth amongst a small group of individuals at the expense of addressing poverty.¹³⁴

Also, like his predecessor, President Mbeki was not exclusively focused on redressing economic inequality and advancing development for South Africa's most disadvantaged populations. President Mbeki devoted part of his presidency to collaborating with African partners, both domestically and across the continent, to restore a positive sense of African identity and renewal—a development vision he described as an "African renaissance."¹³⁵ Through continental partners such as the African Union (AU), its predecessor, the Organization of African Unity, and the New Economic Partnership for Africa's Development (NEPAD),

¹³² Thabo Mbeki, "Speech at the Annual National Conference of the Black Management Forum, Kempton Park - 1999/11/20" qtd in Hirsch, *supra* note 130 at 221; online: Thabo Mbeki Foundation <<https://www.mbeki.org/2016/06/09/speech-at-the-annual-national-conference-of-the-black-management-forum-kempton-park-19991120/>>.

¹³³ *Ibid.*

¹³⁴ Heyns & Mostert, *supra* note 94 at 821.

¹³⁵ Beinart, *supra* note 57 at 304.

President Mbeki advocated for a resurgence of African-driven development strategies.¹³⁶ His leadership was divided among a range of priorities that included protecting South African economic interests by not frightening investors and promoting continental development cooperation through new agencies like the AU and NEPAD.

Additionally, significant reforms to mining governance that were completed during President Mbeki's tenure fell short of having a transformative effect on development. As the discussion in section 5.3.1.c (below) contends, both the new Mining Charter and *MPRDA* did not fulfill the new government's holistic approach to sustainable development encompassed in the Constitution.¹³⁷

A power struggle in the ANC led to the demise of President Mbeki's time in office in 2008. After dismissing Jacob Zuma in 2004 from his role as Deputy President due to his implication in a corruption scandal, the party faithful replaced President Mbeki as leader of the ANC in 2007. When Zuma was cleared of all charges in 2008, President Mbeki was asked by the ANC National Executive Committee to resign, which he did on September 23, 2008. During the 2009 elections, Jacob Zuma was elected president.¹³⁸ Like Presidents Mandela and Mbeki before him, President Zuma was an ANC powerhouse who climbed the party ranks. Unlike his two predecessors, President Zuma's mandate was more radical and marked a return to the ANC's core principles around economic equality and the benefits of redistribution.¹³⁹ However, despite President Zuma's early embodiment as the people's advocate and reformer who would reverse

¹³⁶ Peter Vale & Georgina Barrett, "The curious career of an African modernizer: South Africa's Thabo Mbeki" (2009) 15:4 Contemporary Politics 445 at 454.

¹³⁷ FT Cawood, "The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa" (2004) The Journal of the South African Institute of Mining and Metallurgy 53 at 53.

¹³⁸ Daryl Glaser, "Mbeki and his legacy: A critical introduction" in Daryl Glaser, ed, *Mbeki and After: Reflections on the Legacy of Thabo Mbeki* (Johannesburg: Wits University Press, 2010) 3 at 8.

¹³⁹ *Ibid* at 34.

the economic fortunes of many, he became embroiled in corruption scandals, oversaw the decline in South Africa's economy, and failed to implement meaningful policy reforms indicative of the developmental state the ANC proclaimed in 2007.

President Zuma's development legacy was complicated by two different factors: first, the 2008 economic crisis and crash in commodities prices forced the ANC to reevaluate its development model as South Africa's economy declined;¹⁴⁰ and second, his corruption and state capture scandals¹⁴¹ redirected state funds from development priorities. After the 2008 crash in commodities prices, South Africa's growth rate declined to 1.8 percent, then plunged to -6.4 percent in the first quarter of 2009. South Africa was technically in recession as growth stood at -3.2 percent in the second quarter of 2009.¹⁴² South Africa's recession halted the expansion of Black economic empowerment measures at many corporations that claimed the declining economy prevented compliance.¹⁴³

President Zuma's response to the economic crisis was to deepen the country's reliance on mineral resources.¹⁴⁴ However, this policy direction benefited him personally as his business dealings (and that of his son, Duduzane Zuma) with an elite family led by Ajay, Atul and Rajesh

¹⁴⁰ Roger Southall, "The coming crisis of Zuma's ANC: the party state confronts fiscal crisis" (2016) 43:147 *Review of African Political Economy* 73 at 74 [Southall, "The coming crisis"].

¹⁴¹ Transparency International, the global anti-corruption watchdog, defines "state capture" as "one of the most pervasive of corruption, where companies, institutions or powerful individuals use corruption such as the buying of laws, amendments, decrees or sentences, as well as illegal contributions to political parties and candidates, to influence and shape a country's policy, legal environment and economy to their own interests" (Maira Martini, "State Capture: an Overview" (11 March 2014), online: Transparency International <https://www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf>). The term has become popular to describe the corruption that took place in South Africa under President Zuma's administration (David Pilling, "How corruption became 'state capture' in South Africa" (October 4, 2017), online: Financial Times <<https://www.ft.com/content/36895cd6-a907-11e7-93c5-648314d2c72c>>).

¹⁴² Vishnu Padayachee, "Global economic recession: effects and implications for South Africa at a time of political challenges" presented at the London School of Economics 20th Anniversary Conference & Alumni Reunion, *Responding to the Crisis in International Development* (September 2011) [unpublished].

¹⁴³ *Ibid.*

¹⁴⁴ Southall, "The coming crisis", *supra* note 140 at 74.

Gupta led to allegations of corruption and state capture. One of the scandals the Guptas were accused of perpetrating was bribing state actors, with the assistance of President Zuma, to approve the proposal for a nuclear power plant owned by Russian investors that would rely on uranium from a family-owned mine.¹⁴⁵ More generally, the family was accused of amassing significant wealth from illegally procured government contracts and state-owned enterprises, including Eskom (the power utility) and Transnet (the rail and port operator).¹⁴⁶ Separately, President Zuma was accused of personal corruption, such as when he used USD \$18.4 million in public funds to upgrade his private home with “a visitor’s centre, swimming pool, amphitheatre and a chicken run.”¹⁴⁷ The gross corruption and state capture allegations under President Zuma’s leadership led to the creation of a Judicial Commission of Inquiry into Allegations of State Capture shortly after he resigned in February 2018.¹⁴⁸

At the time President Zuma resigned, South Africa’s government had yet to deliver on many of its post-apartheid development promises. Although the country recovered from the 2008 crisis, income inequality and unemployment remained high, and Black economic empowerment had not been fully implemented across a range of sectors. In mining, relations among workers, the state, and companies remained tense after the Marikana massacre in August 2012, in which 34 miners were shot and killed by police while striking outside the Lonmin platinum mine.¹⁴⁹

¹⁴⁵ Roger Southall, “Family and favour at the court of Jacob Zuma” (2011) 38:130 *Review of African Political Economy* 617 at 619 [Southall, “Family and favour”].

¹⁴⁶ Karl Z Meyer & John M Luiz, “Corruption and state capture in South Africa: will the institutions hold?” in Barney Wharf, ed, *Handbook on the Geographies of Corruption* (Cheltenham, UK: Edward Elgar Publishing Ltd, 2018) 247 at 253.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Judicial Commission of Inquiry to Inquire into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*, Proclamation No. 2 of 2018.

¹⁴⁹ Bond, *supra* note 9 at 7.

President Zuma failed to advance the ANC's development agenda as he prioritized his interests ahead of meaningful socioeconomic development.

President Zuma's deputy, Cyril Ramaphosa, succeeded Zuma upon his resignation in 2018. Like the presidents that came before him, President Ramaphosa was also a longstanding prominent figure in the ANC who ascended through party ranks after spending time in the private sector when he was not appointed President Mandela's deputy.¹⁵⁰ The extensive wealth he accumulated through his business interests (his net worth was recently estimated to be USD \$450 million, which he generated through investments in industries ranging from fast food to mining, including as a Lonmin director at the time of the Marikana massacre)¹⁵¹ was at odds with his past role as a leader in the ANC and South Africa's mining union movement. President Ramaphosa reentered politics in 2012 and became the deputy president in 2014.¹⁵²

President Ramaphosa has been tasked with rectifying the ANC's failed economic promises since he took office in 2018. Thus far, his most pronounced policy objectives in this regard have been land redistribution and concluding the Mining Charter. Land reform was already a contested political issue when President Ramaphosa acceded to the presidency in February 2018. The ANC had just adopted the "expropriation without compensation" approach at its December 2017 national convention.¹⁵³ Soon after taking office, President Ramaphosa committed to implementing land reform, including possible expropriation without compensation. In an August 2018 opinion piece, President Ramaphosa declared that "land reform is crucial for inclusive growth":

¹⁵⁰ *Ibid* at 8.

¹⁵¹ "Cyril Ramaphosa – South African Union leader, mine boss, president" (24 May 2019), online: BBC News <<https://www.bbc.com/news/world-africa-20767093>>.

¹⁵² *Ibid*.

¹⁵³ Ntsenbeza, *supra* note 87.

current distribution of land is the second-biggest constraint to poverty reduction and shared prosperity. In order for South Africa to secure the future, and to ensure equitable and just human development opportunities...reform of patterns of land ownership in South Africa is a critical issue.¹⁵⁴

To address this issue, President Ramaphosa began to undertake two objectives. First, his government “resolved to propose a constitutional amendment that would make explicit the conditions under which land could justifiably be expropriated without compensation.”¹⁵⁵ Although section 25 of South Africa’s Constitution already authorizes this measure, President Ramaphosa’s government sought to review the provision and clarify the mechanism for executing the measure.¹⁵⁶ The Parliament’s Constitutional Review Committee conducted public hearings to review the proposed constitutional amendment and recommended in its final report issued in November 2018, that section 25 of the Constitution be amended to explicitly permit expropriation without compensation.¹⁵⁷ In October 2019, South Africa’s Parliament committed to tabling a bill to amend the Constitution by December 2019, with the aim of passing the legislation by March 2020.¹⁵⁸

Together with the proposed Constitutional Amendment, President Ramaphosa announced the formation of a Presidential Advisory Panel on Land Reform and Agriculture in September 2018. The Panel—whose mandate was more expansive than the Parliamentary Constitutional Review Committee—concluded its review in May 2019 and recommended that government consider other measures in addition to constitutional reform (including immediate action like the allocation of already acquired land).¹⁵⁹ It is not yet known what measures President Ramaphosa’s

¹⁵⁴ Ramaphosa, *supra* note 151.

¹⁵⁵ *Ibid.*

¹⁵⁶ Announcements, Tablings and Committee Reports (15 November 2015), No 169-2018.

¹⁵⁷ *Ibid.*

¹⁵⁸ “Land reform: MPs finalise programme to amend Section 25 of Constitution” (25 October 2019), online: Independent Online <<https://www.iol.co.za/news/politics/land-reform-mps-finalise-programme-to-amend-section-25-of-constitution-35884697>>.

¹⁵⁹ *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019).

government will put in place and what impact it will have on reducing poverty and promoting socioeconomic development. Since he took office, President Ramaphosa has yet to show meaningful development-oriented leadership. His leadership in this area has instead reacted to party priorities to appease dominant interests and the party's base.¹⁶⁰

Efforts to conclude the most iteration of the Mining Charter were undertaken for similar reasons. President Ramaphosa's strong ties to industry were evident at the 2017 ANC national conference when his allies pushed the party to recommend that industry be consulted to ensure any changes to the Mining Charter did not detrimentally affect investment or employment in the sector.¹⁶¹ This was something President Ramaphosa called for during his time as deputy president when he encouraged government and industry to reenter negotiations for a new Mining Charter in 2017.¹⁶² Changes to the latest iteration of the Mining Charter were not significant—new targets were introduced to better align the Charter with requirements in the *BBBEE*. An industry evaluation of the new Charter indicates the new compliance targets are less rigorous than previous draft Charters.¹⁶³ Like other initiatives before it, the Charter presents another missed opportunity that South Africa's leadership failed to capitalize on in order to advance an ambitious development agenda. Notwithstanding the legislative and policy measures enacted to eradicate poverty and promote socioeconomic development amongst South Africa's most

¹⁶⁰ South Africa's most recent elections were held in May 2019 after a campaign that revealed simmering discontent about the economy. Although the ANC was reelected, its majority was reduced as it experienced its worst electoral performance in 25 years amidst declining support from many of the constituencies it relied on in the past: young voters and those residing in townships (Carin Runciman & Marcel Paret, "Black South Africans explain who they voted for in last poll, and why" (September 1, 2019), online: The Conversation <<https://theconversation.com/black-south-africans-explain-who-they-voted-for-in-last-poll-and-why-122133>>).

¹⁶¹ African National Congress, *54th National Conference Report and Resolutions* (December 2017).

¹⁶² Bowman, *supra* note 8 at 238.

¹⁶³ Deloitte, "2018 Mining Charter Analysis: Finding a happy medium" (April 2019), online: Deloitte <<https://www2.deloitte.com/za/en/pages/energy-and-resources/articles/2018-mining-charter.html>>. The Mining Charter is discussed in greater detail in section 5.3.2.

disadvantaged populations, the implementation of this agenda has yet to have the meaningful effects the party has championed since 1994.

b. Autonomous and effective bureaucracy

The second prong of the developmental state, an autonomous and effective bureaucracy, ensures a government's development agenda can be successfully implemented with little political interference—only direction. Knowledge and skills were not hindrances in South Africa's post-apartheid civil service, compared to other African countries that were building new bureaucratic institutions after independence with a limited, educated workforce. Instead, South Africa's civil service lacked the institutional infrastructure to enact a development agenda meant to uplift the country's disadvantaged populations—apartheid-era ministries and government agencies were tasked with delivering services to the white minority.¹⁶⁴ Consequently, one of the ANC's early objectives was to create the necessary bureaucratic institutions to carry out its development agenda.

Reforming South Africa's civil service was another priority for the ANC to solidify the transition from apartheid. The ANC sought to do this through more centralized government institutions that would permit the party to assert greater control over the implementation of its agenda.¹⁶⁵ According to South African political economists Nicoli Nattrass and Jeremy Seekings, two remnants of apartheid-era politics contributed to this approach. First, during the early years

¹⁶⁴ Robert Cameron, "Public service reform in South Africa: from apartheid to new public management" in Andrew Massey & Karen Johnston, eds, *The International Handbook of Public Administration and Governance* (Cheltenham, UK: Edward Elgar Publishing, 2015) 135 at 135.

¹⁶⁵ Nattrass & Seekings, "Democratic Institutions", *supra* note 71 at 219.

of the transition under the Government of National Unity,¹⁶⁶ a National Party affiliate was appointed Minister of Finance in what Nattrass and Seekings contend was “an apparent effort to reassure local and international investors that there would be sound macro-economic management.”¹⁶⁷ Secondly, senior bureaucrats from the apartheid era were kept in their positions. Although this continuity brought some stability to the transition, it could have hindered the ANC’s ability to govern if these senior bureaucrats attempted to derail the party’s agenda.¹⁶⁸

To the ANC’s detriment, the institutions introduced to implement the RDP and GEAR were ineffective. The RDP Office could not effectively coordinate the government’s agenda across various departments. It was slow and inefficient, which reduced its credibility in the eyes of other ministries that were required to run some of their operations through the Office.¹⁶⁹ The RDP Office’s inability to execute its mandate led to its closure and to restructured development planning under the GEAR. Various government ministries, including the Departments of Finance, Labour, Public Works, Housing, Education, Welfare, Trade and Industry, were responsible for implementing applicable elements of GEAR. This, too, was ineffective without a central institution in place to coordinate government policy across departments. As Nattrass and Seekings astutely observed, this “piecemeal” approach was an insufficient response to the major development challenges facing South Africa—“a much higher degree of institutional coordination [was] ...necessary.”¹⁷⁰

¹⁶⁶ During South Africa’s transition from apartheid to democratic rule, a Government of National Unity was struck to ensure a peaceful transition and to negotiate the desired changes to state institutions. An interim constitution was in place at the time. The ANC and National Party were the main political actors that participated in this process (Michael Macdonald, “Power Politics in the New South Africa” (1996) 22:2 *Journal of Southern African Studies* 221 at 222).

¹⁶⁷ Nattrass & Seekings, “Democratic Institutions”, *supra* note 71 at 220.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid* at 222.

President Zuma attempted to reform the gap in South Africa's bureaucratic institutions with the creation of the Department of Economic Development in 2009 and the National Planning Commission in 2010.¹⁷¹ Soon after, each entity released separate national development agendas: the New Growth Path issued by the Department of Economic Development; and the National Planning Commission's National Development Plan 2030.¹⁷² Although both proposals endorsed the creation of a developmental state to carry out South Africa's economic transformation, neither the Department nor the Commission possessed the status and authority to effectively implement either agenda.¹⁷³ Rather than streamline the developmental bureaucracy, both the Department and the Commission are among a complex web of South African institutions that carry out development policies and programs, including 30 other national ministries and approximately 700 state-owned enterprises.¹⁷⁴ Despite the existence of these institutions, South Africa's bureaucratic institutions are not yet on par with those of established developmental states.

c. Performance-oriented governance

To date, much of South Africa's development agenda emerged as reactive measures to the demands of different constituencies, including the ANC's base, foreign corporatists, and Black political elites. This occupation with appeasing political interests compromised the government's ability to craft a development agenda focused on outcomes and delivery.¹⁷⁵ It also produced a record of ad hoc proposals that hampered the creation of a holistic development plan that could

¹⁷¹ Lee, *supra* note 6 at 98.

¹⁷² Ben Fine, "Assessing South Africa's New Growth Path: framework for change?" (2012) 39:134 *Review of African Political Economy* 551 at 552.

¹⁷³ Lee, *supra* note 6 at 99.

¹⁷⁴ Poove, *supra* note 61 at 382.

¹⁷⁵ Natrass & Seekings, "Democratic Institutions", *supra* note 71 at 221.

improve socioeconomic conditions for South Africa's most disadvantaged populations.¹⁷⁶ In addition to the evolving national development frameworks (from the RDP to GEAR to the NDP), reforms to the country's mining regime exemplify the ANC's lack of performance-oriented governance.

Developing new mining legislation was a priority for the ANC government after it came to power in 1994.¹⁷⁷ As the country's economic engine, redistributing mining wealth and enforcing minimal ownership requirements would improve Black economic conditions. This objective was first envisioned in the 1955 Freedom Charter, which called for restoring the country's national wealth, including its minerals, to its people.¹⁷⁸ ANC nationalization of the industry was investors' greatest fear. The ANC abandoned this position articulated in the Freedom Charter and instead spent five years conducting consultations with the public, industry, mineworkers' unions, and local governments to conclude a new mining and minerals policy.¹⁷⁹ The ANC's dual vision for this policy was outlined in its 1998 *Minerals and Mining Policy of South Africa: Green Paper*,¹⁸⁰ which became official government policy when it was finalized in October 1998 as the *White Paper – A Minerals and Mining Policy for South Africa*.¹⁸¹ The government stated that making necessary changes to the industry required it to “[seek] changes and adjustments that are conducive to increased mineral investment and address past racial inequity without disturbing investor confidence.”¹⁸²

¹⁷⁶ Lee, *supra* note 6 at 94.

¹⁷⁷ Butler, *supra* note 56 at 254.

¹⁷⁸ *Freedom Charter*, *supra* note 53; Butler, *ibid*.

¹⁷⁹ Butler, *ibid*.

¹⁸⁰ *Minerals and Mining Policy of South Africa: Green Paper* (1 February 1998).

¹⁸¹ *White Paper – A Minerals and Mining Policy for South Africa* (October 1998).

¹⁸² *Ibid*.

With these two objectives in mind, the government embarked on passing the *MPRDA* and its companion Mining Charter, which were both concluded by 2004. Despite efforts to assuage investors' fears (through consultations with industry),¹⁸³ the *MPRDA* was called “the [ANC’s] most *interventionist* legislation since 1994”¹⁸⁴ by Canada’s Export Development Agency when it was first introduced in South Africa’s Parliament in June 2002.¹⁸⁵ The *MPRDA* overhauled South Africa’s mining regime by eliminating dual ownership and vesting all mineral rights in the state. The responsible minister was also granted discretionary authority to grant, refuse, control and administer prospecting and mining, which investors argued created greater uncertainty.¹⁸⁶ Investors also criticized the Black economic empowerment requirements introduced in the *MPRDA* (and detailed in the Mining Charter) as being too onerous and a hindrance to market entry.¹⁸⁷ The requirements established in the Mining Charter included, *inter alia*, ownership benchmarks for historically disadvantaged South Africans, expanded employment opportunities and skills training in mining communities, and promoted beneficiation of South Africa’s mineral commodities.¹⁸⁸

In the five years after the *MPRDA* and Mining Charter were passed, neither proved successful in achieving the government’s stated dual objectives for the industry. Lost investment

¹⁸³ Butler, *supra* note 56 at 254-55.

¹⁸⁴ Export Development Canada, “South Africa – Government Takes Ownership of Minerals Development,” (14 May 2002) qtd in Butler, *supra* note 56 at 256 (emphasis in the original).

¹⁸⁵ South Africa’s parliamentary system is similar to other Westminster democracies—it consists of two houses (the National Assembly and National Council of Provinces) that both have the power to pass laws. Before a law is created, it must first be introduced as a bill in either house of Parliament, then discussed and passed by both houses before it comes a law (See the Parliament of the Republic of South Africa, online: <<https://www.parliament.gov.za/how-law-made>>).

¹⁸⁶ Peter Leon, “A Fork in the Investor-State Road: South Africa’s New Mineral Regulatory Regime Four Years On” (2008) 42:4 *Journal of World Trade* 671 at 683.

¹⁸⁷ Butler, *supra* note 56 at 282.

¹⁸⁸ Mining Charter, *supra* note 105 at s. 3.

was estimated to be between USD \$0.7 billion and USD \$1.4 billion a year by 2006,¹⁸⁹ despite the global commodities boom at the time. A 2009 impact assessment of the Mining Charter showed the industry had not yet met the broad-based economic empowerment targets set out in 2004, leading the report to conclude that

the intended benefits flowing from the mining industry fall significantly below the expectations and aspirations of the majority of South Africans as intended by the Charter. To this extent, there is a degree of criticism levelled against the Mining Charter that in its current form, it is a blunt tool to address the broad based transformation agenda.¹⁹⁰

A year later, the government amended the Mining Charter. It was revised again in 2017 and concluded in 2018.¹⁹¹

The government's inability to achieve desired outcomes through both the *MPRDA* and the Mining Charter is indicative of limitations performance-oriented governance presents when transforming a minerals regime to meet opposing objectives. First, both instruments were meant to alleviate racial disparities in the industry and thus ameliorate social and economic conditions among historically disadvantaged South Africans. Doing so inherently required the cooperation of corporations, several of which were foreign-owned and expressed concern with the government's Black economic empowerment requirements. This revamped regulatory environment, however, was opposed by industry, which was dominated by foreign corporate interests. Thus the government's second objective—to boost investment and productivity in the sector—was compromised. Consequently, for the South African government to satisfy this component of the developmental state, it must first ascertain which objective and subsequent performance targets are at the crux of its developmental agenda. Alternatively, it must determine how the two objectives can be reconciled.

¹⁸⁹ Leon, *supra* note 186 at 683.

¹⁹⁰ Department of Mineral Resources, *Mining Charter Impact Assessment Report* (October 2009).

¹⁹¹ Bowman, *supra* note 8 at 239.

d. Production coordination and conflict-management

Production coordination and conflict-management in the developmental state contemplates the efficacy of the state's coordinative institutions. In South Africa, the state's complex institutional framework limited the effective delivery of several development policies and the new mining governance regime. The country's contentious post-apartheid development agenda also hindered the formulation of a cohesive approach that limited (or, at least, managed) conflict and ensured greater production coordination.

At the crux of this conflict was the conflict between a robust state-led approach to industrialization and mining, or sticking to the neoliberal economic path the ANC government adopted in 1994. South Africa's multiple efforts to redirect its economic forces towards achieving developmental objectives—through the RDP, to GEAR, then the *BBBEE*—demonstrated this tension and the government's inability to effectively coordinate production and manage conflict. These policies relied on a strong private sector and the redistribution of some resources, which offered few opportunities for the state to play a more active role in making systemic changes to the economy.¹⁹² Although it has adopted many features of a developmental state, South Africa does not yet have the structures in place to effectively operate as one.

5.3.2. South Africa's mining developmental state institutions

The absence of a developmental state in South Africa did not prevent the ANC government from introducing several legal measures over the past 25 years that are equivalent to the MDSIs described in Chapter Three. Many of these initiatives were introduced via legislation that was intended to transform South Africa's mining governance, including the *MPRDA*, the

¹⁹² Lee, *supra* note 6 at 94–95.

Mining Charter, and the *Mineral and Petroleum Resources Royalty Act (MPRRA)*.¹⁹³ These measures are discussed in this section using the criteria established in Chapter Three, followed by an examination of their functionalities in section 5.3.3.

a. Enhancing local participation and content

Local participation and content in South Africa's post-apartheid MDS has been primarily occupied with increasing the participation of historically disadvantaged South Africans, which includes individuals, associations and corporations.¹⁹⁴ White South Africans dominated ownership and leadership positions in locally-owned mining companies that existed before the end of apartheid. The Mining Charter is the primary statute used to advance local participation and content through a variety of different mechanisms: ownership, inclusive procurement, employee skills development, and employment equity.¹⁹⁵ Incorporating these different elements into the Mining Charter has made South Africa's local content and participation policies, one of the most robust components of its MDS.

All but one of the Charter's elements is further subdivided into different categories. Table 5.1¹⁹⁶ provides a summary of the key provisions:

¹⁹³ *Mineral and Petroleum Resources Royalty Act*, Act 28, 2008.

¹⁹⁴ *MPRDA*, *supra* note 56 at s. 1.

¹⁹⁵ Mining Charter, *supra* note 105 at sections 2.1–2.4.

¹⁹⁶ *Ibid.* "Host community" is defined in the Charter as "a community within a local or metropolitan municipality adjacent to the mining area." According to the *MPRDA*, the "mining area" is the area for which the mining right or permit is granted.

Table 5.1 – Summary of the elements and key requirements of the Mining Charter

Element and Purpose	Subcategory	Requirements
Ownership: “To give effect to meaningful economic participation, integration into the mainstream economy, and effective ownership of the country’s mineral resources by Historically Disadvantaged Persons.”	Existing mining rights	<ul style="list-style-type: none"> • Minimum 26 percent Black economic empowerment shareholding. • Renewal of an existing mining right shall be subject to Mining Charter requirements at the time of application.
	New mining rights	<ul style="list-style-type: none"> • Minimum 30 percent Black economic empowerment shareholding distributed in accordance with Mining Charter obligations, of which at least five percent must be bestowed to mining host communities.
	Equity equivalent benefit for host communities	<ul style="list-style-type: none"> • The five percent shareholding benefit must be administered as a trust or a similar mechanism for the benefit of the host community. • Mining right holders must identify host community development needs in consultation with relevant municipalities, host communities, traditional authorities and affected stakeholders (the trust can be used to fund the development program).
Inclusive procurement: To “provide opportunities for expanding economic growth, creating decent jobs	Mining goods	<ul style="list-style-type: none"> • A minimum of 70 percent of total mining goods procured must be South African manufactured goods. • Of that 70 percent, 21 percent must be spent on goods produced by companies owned and controlled by historically disadvantaged persons, and 44 percent by a Black economic empowerment compliant company.

and widening market access to the country's goods and services."	Services	<ul style="list-style-type: none"> • A minimum of 80 percent of the total services procured must be sourced from a South African based company. • Of that 80 percent, 50 percent must be spent on services supplied by companies owned and controlled by historically disadvantaged persons, and 10 percent by a Black economic empowerment compliant company. • Compliance must be progressively achieved within five years.
	Verification of local content	Mining rights holders must verify adherence to local content requirements by receiving certification from the South African Bureau of Standards.
	Enterprise and supplier development	<ul style="list-style-type: none"> • Enterprise and supplier development is intended to strengthen local procurement and enhance the competitiveness of South African goods and services. • Mining right holders may invest in supplier and enterprise development to offset up to 30 percent of its total procurement budget on mining goods, and 10 percent of services.
Human resource development: "...to produce a skilled, trained and diverse workforce... and improve the employment prospects of historically disadvantaged persons..."	None.	<ul style="list-style-type: none"> • A mining right holder must invest a minimum of five percent on essential skills development in such areas as science, technology, engineering, research and development of solutions in exploration, mining, processing, and beneficiation. • Directors and executives are excluded from this requirement.
Employment equity: "...to achieve equity in the workplace."	Board	<ul style="list-style-type: none"> • A minimum of 50 percent historically disadvantaged persons with exercisable voting rights, 20 percent of which must be women.
	Executive management	<ul style="list-style-type: none"> • A minimum of 50 percent historically disadvantaged persons at the executive level, 20 percent of which must be women.

Senior and middle management	<ul style="list-style-type: none"> • A minimum of 60 percent historically disadvantaged persons, 25 percent of which must be women.
Junior management	<ul style="list-style-type: none"> • A minimum of 70 percent historically disadvantaged persons, 35 percent of which must be women.
Core and critical skills	<ul style="list-style-type: none"> • Mining rights holders must ensure that a minimum of 60 percent historically disadvantaged persons are represented in its core and critical skills, including science, technology, and engineering. • To achieve this obligation, a mining right holder must identify and implement its existing skills pool in accordance with an approved social and labour plan.
Career progression	<ul style="list-style-type: none"> • A mining right holder must develop and implement a career progression plan consistent with the demographics of the country that includes individual development plans for employees, and a comprehensive plan with targets, timeframes and implementation framework.

The breadth and depth of local content and procurement obligations in the Mining Charter reflected the government's acknowledgement of its importance, which went beyond simply procuring goods and services from local companies. Under the banner of Black economic empowerment, the South Africa government implemented a holistic approach to local content requirements that attempted to rectify historical racial injustice in the industry. Consequently, the obligations not only demanded that goods and services be procured locally, but that a certain percentage must also be sourced from companies owned and controlled by historically disadvantaged persons. Additionally, further obligations were imposed that were directed at transforming mining corporations and communities. Representation of historically disadvantaged

persons (including specific targets for women in some areas) must be increased at all levels of mining corporations, from ownership and human resource development to board makeup. Equity equivalent benefits for mining communities, which were designed to advance local community development interests, were also imposed. With these robust obligations, South Africa's Mining Charter was designed to increase employment and advancement opportunities for historically disadvantaged South Africans.

Implementing these obligations, however, has proven difficult. The Mining Charter faced significant resistance and underwent several revisions since the first version was finalized in 2004.¹⁹⁷ More recently, the Minerals Council South Africa (MCSA) launched a legal challenge in response to the 2018 version of the Charter (parts of which are detailed above).¹⁹⁸ As the organization representing mining interests in South Africa, the MCSA alleged that the Charter would discourage new investment in the industry. In its application for judicial review, the MCSA challenged the legality of the Charter, contending that the Charter is merely policy and not law, and that the Charter was not intended to be subordinate legislation of the *MPRDA*. The MCSA also challenged Charter provisions that imposed Black economic empowerment shareholding obligations on the ownership of new and existing mining rights.¹⁹⁹

As the case makes its way through the courts, implementation of one of South Africa's more robust MDSIs remains uncertain. Ongoing challenges and lack of industry buy-in suggests the Charter's legal functionalities may be limiting its impact. These impediments are considered further in section 5.3.3.

¹⁹⁷ Heyns & Mostert, *supra* note 94 at 803.

¹⁹⁸ Njini, *supra* note 107.

¹⁹⁹ Judicial Review of the Mining Charter (Founding Affidavit of the Applicant at para 48.3 and 50), online: Minerals Council South Africa <<https://www.mineralscouncil.org.za/special-features/724-court-documents>>.

b. Developing cross-sectoral linkages

Historically, upstream linkages to other South African industries have been more entrenched than downstream linkages, due to the enclave nature of South Africa's mining industry. Access to construction materials, machinery, transport equipment, and engineering and financial services was well established in South Africa and contributed to the growth and dominance of its mining industry domestically.²⁰⁰ In contrast, linkages to downstream industries, particularly the beneficiation of minerals, were less constituted.²⁰¹ Raw minerals exports have dominated South Africa's mining industry over the past century.²⁰² Hence, beneficiation forms the crux of the government's current priorities in this component of its MDS.

Ministerial authority to promote mineral beneficiation is included in section 26 of the *MPRDA*. The mandate grants the Minister to "initiate or prescribe incentives to promote the beneficiation of minerals in the Republic."²⁰³ This geographical limitation is enforced in subsection 3, which requires that "[a]ny person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister."²⁰⁴ In 2011, the South African government launched its mineral beneficiation strategy. Recognizing the contributions beneficiation could make to advancing the country's development goals, the policy includes strategies to promote downstream linkages in energy commodities (such as coal, uranium and thorium), iron and steel, titanium, and precious metals

²⁰⁰ Jourdan, *supra* note 12 at 111; Paseka Leeuw & Hudson Mtegha, "The significance of mining backward and forward linkages in reskilling redundant mine workers in South Africa" (2018) 56 Resources Policy 31 at 35.

²⁰¹ The mining industry's linkages to manufacturing are one exception. Recent figures estimate that mines sold USD \$24.8 billion to the manufacturing sector, compared to USD \$6 billion to other sectors (Leeuw & Mtegha, *ibid*).

²⁰² Department of Mineral Resources, *A Beneficiation Strategy for the Minerals Industry of South Africa* (June 2011) at iii [*Beneficiation Strategy*].

²⁰³ *MPRDA*, *supra* note 6 at s. 26(1).

²⁰⁴ *Ibid* at s. 26(3).

(gold, platinum, and diamond) value chains.²⁰⁵ Each strategy contemplates government interventions necessary for effective implementation. For example, the precious metals strategy includes establishing schemes to ensure access to minerals, creating a structured training programme to ensure sustained beneficiation, promoting increased investment in the jewelry sector, and providing continuous support to private sector initiatives, such as the Kgabane Jewellery Programme, that manufacture jewelry locally.²⁰⁶

Critics of South Africa's current push for increased minerals beneficiation contend that it detracts resources and investment from upstream linkages that could boost mining, especially infrastructure development around mines, including roads, railways, and power lines.²⁰⁷ This critique, however, treats mining as a zero-sum development strategy rather than one that is multi-tiered and offers multiple developmental avenues. Minerals beneficiation is not the panacea that will solve all of South Africa's development challenges. Nonetheless, it offers an additional strategic tool in the government's mining developmentalism toolbox. Moving forward, the South African government should prioritize the proper legal functionality of this strategy to ensure its success.

c. Broader resource nationalism

The *MPRDA* was derided by industry and foreign governments as being interventionist and nationalistic when it was concluded in 2002.²⁰⁸ Fundamentally, the *MPRDA* was used to overhaul an industry that promoted the interests of a small elite and entrenched racial and

²⁰⁵ *Beneficiation Strategy*, *supra* note 202 at 13–18.

²⁰⁶ *Ibid* at 19.

²⁰⁷ South African Institute of Race Relations, "Multipliers from Mining: Upstream Development as an Alternative to Beneficiation Policy in South Africa" (February 2019), online: <https://irr.org.za/reports/atLiberty/files/liberty_2014_issue-40_2014_multipliers-from-mining-04-03-2019.pdf> at 1.

²⁰⁸ Butler, *supra* note 56 at 256.

economic injustice in the country for nearly a century. South Africa's post-apartheid leadership recognized that drastic reformation was the only way this could be achieved. Many of the *MPRDA* provisions that can be described as broader resource nationalism, as explained in Chapter Three, brought South Africa in line with its counterparts across the region, including Botswana and Zambia. Additionally, the *MPRRA* was another instrument that instituted broader resource nationalism in the industry.

State custodianship of minerals was a significant component of South Africa's MDS. Articulated in sections 2(a), (b) and 3, the *MPRDA* implemented the internationally accepted principle of permanent sovereignty over natural resources in South Africa for the first time. As discussed previously, minerals were privately owned in the country in accordance with British common law. The *MPRDA* overhauled that system of ownership and declared that "[m]ineral... resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans."²⁰⁹ In addition to state custodianship, the *MPRDA* introduced greater ministerial discretion to "grant, issue, refuse, control, administer and manage"²¹⁰ mining rights. This authority increased the state's power and control over the mining industry, such that it could be directed towards meeting several objectives, such as ensuring the sustainable development of South Africa's minerals, promoting equitable access to mineral resources, and directing mining rights holders to contribute to the socioeconomic development of the areas in which they operate.²¹¹

²⁰⁹ *MPRDA*, *supra* note 56 at s. 3.1.

²¹⁰ *Ibid* at s. 3.2(a)

²¹¹ *Ibid* at s. 2.

The *MPRRA* implemented the government's new royalty regime under the *MPRDA*. Due to the new system of state ownership, royalties were to be applied universally and not in the fragmented way it had been before 1994.²¹² After years of consultations and various drafts, the new royalty regime promulgated in the *MPRRA* imposed a rate that was calculated by multiplying the gross sales of the extractor in a given year by a percentage formula based on whether the minerals were refined or unrefined. Regardless of which formula was used, the rate was capped at five percent.²¹³ According to F.T. Cawood, a South African mining engineering professor and expert on royalty rates, the *MPRRA* regime was comparable to others internationally. Average rates under the scheme did not exceed three percent, which fell within the international range.²¹⁴

Although South Africa's new state custodianship and royalty regimes ushered in a new era for the industry, they were not as extreme expressions of resource nationalism as critics made them seem. Certainly, the reforms overhauled the status quo and altered laws and legal institutions that had been in place for decades. However, the new system introduced changes that were aligned with international norms meant to ensure widespread benefits were derived from the country's mineral resources.

5.3.3. Assessing legal functionalities in South Africa's mining developmental state

The precarity of South Africa's MDSIs reveals much about their legal functionalities. The longterm sustainability of some, notably the Mining Charter and the minerals beneficiation

²¹² Although mineral rights were historically tied to land ownership, some ad hoc royalty schemes emerged in response to significant mining developments, including the early twentieth century gold mines in Witwatersrand (FT Cawood, "The South African mineral and petroleum resources royalty act—Background and fundamental principles" (2010) 35 Resources Policy 199 at 201.

²¹³ *MPRRA*, *supra* note 193 at s. 2-4.

²¹⁴ Cawood, *supra* note 212 at 207.

strategy, suggests new challenges for law in South Africa's MDS. The following sections use Trubek, Coutinho, and Schapiro's legal functionalities framework to assess South Africa's MDSIs.

a. Safeguarding flexibility and framing synergy

Law-making related to mining governance has been a contentious endeavour in post-apartheid South Africa. Redressing historical economic and racial injustice in the mining industry was an early priority for the ANC government. Such an undertaking necessitated legislation that proposed drastic reforms to the status quo and threatened elite interests. Despite the potential for South Africa's MDSIs to dramatically transform the mining industry to promote widespread socioeconomic development, few advancements have been made. These prongs of Trubek, Coutinho, and Schapiro's legal functionalities framework implies a cooperative and collaborative relationship between the state and the private sector. South Africa's recent history has shown this could be disadvantageous to the country's most marginalized people. Additionally, the framework does not offer clarity regarding the balance between the two actors, and which actor could, or should, compromise its interests in the name of development. The state's experience with the Mining Charter has been a great example of this conundrum.

The industry's ongoing objection to the Mining Charter has hindered South Africa's attempts to implement its developmental agenda. Despite the industry's lack of cooperation, the ANC government instituted measures to respond to some of the industry's concerns. However, reform efforts also contemplated the interests of the government's base—the mostly poor, disadvantaged South Africans who have not yet benefited from changes imposed on the industry. Moving forward, striving for greater flexibility and synergy within state-industry relations could

likely enhance the developmental prospects of mining in South Africa, as this element of Trubek, Coutinho, and Schapiro's framework suggests. However, this should not be undertaken at the expense of implementing developmental objectives that go beyond the minimum requirements to which industry would agree.

b. Stimulating orchestration

Institutional coordination was one of the early hurdles affecting South Africa's new post-apartheid government. The proliferation of relevant ministries and departments hindered the creation of cohesive policies designed to implement the government's early developmental agenda. Over time, entities responsible for mining began to engage more meaningfully across government departments, from senior leadership to various ministries. Insufficient levels of vertical coordination with industry have remained a significant obstacle, particularly as the private sector continues to oppose the Mining Charter. Vertical coordination with labour unions has been one of the stronger relationships the ANC government has maintained, with labour regularly consulted as the Mining Charter was being drafted.²¹⁵ Government coordination with labour remains vital, however, to ensure violence against mineworkers—like the massacre at Marikana—does not occur again.

Mining-affected communities (or their representatives) were a constituency that government neglected to formally consult during the development of the Mining Charter. Community organizations sought judicial review of an earlier draft of the Charter as a result. Their challenge was successful, as the government was ordered to expand consultations to include mining communities. Unfortunately, the government failed to act; community concerns

²¹⁵ Centre for Applied Legal Studies, "Mining Charter", online: University of the Witwatersrand <<https://www.wits.ac.za/cals/our-programmes/environmental-justice/mining-charter/>>.

were only communicated during the obligatory public consultation process.²¹⁶ This lack of proper consultation with mining-affected communities has limited the effective implementation of South Africa's MDSIs.

c. Ensuring legitimacy

The ongoing contestations among various actors—local communities, historically disadvantaged populations, and industry—affected by mining in South Africa inhibit the government's ability to ensure legitimacy. Although the ANC has enjoyed widespread electoral support, it has waned over the years. The government's position on several mining matters has also faced resistance from industry, labour, civil society, the general public, and mining-affected communities. This raises the question: what should legitimacy look like in South Africa? Trubek, Coutinho, and Schapiro suggest this requires government's ensure adequate participation in the development of new state activism. This could entail public and corporate participation, which would depend on the interventions being contemplated by the state. In South Africa's case, the resistance corporations have mounted to its developmental agenda have proven to be one of the greatest obstacles to its full implementation. Therefore, ensuring the state garners and balances legitimacy from the mining industry with that of local communities may be critical to the success of South Africa's mining developmental state.

However, balancing these disparate interests will likely be challenging for the state. Perhaps providing the opportunity for public consultation and engagement has been sufficient while the government continues to work with industry to implement the Mining Charter. Nonetheless, given the state has equated its developmental agenda to transforming the mining

²¹⁶ *Ibid.*

industry and making it work for all South Africans, demonstrable concern for the stakeholders with the most at stake—labour (both current and future) and mining-affected communities—should be the paramount for ensuring legitimacy in South Africa’s mining developmental state.

5.4. From economic engine to driving development: realizing a rights-based approach to mining governance in South Africa

Despite its emphasis on “economic empowerment,” South Africa’s mining developmental state includes few mechanisms that promulgate the rights-based approach to mining governance by mandating the participation, consultation or consent of mining-affected communities. Thus far, reversing the negative legacy of apartheid in this area has proven to be slow. As previously discussed, land dispossession was a critical component of apartheid governance. Restoring these rights, mandating consultation, and directing mining rights holders to promote mine community development have been the key tenets of South Africa’s rights-based approach to mining governance, with varying levels of successful implementation. Although the state has yet to fully implement certain measures, the fundamental nature of these rights has been adopted in recent jurisprudence, which has advanced community interests beyond the legal minimum in some instances.

South Africa’s early rights-based approach to mining governance was grounded in its Constitution and the 1996 *Interim Protection of Informal Land Rights Act (IPILRA)*.²¹⁷ Where the Constitution entrenched environmental and property rights for all, the *IPILRA* was introduced to address a gap in the restoration and protection of dispossessed South Africans’ land rights.

²¹⁷ *Interim Protection of Informal Land Rights Act*, Act 31 of 1996. “Informal right to land” was defined in section 1 of the *IPILRA* as land used or occupied in accordance with “any tribal, customary or indigenous law or practice of a tribe” or land deprived through specific government action, including the Bantustans.

Although “interim” was included in the title of the legislation, it remains in force today.²¹⁸ The *IPILRA* restored community rights to land, and mandated that “no person may be deprived of any informal right to land without his or her consent.”²¹⁹ Additionally, any communities that held land communally were granted the right to use customary law when during decision-making processes regarding their land, regardless of the powers held by any traditional leaders.²²⁰ Despite the potential for the *IPILRA* to advance state enforcement of community rights, the state neglected to implement it fully, nor did it promulgate any regulations. Instead, South African courts have shown a greater willingness to use the statute to uphold and recognize informal land rights, most recently in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*²²¹ and *Baleni and Others v Minister of Mineral Resources*.²²² Both cases, discussed in greater detail later in this section, challenged mining rights that had been granted without appropriate consultation.

Parts of the *MPRDA* also contribute to South Africa’s rights-based approach to mining governance. A state obligation to consult “with interested and affected parties” is included in section 10(1) of the Act, which requires the state (through the office of the appropriate Regional Manager, the government’s representative in a given region) to consult with the parties within 14 days of receiving an application for a prospecting right, mining right, or mining permit.²²³ Section 3 of the *MPRDA* Regulations²²⁴ details the government’s consultation requirement,

²¹⁸ Oxfam & Legal Resources Centre, “Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An Analysis of Legislation and their Implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia” (3 October 2018), online: <<https://policy-practice.oxfamamerica.org/publications/free-prior-and-informed-consent-in-the-extractive-industries-in-southern-africa/>> at 55.

²¹⁹ *IPILRA*, *supra* note 217 at 2.1.

²²⁰ Oxfam & LRC, *supra* note 218 at 56.

²²¹ [2018] ZACC 41.

²²² [2018] ZAGPPHC 829.

²²³ *MPRDA*, *supra* note 56 at s. 10(1).

²²⁴ *Mineral and Petroleum Resources Development Act, 2002* Regulations No. R. 527 of 2004.

which amounts to a 30-days comments submission process open to all members of the public. In addition to section 10, the environmental assessment provisions of the *MPRDA* also include mandatory engagement requirements with interested and affected persons during assessment. The details must be included in the mining applicant's final environmental impact assessment report.²²⁵ Private actor duties to consult are included in sections 16(4) and 22(4) of the *MPRDA*. Both sections impose obligations for prospecting right and mining right applicants, respectively, to consult with affected persons once the Regional Manager accepts the application.

The concurrent consultation obligations in the *IPILRA* and the *MPRDA* have not been applied as such by the South African government; rather, the requirements in the *MPRDA* have, in effect, displaced the rights enacted in the *IPILRA*. Recent jurisprudence, however, has clarified this relationship. In both *Maledu* and *Baleni*, South African courts clarified the application of *IPILRA* rights when in conflict with the *MPRDA*. *Maledu* concerned a community's challenge of a mining right issued over land they claimed ownership because it had belonged to their ancestors before they were evicted in the early 1900s. The Constitutional Court held that despite the government properly granting the respondent's mining rights in accordance with the *MPRDA*, the applicant's rights under the *IPILRA* were not complied with.²²⁶ Essentially, the Constitutional Court found that the *MPRDA* must be read in congruence with the *IPILRA*.²²⁷ Following *Maledu*, the High Court of Pretoria heard *Baleni*, a case that involved the Umgungundlovu community's challenge of a mining right granted in their ancestral lands in Xolobeni, Eastern Cape. Applying the holding in *Maledu*, the High Court concluded that not

²²⁵ *Ibid* at s. 50(f).

²²⁶ *Maledu*, *supra* note 221 at para 105.

²²⁷ *Ibid* at para 106.

only must the *MPRDA* and *IPILRA* be read together, but that the consent obligation in the *IPILRA* requires the “free, prior and informed consent” of the affected community in accordance with several international legal obligations, including the *African Charter on Human and People’s Rights*.²²⁸

Affirmation of the right to free, prior and informed consent in *Baleni* is a positive step towards implementing a robust rights-based approach to mining governance in South Africa. The court did not, however, problematize community representation in the community despite concerns with the authority of traditional leaders and their close connections with the mining company.²²⁹ Since the case was decided in 2018, government willingness to legislate FPIC and adequately address any deficiencies in its meaningful implementation remains unclear. Proposed amendments to the *MPRDA* Regulations would add “meaningful consultation” to its definitions, which would oblige that the

applicant, has in good faith engaged the landowner, lawful occupier or interested and affected party in respect of the land subject to the application about the impact the prospecting or mining activities would have to his right of use of the land by availing all the information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities.²³⁰

Additionally, the definition of “interested and affected persons” would be expanded to include host communities, landowners (traditional and title deed owners), and holders of informal rights. However, the proposal for “meaningful consultation” with interested and affected persons is not contemplated anywhere in the rest of the draft amendments. Realizing a rights-based approach to mining governance in South Africa could require further judicial intervention if the state remains unwilling to give effect to free, prior and informed consent in future legislation.

²²⁸ *Baleni*, *supra* note 222 at para 82.

²²⁹ Daniel Huizenga, “Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa” (2019) 6:3 *The Extractive Industries and Society* 711 at 716.

²³⁰ Draft Amendments to the *Mineral and Petroleum Resources Development Regulations*, 2019 No. R. 1554 at section 1(c) (emphasis added).

Moreover, legislating free, prior and informed consent would require that the state address any potential implementation challenges. First, the definition of “interested and affected persons” should be revised to ensure that any qualifying parties actually represent community interests and affected rights-holders, and would not only take into account the interests of self-declared spokespersons. This would require the Ministry clearly identify community leaders and empower local decision-making.²³¹

5.5. Conclusion

South Africa’s post-apartheid experience offers many insights into the efficacy of the developmental state paradigm to govern mining. Unlike Botswana’s experience, in which corporate partnerships proved beneficial to some successful elements of the country’s mining developmental state, corporate interests have hindered the successful implementation of the paradigm in South Africa. This is not to suggest that the model could not operate in the South African context; rather, it is indicative of some obstacles that obstruct full implementation of the paradigm within some mining-dependent countries.

Additionally, South Africa’s experience illustrates the important role that courts may play in realizing a rights-based approach to governing mining developmentalism. The South African state has adopted the requisite legislative and policy instruments that could contribute to a robust mining developmental state; however, the state has lacked the requisite institutional apparatus to fully implement it. Overcoming decades of racial and economic injustice surely cannot be done quickly; and until the concerns of the most vulnerable stakeholders—namely mining-affected

²³¹ Oxfam & LRC, *supra* note 218 at 62.

communities—are prioritized, implementing the rights-based mining developmental state will only take longer.

6 Reversing the Neoliberal Legacy? Mining Developmentalism in Zambia¹

6.1. Introduction

Of the three case studies, Zambia epitomizes the “paradox of plenty”² crisis that has afflicted resource-rich African states. At independence, Zambia was blessed with an established mining industry and was described as a nation “born with a copper spoon in its mouth.”³ Despite its good fortune, Zambia has yet to fully realize the benefits of its mineral wealth. Zambia’s failed attempts can be attributed to the “resource curse”⁴—its over-reliance on mining made the country vulnerable to volatile copper prices over the past 40 years as it neglected to diversify its economy away from mining or to expand opportunities within the industry by promoting sectoral linkages.⁵ Zambia’s economy continued to depend on mining: as Africa’s largest producer of copper and cobalt, mining accounts for 12 percent of Zambia’s Gross Domestic Product (GDP), 70 percent of its total export value and 62 percent of all foreign direct investment in the country.⁶ However, as much as Zambia’s mining-led development failings can be attributed to the resource curse, it could also be due to poor timing and bad luck.⁷

¹ Most of this chapter was adapted from a chapter on mining land conflict in Zambia published during my doctoral studies: “Can free, prior and informed consent help combat mining land use conflicts in Zambia?” in Amissi Manirabona & Yenny Vega Cárdenas, eds, *Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts* (Toronto: LexisNexis, 2019) 313. It is reprinted here with the publisher’s permission.

² Francis B Nyamnjoh & Ignasio M Jimu, “Success or Failure of Developmental States in Africa: Exploration of the Development Experiences in a Global Context” in Pamela Mbabazi & Ian Taylor, eds, *The Potentiality of ‘Developmental States’ in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005) 16 at 18.

³ Christopher S Adam & Anthony M Simpasa, “The Economics of the Copper Price Boom in Zambia” in Alastair Fraser & Miles Larmer, eds, *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (New York: Palgrave MacMillan, 2010) 59 at 85.

⁴ *Ibid.*

⁵ Alastair Fraser, “Introduction: Boom and Bust on the Zambian Copperbelt” in Alastair Fraser & Miles Larmer, eds, *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (New York: Palgrave MacMillan, 2010) 1 at 2.

⁶ World Bank, “How Can Zambia Benefit More From Mining?” (18 July 2016), online: <<http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining>>.

⁷ Fraser, *supra* note 5 at 1.

The success of Zambia's copper industry—before and after independence—was directly linked to the global economy and its effect on the price of copper. The Great Depression of 1929 began just after the opening of Zambia's copper mines, decimating commodity prices.⁸ In the early 1970s, after Zambia's first independent government under President Kenneth Kaunda decided to nationalize the mines and ensure greater benefits for the state from a burgeoning industry, copper prices declined and remained low for nearly 30 years as the country dealt with neoliberal structural adjustment programmes that privatized the national mining company. At the turn of the century, as prices experienced a boost, the Zambian government implemented a windfall tax to again ensure the state benefitted from revenue generation from copper mining.⁹ Copper prices declined in response, forcing the government to reverse its stance even as prices recovered. The country continues to search for ways to govern the sector and promote mining-led development.¹⁰

As Zambia continues to find ways to ensure meaningful economic benefits from mining, it is simultaneously attempting to reconstruct its human rights regime by contemplating the adoption of the free, prior and informed consent (FPIC) obligation on mining companies. In February 2018, the Government of Zambia concluded consultations on its Draft National Land Policy, the first policy of its kind in Zambia since the country gained independence from Great Britain in 1964.¹¹ The policy aims to grant equal access to land for all Zambians and to implement an efficient land administration and management system that supports sustainable

⁸ *Ibid* at 2.

⁹ *Ibid*.

¹⁰ Chris Phiri, "Enough is Enough, Lungu Tells Mines" (May 17, 2019), online: Zambia Reports <<https://zambiareports.com/2019/05/17/enough-enough-lungu-tells-mines/>>.

¹¹ Hon. Jean Kapata, "Ministerial Statement – The Outcome of the National Validation Meeting for the Draft National Land Policy" (23 March 2018), online: <http://www.parliament.gov.zm/sites/default/files/images/publication_docs/MINISTERIAL%20STATEMENT%20BY%20THE%20MINISTER%20OF%20LANDS.pdf>.

development.¹² Wide-ranging in its scope, the policy addresses pressing issues related to rural settlements, agricultural land, housing, and mining land. Within its proposed changes to mining land administration is “Objective 34: To ensure that mining developers adopt principles of Free, Prior and Informed Consent of local people for decisions that may affect them.”¹³ The proposed obligation is twofold, requiring mining developers to “conclude agreements that recognize the land rights of local communities” and “develop specific policies to address involuntary displacement in line with international best practice.”¹⁴

Due to Zambia’s continued reliance on mining, its historically complex land tenure system, and its troubled experience with neoliberal policy incursions in its mining sector, adoption of the FPIC standard offers local communities the means to protect their rights and interests¹⁵ and help redirect the country towards a rights-based approach to mining governance. This chapter will explore how FPIC, as it is envisioned in the Draft National Land Policy, could contribute to a rights-based approach to mining governance in Zambia. Before completing that analysis in section 6.4, section 6.2 first provides a historical overview of mining and development in Zambia, from colonialism to the present. Section 6.3 then examines Zambia’s aspiring mining developmental state, considers how and why it does fit the model and concludes by applying Trubek, Coutinho and Schapiro’s legal functionalities framework to Zambia’s attempted mining developmental state institutions. Section 6.4 discusses Zambia’s efforts to redirect its mining governance towards a rights-based approach by examining the Draft National Land Policy’s FPIC requirement and specific implementation challenges. The section concludes

¹² Ministry of Lands and Natural Resources, *Draft National Land Policy* (2018) ch 3.

¹³ *Ibid* ch 6.

¹⁴ *Ibid*.

¹⁵ Pacifique Manirakiza, “Towards an African Human rights Perspective on the Extractive Industry” (2013) Loy U Chicago Intl L Rev 1 at 3.

with a consideration of specific recommendations that contemplate adopting the obligation in accordance with a rights-based approach to mining governance. Section 6.5 concludes the chapter with a brief discussion of factors that have impeded Zambia's implementation of a successful mining developmental state, which will be examined further in Chapter 7.

6.2. Mining and development in Zambia: from colonialism to the present

The management and administration of mining and land have been contentious issues in Zambia. Much of the foundation for Zambia's contemporary challenges can be traced to the colonial period when the British colonial administration first enacted Zambia's mining regime and land tenure system.¹⁶ In addition to laying the foundation for most of Zambia's post-colonial mining governance, British colonial rule was also instrumental in crafting the country's development priorities through its ties to private sector investment in the industry. Zambian historians split the country's colonial era into two distinct periods: the first, from 1890-1923 when the colony was administered by the British South Africa Company (BSAC); and second, from 1924 until independence in 1964 when the colonial administration was under the control of Britain's Colonial Office.¹⁷ Both periods, and their contributions to Zambia's mining and development trajectory, are discussed in the following section before Zambia's turn to neoliberalism and its attempts at reversing Washington Consensus policies are examined.

¹⁶ John Kangwa, "Zambia: 'Having a Place of Your Own' in Kitwe" in Robert Home & Hilary Lam, eds, *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean* (Portland: Cavendish Publishing, 2004) 121 at 125.

¹⁷ Bizeck Jube Phiri, *A Political History of Zambia: From the Colonial Period to the 3rd Republic* (Trenton, NJ: Africa World Press, Inc, 2006) at 9.

6.2.1. Settlers and local resistance during the colonial and early post-colonial periods

British incursion into what is now Zambia began during the scramble for Africa in the late eighteenth century. Like the Bechuanaland Protectorate (colonial Botswana), colonial Zambia was part of Cecil Rhodes' expansion of British holdings in Cape Colony. Through a series of treaties negotiated with local rulers in Barotseland (what is now western Zambia), Rhodes' BSAC established Northern Rhodesia and administered the territory on behalf of the British Crown.¹⁸ In its early years, the BSAC saw little benefit in Northern Rhodesia—the colony became expensive to administer, and no exploitable natural resources were immediately evident.¹⁹ To manage the high costs of administration, the BSAC undertook two measures to help raise revenue: the settlement of European farmers and the implementation of a “hut tax” on local Zambian houses.²⁰ With the rise in the white settler population, Rhodes' vision for the colony morphed into one “ruled by whites, developed by Indians and worked by Africans.”²¹ This position, and the implementation of the hut tax, led many Zambians to work in Southern Rhodesian and South African mines.²² Zambians became a labour source as settlers and the colonial administration accumulated wealth. To maintain this system and combat Zambian resistance, the BSAC leaned heavily on the local authority of chiefs to collect taxes.²³ With BSAC's dominance and the growing settler population, this was likely the only instance in which colonial rulers utilized and integrated local institutions into its administration. Although local

¹⁸ *Ibid.* Northern Rhodesia was officially created in 1911, after the BSAC amalgamated Northeastern and Northwestern Rhodesia. Since the separate governance of these regions was not critical to Zambia's colonial history, “Northern Rhodesia” is also used to refer to pre-1911 colonial Zambia.

¹⁹ *Ibid* at 10.

²⁰ *Ibid* at 11.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

systems of authority were maintained, their diminished role in colonial administration could have limited their influence on post-colonial institutions and governance.²⁴

By the mid-1920s, BSAC could no longer operate Northern Rhodesia profitably. Control was relinquished to the British Colonial Office, which moved to strengthen settler influence in the colony by increasing their numbers through land grants.²⁵ Before BSAC's administration ended, copper deposits were discovered in the area that became known as the Copperbelt, home to the majority of Zambia's mines. Despite ending its administration of the colony, BSAC retained the mineral rights and entered into agreements with two mining companies—the Roan Selection Trust and Anglo-American Corporation—to begin commercial mining at the Roan Antelope Mine located near Luanshya.²⁶ With the opportunities quickly generated by the Copperbelt, "mining became the backbone of Northern Rhodesia's social, economic and political development."²⁷ Racial employment inequities were further entrenched as white semi-skilled settlers migrated to the region to take up new jobs at the mines. Zambian labour was also attracted to the mines, which saw many Zambians leave their communities to earn wages that could pay the tax.²⁸

British laws also became the law of Northern Rhodesia when the colony was created in 1911.²⁹ Britain's land law was adopted and coexisted alongside a conventional system of landholding. In 1928, the British colonial administration entrenched the dual land title system

²⁴ In contrast to Botswana's successful post-colonial institutions, which many scholars attributed to its indigenous systems of governance.

²⁵ Phiri, *supra* note 17 at 15.

²⁶ Fraser, *supra* note 5 at 4; Muna Ndulo, "Mining Legislation and Mineral Development in Zambia" (1986) 19:1 Cornell Int'l LJ 1 at 9; John Lungu, "Copper Mining Agreements in Zambia: Renegotiation or Law Reform?" (2008) Review of African Political Economy 403 at 404.

²⁷ Phiri, *supra* note 17 at 12.

²⁸ *Ibid* at 13.

²⁹ Kangwa, *supra* note 16 at 125.

through the *Northern Rhodesia (Crown Land and Native Reserves) Order* that restricted Crown land to European settlers and “native reserves ... ‘for the sole and exclusive use of the natives of Northern Rhodesia.’”³⁰ Like other dual land title colonial systems, potentially profitable mining land was vested in the Crown.³¹ Black Zambians were further dispossessed of land ownership through the implementation of policies prohibiting the formation of permanent settlements for Black Zambians on Crown land in the Copperbelt. Zambians who relocated to the mines for work were housed in accommodations provided by the mines, leading to the creation of informal settlements in the Copperbelt.³²

Reclaiming economic and political power from the white settler population launched Zambia’s long march to independence during the last decade of colonial rule. The settler population strengthened its political power from 1924 to 1954 as the British Colonial Office sought to placate the group’s political demands and prioritized its interests over Zambians.³³ In an effort to consolidate European influence in Southern Africa, white settlers campaigned for the amalgamation of Northern Rhodesia, Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi) in a new Central Africa Federation.³⁴ Elevating white minority rule was the Federation’s top priority. However, the group acknowledged this was not sustainable without the allyship of local African elites from the business and working class. Despite the group’s efforts to create a multiracial society, African elites opposed the Federation and formed political parties to fight for

³⁰ *Ibid.*

³¹ Taylor Brown, “Contestation, confusion and corruption: market-based land reform in Zambia” in Sandra Evers, Marja Spierenburg & Harry Weis, eds, *Competing jurisdictions: settling land claims in Africa* (Amsterdam: Koninklijke Brill, 2005) 79 at 82.

³² The Umuchinshi Initiative, “Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study – The Evictions at Mufulira by First Quantum Minerals/Mopani Copper Mines,” online: <https://ihp.law.utoronto.ca/utfl_file/count/documents/WorkingGroup_Clinic/Mining%20Case%20Study.pdf> at 5 [Umuchinshi].

³³ Phiri, *supra* note 17 at 93.

³⁴ *Ibid* at 32.

independence.³⁵ The Zambia African National Congress and its successor, the United National Independence Party (UNIP), adopted a populist approach to African nationalism that sought to wrestle political power away from the settler minority and reclaim Africa for the Africans. Under the leadership of Kenneth Kaunda, gaining control over Zambia's political institutions would ultimately lead to control over state revenue, which would then allow them to dictate the course of economic development in the country.³⁶

After the defeat of the proposed Federation, settlers and the British Colonial Office continued to push for a multiracial government that some Zambian leaders felt left the door open to majority rule.³⁷ UNIP, however, continued to resist until majority rule could be achieved. In January 1964, UNIP's plan came closer to fruition as it won Zambia's legislative elections and formed a cabinet, with Kenneth Kaunda as Prime Minister. Five months later, constitutional talks were held with the aim of pressuring Britain to grant independence. UNIP succeeded—the talks concluded with a plan to grant colonial Zambia independence on October 24, 1964.³⁸ President Kaunda became Zambia's first President and remained in power until 1991.

Zambia's economic prospects at independence were positive. During colonial rule, Zambia's mining industry acquired the necessary capital and infrastructure to compete.³⁹ At independence, the UNIP government successfully negotiated the transfer of mining royalties, which were still being paid to BSAC, to the Zambian state.⁴⁰ Copper mining remained

³⁵ *Ibid* at 102.

³⁶ Miles Larmer, "Historical Perspectives on Zambia's Mining Booms and Busts" in Alastair Fraser & Miles Larmer, eds, *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (New York: Palgrave MacMillan, 2010) 31 at 34.

³⁷ Phiri, *supra* note 17 at 106-107.

³⁸ *Ibid* at 118.

³⁹ Stuart John Barton, "Why Zambia failed" (2015) 11:4 *Journal of Institutional Economics* 803 at 815.

⁴⁰ Larmer, *supra* note 36 at 35.

prosperous and propelled Zambia to the status of a middle-income country, with one of the highest per capita GDPs in Africa and higher than Brazil, Malaysia and South Korea, some of the world's leading economies today.⁴¹ To remain competitive, Zambia required the necessary foreign investment to compensate for its limited domestic financial resources and sustain its capital intensive industry. As a land-locked country with underground mines in a complex geographical region, Zambia's industry needed foreign investors willing to front the high costs of production and the provision of "complementary inputs"⁴²—such as transport, power and communication networks—to sustain its growth.⁴³

Land ownership in Zambia drastically changed at independence, but the new tenure system failed to resolve the legal issue surrounding informal settlements in the Copperbelt.⁴⁴ Under Zambia's new constitution, all former Crown land was vested in the president and converted to state-owned land.⁴⁵ Customary land title, as it was recognized under colonial rule, remained and was constitutionally protected in independent Zambia. Further complicating the issue of access to land for native Zambians was the ownership of Zambia's mines, which remained under the control of foreign corporations when the country gained its independence in 1964. Access to land was not an immediate concern for the UNIP. Instead, high copper prices buttressed President Kaunda's economic development plans, allowing the new independence government to focus its efforts on matters of immediate concern, including the promotion of wide-scale industrialization that would shed remnants of the colonial economy and alleviate

⁴¹ Fraser, *supra* note 5 at 6.

⁴² Adam & Simpasa, *supra* note 3 at 60.

⁴³ *Ibid.*

⁴⁴ Umuchinshi, *supra* note 32 at 5.

⁴⁵ Kerstin Nolte, "Large-scale agricultural investments under poor land governance in Zambia" (2014) Land Use Policy 698 at 699.

poverty.⁴⁶ Driven by his policy of “Zambian humanism,”⁴⁷ President Kaunda sought to improve the wellbeing of Zambia’s population through five-year National Development Plans that would direct government revenue from copper mining to fulfil his social development agenda: building schools and hospitals, and subsidizing state-owned manufacturing companies.⁴⁸ Zambia’s first development plan, the 1964 Seers Report, confirmed the need to attract foreign investment and create an environment attractive to such investment.⁴⁹

However, the global pricing system for copper—which saw prices set on the world market and the mineral sold on the London Metal Exchange—meant foreign mining companies repatriated profits outside of Zambia and offered few benefits to the state beyond royalties.⁵⁰ Soon after independence, President Kaunda attempted to reverse this inequity in partnership with other leaders of the Non-Aligned Movement seeking a New International Economic Order at the United Nations. President Kaunda’s idea was a “price- and quota-fixing copper cartel”⁵¹ (similar to the oil cartel OPEC) that was comprised of the world’s leading copper-exporting countries: Chile, Zaire (the Democratic Republic of Congo), Peru, and Zambia.⁵² The group, which called itself the Intergovernmental Conference of Copper Exporting Countries (CIPEC), failed to achieve OPEC’s level of influence: it controlled less than 60 percent of global copper trade; it did not count major producers, such as Canada, amongst its members; and it failed to reach consensus on key long-term strategic issues, including the management of copper supplies.⁵³

⁴⁶ Lungu, *supra* note 26 at 404.

⁴⁷ Alastair Fraser & John Lungu, “For whom the windfalls? Winners and losers in the privatisation of Zambia’s copper mines,” online: <https://sarpn.org/documents/d0002403/1-Zambia_copper-mines_Lungu_Fraser.pdf> at 7.

⁴⁸ *Ibid.*

⁴⁹ Larmer, *supra* note 36 at 35.

⁵⁰ Fraser, *supra* note 5 at 6.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Larmer, *supra* note 36 at 40.

Despite its economic success, the UNIP government remained concerned with the country's disadvantaged position globally and in relation to its copper investors. Additionally, the limited participation of local Zambians in the mining sector hindered UNIP's development plans.⁵⁴ To promote mining-led development, the government set its sights on an ownership stake in the mines. The Seers Report made this policy recommendation,—and mining companies anticipated and even welcoming its implementation, given the security that state compensation would mean for their investments.⁵⁵ Starting in the late 1960s and early 1970s, the UNIP government embarked on a series of reforms that eventually paved the way for complete nationalization of the copper mines. Through the Matero reforms of 1969, the Zambian government obtained a 51 percent ownership stake in Roan Selection Trust and the Anglo-American Corporation and subsequently created the Mining Development Corporation to manage its shares.⁵⁶ The mining companies were also restructured: Roan Selection Trust was rebranded Roan Consolidated Copper Mines (RCCM) and oversaw six mines in Chibuluma, Chambishi, Kalengwa, Luanshya, Mufulira and Ndola; Anglo-American Corporation was renamed Nchanga Consolidated Copper Mines (NCCM) and was responsible for the mines in Konkola, Nchanga and Rhokana.⁵⁷ Along with receiving 51 percent ownership stakes, the Zambian government introduced a constitutional amendment that vested the rights of all mineral ownership in the state and granted exclusive rights to the state for prospecting and mining licences.⁵⁸ By 1982, RCCM and NCCM were merged to form the Zambia Consolidated Copper

⁵⁴ J Sikamo, A Mwanza & C Mweemba, "Copper mining in Zambia – history and future" (2016) *The Journal of the Southern African Institute of Mining and Metallurgy* 491 at 492.

⁵⁵ Larmer, *supra* note 36 at 37.

⁵⁶ Sikamo, Mwanza & Mweemba, *supra* note 54 at 492.

⁵⁷ *Ibid* at 493.

⁵⁸ Fraser & Lungu, *supra* note 47 at 7.

Mines (ZCCM).⁵⁹ ZCCM was treated as a means to support the implementation of the state's development plan. Like its predecessors, it continued to provide housing to its employees, and supplemented this service with a "'cradle to the grave' welfare policy"⁶⁰ that offered basic provisions to its staff and members of the local community, including food, electricity, water, and health care.⁶¹

President Kaunda eventually applied his "Zambian humanism" principles of economic socialism and development to the country's land tenure system in the decade following independence. Freehold tenure was abolished and converted to statutory leasehold in 1975 through the passage of the *Land (Conversion of Titles) Act*.⁶² Previous land interests entrenched under colonial rule were reformed through this legislation, which eliminated the private market for land and centralized all leasehold land transfers within the national government. Land, which President Kaunda declared a gift from God in accordance with African tradition,⁶³ was stripped of its inherent value—only structures built on land, such as buildings, were available for purchase.⁶⁴ Critics contend these reforms offered little security to Zambians, and instead entrenched land inaccessibility for most of the population.⁶⁵

The decline in copper prices starting in the mid-1970s began the decline of President Kaunda's "Zambian humanism" policies and, ultimately, his administration. Zambia borrowed heavily from foreign debtors after the price of copper collapsed following the two oil crises in

⁵⁹ *Ibid.*

⁶⁰ Lungu, *supra* note 26 at 5.

⁶¹ *Ibid.*

⁶² Brown, *supra* note 31 at 84; Kangwa, *supra* note 16 at 125. Customary land was not affected by this legislation.

⁶³ Kangwa, *ibid* at 25.

⁶⁴ Brown, *supra* note 31 at 84.

⁶⁵ Kangwa, *supra* note 16 at 126.

1974 and 1979.⁶⁶ From 1970 to 1980, Zambia's external debt nearly quadrupled from USD \$814 million to USD \$3.2 billion.⁶⁷ To offset its declining revenues, the Zambian government exhausted all available ZCCM resources without making the necessary investments to support exploration and improve mining facilities.⁶⁸ The decline in production and copper revenues led to widespread poverty across Zambia and shrunk the country's GDP per capita to USD \$232 in 1986, the lowest it had been since independence in 1964.⁶⁹ Zambia's ballooning debt soon ushered in the era of economic liberalization as the country accepted debt assistance from the World Bank and the International Monetary Fund (IMF). The country's economic policies were greatly scrutinized as it entered its first World Bank structural adjustment programme in 1983.⁷⁰

6.2.2. The neoliberal turn and its aftermath: the 1980s and 1990s

Structural adjustment in Zambia from 1983–1987 comprised a mix of fiscal, monetary and privatization policies aimed at reducing the state's participatory role in the economy and confining it to a regulator. One IMF priority critical to achieving these objectives was reducing government deficit.⁷¹ To accomplish this, the government was ordered to: reduce subsidies; eliminate price controls on several consumer goods, including maize, petrol and fertilizer; increase non-tax revenues (through measures like user fees for government services); reduce the

⁶⁶ Lungu, *supra* note 26 at 405.

⁶⁷ Lishala C Situmbeko & Jack Jones Zulu, "Zambia: condemned to debt" (April 2004), online: <<https://www.globaljustice.org.uk/sites/default/files/files/resources/zambia01042004.pdf>>.

⁶⁸ Lungu, *supra* note 26 at 405.

⁶⁹ World Bank, "GDP per capita (current US\$) – Zambia," online: <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZM>>.

⁷⁰ Lungu, *supra* note 26 at 405.

⁷¹ Beatrice Kalinda & Maria Floro, *Zambia in the 1980s: A Review of National and Urban Level Economic Reforms* (Washington, DC: The World Bank, 1992) at 10.

size of state-owned enterprises, including the ZCCM; and implement a freeze on public sector hiring in order to cut the size of the civil service.⁷²

By 1987, President Kaunda's government resisted full implementation of the first structural adjustment programme due to growing opposition to the proposed austerity measures.⁷³ The government's inability to fully adhere to the program and pay its arrears led the World Bank and IMF to discontinue its lending in 1987.⁷⁴ With limited means to promote economic growth and development, President Kaunda's government gradually lost support and legitimacy. In 1991, President Kaunda and UNIP were resoundingly defeated by Frederick Chiluba and the Movement for Multiparty Democracy (MMD), which campaigned on a platform of wide-ranging free-market reforms, including a market-based land policy and privatization.⁷⁵

With the election of the new MMD government, the World Bank and IMF were invited back to assist Zambia with restructuring its foreign debt. Many of the promises central to the MMD platform were premised on neoliberal principles promoted by the World Bank and IMF. Foreign donors were also keen to provide aid and support the MMD's liberalization agenda.⁷⁶ In the years after the MMD's election, foreign aid ballooned to more than 40 percent of the state's budget.⁷⁷ As a condition of renewed aid, President Chiluba's government was required to implement a new series of reforms. Two mandatory reforms that significantly shaped the nexus

⁷² *Ibid* at 11.

⁷³ Fraser & Lungu, *supra* note 47 at 9.

⁷⁴ Patricia Feeney, "The Human Rights Implications of Zambia's Privatisation Programme" in Michael Addo, ed, *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer Law International, 1999) 323 at 327.

⁷⁵ Brown, *supra* note 31 at 327.

⁷⁶ Feeney, *supra* note 74 at 328.

⁷⁷ Fraser & Lungu, *supra* note 47 at 9.

between mining, land and development were the privatization of ZCCM and the transformation of the land title system under the 1995 *Lands Act*.⁷⁸

ZCCM's privatization was a cautious undertaking for the Zambian government. The company was the largest state-owned enterprise and generated most of the country's foreign exchange earnings.⁷⁹ The company's importance to the nation's economy was often expressed through the phrase "ZCCM is Zambia, Zambia is ZCCM."⁸⁰ Consequently, the government considered a number of different options for privatizing ZCCM over four years. In 1996, the government approved unbundling the company and selling its various mines to multiple investors while retaining minority interest through a remodelled ZCCM: ZCCM Investment Holdings (ZCCM-IH).⁸¹ From 1997 to 2000, ZCCM was divided into seven different units and sold to seven transnational mining companies: 1) Mopani Copper Mines Plc, a joint venture of Glencore International AG and First Quantum Minerals; 2) Konkola Copper Mines, purchased by Anglo-American Corporation; 3) Roan Antelope Mining Corporation of Zambia Plc, owned by Binani Group of India; 4) Chambishi Metals Plc., acquired by Anglovaal Mining Limited; 5) NFCA Africa Mining Plc., owned by China Non-ferrous Metals Company Limited; 6) Cyprus Amax Kanshansi Mining Plc, a subsidiary of Cyprus Amax Minerals Company; and 7) Chibuluma Mines Plc, operated by a consortium consisting of Crew Development Corporation,

⁷⁸ *Lands Act*, 1995.

⁷⁹ John Craig, "Putting privatization into practice: the case of Zambia Consolidated Copper Mines Limited" (2001) *J Mod Afr Stud* 389 at 390 ["Privatization into practice"].

⁸⁰ *Ibid.*

⁸¹ Fraser & Lungu, *supra* note 47 at 390.

Meterorex Maranda Mines and Genbel Securities.⁸² The Government of Zambia's minority interests in each company did not exceed 20 percent.⁸³

Critics of privatization argued that President Chiluba's administration failed to negotiate fair-market value for the sale of ZCCM for two key reasons. First, the government's negotiating position was weakened due to the low price of copper and ZCCM's year-over-year losses.⁸⁴ Second, the government wished to create a favourable investment environment to attract foreign investors. This included implementing a favourable mining code via standard development agreements entered into with each company that could also have offered incentives more favourable than those included in statute, the revised *Mines and Minerals Act of 1995*.⁸⁵ The standard terms included in each Agreement were:

- 25 percent corporate income tax collected on taxable profits;
- 3 percent cap on royalty rates (although rates in practice were typically only 0.6 percent);
- Interest costs and repatriated dividend income were fully tax-deductible;
- Capital expenditure could be expensed in the year in which it was incurred;
- Loss carry-forward provisions were extended up to 15–20 years.
- Relief from assuming any of ZCCM's financial or environmental liabilities;
- Stability clauses of 15–20 years, thus guaranteeing the terms for that period.⁸⁶

⁸² *Ibid* at 402; ZCCM Investment Holdings Plc, "Investments-Copper, Cobalt & Gold," online: <<http://www.zccm-ih.com.zm/copper-cobalt-gold/>>.

⁸³ ZCCM Investment Holdings Plc, *ibid*.

⁸⁴ Lungu, *supra* note 26 at 409.

⁸⁵ Fraser & Lungu, *supra* note 47 at 11.

⁸⁶ Larmer, *supra* note 36 at 67.

The new companies took advantage of Zambia's desperation to secure new investment and exploited its weak bargaining position. Zambia's desire to keep the companies happy also compounded its inability to regulate them effectively, leading to lax health, safety, labour and environmental enforcement at the mines.⁸⁷ Only Zambia's donors, including the Bretton Woods Institutions, praised its privatization program and continued to offer support through aid. The World Bank, in particular, applauded Zambia's program and called it the "most successful program"⁸⁸ in Africa. The Bank commended the government's commitment to privatizing, as evidenced by the legislative (passage of the *Privatization Act*) and institutional (creation of a government agency, the Zambia Privatization Agency, and the lead role granted to the private sector) structure put in place to complete privatization in the 1990s.⁸⁹

The MMD government also liberalized Zambia's land tenure system while it privatized ZCCM. Three key reforms were adopted with the passage of the 1995 *Lands Act*. First, the 1975 *Land (Conversion of Titles) Act* was repealed and private property rights were introduced for those holding title on state land, making it possible for land to be bought and sold once again.⁹⁰ Freehold tenure was not reinstated, as land remained vested in the President.⁹¹ Second, the Act created the Lands Tribunal to protect leaseholders and customary rights holders. The Tribunal was established to hear land disputes expeditiously and reduce congestion in the Zambian High Court. It was also intended as an accessible and low-cost option for rural Zambians.⁹² Third, the Act recognized existing rights to customary land and created a mechanism, available to both

⁸⁷ Fraser, *supra* note 5 at 16.

⁸⁸ Oliver Campbell White & Anita Bhatia, *Privatization in Africa, World Bank Directions in Development* (Washington, DC: World Bank, 1998) at 4.

⁸⁹ *Ibid* at 111.

⁹⁰ Brown, *supra* note 31 at 85.

⁹¹ *Ibid*.

⁹² *Ibid*.

local Zambians and foreign investors, to convert customary title to private title if the land's proposed use was deemed to be of "national interest."⁹³ The government's rationale for this reform was to make customary land tenure more secure. However, the Act instead made customary land—which is approximately 94 percent of all land in Zambia—available to foreign investors.⁹⁴

The privatization of ZCCM and the 1995 land reforms converted institutions managed by the state for the benefit of all Zambians into commodities meant to open Zambia for business and attract foreign investment. Additionally, both the privatization process and the new land governance system created significant discretionary power in the hands of a small elite.⁹⁵ MMD leaders and foreign investors were accused of looting ZCCM during privatization by using their influential positions to gain ZCCM assets at favourable prices, despite the regulation of political involvement in ZCCM's privatization.⁹⁶ Similarly, the 1995 *Lands Act* created a land-purchase system that introduced consultation with local chiefs yet removed local communities from the process.⁹⁷ Through ZCCM's privatization and the *Lands Act*, local communities were disenfranchised from political processes that significantly affected their access to land and altered their developmental prospects.

The land insecurity created by ZCCM's privatization also made local Zambians living in informal settlements near mines vulnerable to eviction. Neither the *Lands Act* nor the privatization process itself envisaged protections for vulnerable communities. Even the World

⁹³ *Ibid.*

⁹⁴ *Ibid* at 80, 86.

⁹⁵ *Ibid* at 70; John Craig, "Evaluating Privatisation in Zambia: A Tale of Two Processes" (2000) 85 Review of African Political Economy 357 at 361-2 [Craig, "Evaluating privatisation"].

⁹⁶ Craig, "Privatization into practice", *supra* note 79 at 392.

⁹⁷ Nolte, *supra* note 45 at 700.

Bank did not invoke, or recommend, its resettlement policy during its involvement in privatization, despite its past acknowledgement of the negative consequences large-scale projects can have on local communities.⁹⁸ The guidelines were broad and thorough in their scope, and included the following objectives:

- (a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs.
- (b) Where displacement is unavoidable, resettlement plans should be developed. All involuntary resettlement should be conceived and executed as development programs, with resettlers provided sufficient investment resources and opportunities to share in project benefits. Displaced persons should be (i) compensated for their losses at full replacement cost before the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them. Particular attention should be paid to the needs of the poorest groups to be resettled.
- (c) Community participation in planning and implementing resettlement should be encouraged. Appropriate patterns of social organization should be established, and existing social and cultural institutions of resettlers and their hosts should be supported and used to the greatest extent possible.
- (d) Resettlers should be integrated socially and economically into host communities so that adverse impacts on host communities are minimized...
- (e) Land, housing, infrastructure, and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities, and pastoralists who may have usufruct or customary rights to the land or other resources taken for the project. The absence of legal title to land by such groups should not be a bar to compensation.⁹⁹

If these principles were adopted at the time, they might have mitigated the harmful impact of ZCCM's privatization on local communities. Instead, communities were displaced without a resettlement plan or adequate compensation.

The evictions by Mopani Copper Mines at its site in Mufulira were one of the worst land displacements in post-privatization Zambia. The evictions were the foundation of a complaint lodged by two non-governmental organizations (NGO), Oxfam-Canada and the Zambian Development Education Community Project, against the company under the *Organisation for*

⁹⁸ Feeney, *supra* note 74 at 345.

⁹⁹ World Bank, "Operational Directive 4.30," online: <https://www.ifc.org/wps/wcm/connect/322d9d80488559f584b4d66a6515bb18/OD430_InvoluntaryResettlement.pdf?MOD=AJPERES>.

Economic Co-operation and Development Guidelines for Multinational Enterprises.¹⁰⁰ Three violations formed the basis of the complaint: (1) the evictions breached the human rights of local Zambians, contrary to Policy II(2); (2) the company failed to “foster a relationship of confidence and mutual trust” with the local community, contrary to Policy II(7); and (3) the company failed to “engage in adequate and timely communication and consultation with the communities directly affected by [its] environmental, health and safety policies.”¹⁰¹ Because Mopani was co-owned by the Canadian company First Quantum Minerals, the complaint was heard by Canada’s OECD National Contact Point, whose role was to facilitate dialogue between the mine and the complainant NGOs. The initial results of these negotiations yielded positive results. The company agreed to three conditions: first, to stop the evictions; second, to resettle the local community in conjunction with the local government and NGO; and third, ensure continued dialogue with the NGO and the state.¹⁰²

The hopes for an amicable resolution were dashed in the years following the initial agreement when Mopani’s lack of commitment became evident. Without any enforcement mechanism, the OECD Guidelines proved ineffectual in preventing continued evictions.¹⁰³ By 2006, Mopani confirmed evictions were ongoing as it undertook construction to reopen a mine shaft and install another.¹⁰⁴ To offset some of the concerns raised in the original OECD Guidelines complaint, Mopani began issuing annual licences permitting local residents to farm on mining land.¹⁰⁵ The Umuchinshi Initiative (a former International Human Rights Program

¹⁰⁰ Umuchinshi, *supra* note 32 at 7.

¹⁰¹ Umuchinshi, *ibid*; Organisation for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (2008), online: OECD <<http://www.oecd.org/investment/mne/1922428.pdf>>.

¹⁰² Umuchinshi, *supra* note 32 at 7.

¹⁰³ *Ibid* at 9.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

Working Group based at the University of Toronto) found this arrangement entrenched land insecurity and breached both international human rights standards and the OECD Guidelines.¹⁰⁶

6.2.3. Zambia's post-neoliberal recovery and current development challenges

In the twenty years since ZCCM's privatization, Zambia has yet to fully recover from the devastation it wrought on its economy and local communities. Soon after privatization was completed, Zambia qualified for the Heavily-Indebted Poor Country Initiative, the World Bank designed program intended to relieve extremely poor countries from the stranglehold of massive debt.¹⁰⁷ In 2000, Zambia's United Nations Human Development Index was barely higher than its 1990 figure. Some indices actually declined, including both life expectancy (from 45 years to 44.7) and Gross National Income per capita (USD \$2,076 to \$2,012).¹⁰⁸ Since 2000, Zambia has seen an upward trend in all of its indices, although it continues to rank low globally: 144 out of 189 countries in the 2018 Index.¹⁰⁹

Privatization and Zambia's neoliberal turn also had a political toll that left the country in search of true multiparty democracy. After attempting to change the democratic reforms his own government introduced so that he could remain in office for a third term, President Chiluba stood down and helped his chosen successor, Levy Mwanawasa, secure victory in 2001.¹¹⁰ Although President Mwanawasa came to power with a weak mandate—he only garnered 29 percent of the vote—the MMD remained a dominant political force, benefiting from rising copper prices and

¹⁰⁶ *Ibid* at 10-13.

¹⁰⁷ Fraser, *supra* note 5 at 12.

¹⁰⁸ United Nations Development Programme, "Briefing note for countries on the 2018 Statistical Update: Zambia," online: <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZMB.pdf>.

¹⁰⁹ United Nations Development Programme, "Human Development Data," online: <<http://hdr.undp.org/en/data>>.

¹¹⁰ Miles Larmar, "Reaction and Resistance to Neoliberalism in Zambia" (2005) 32:103 *Review of African Political Economy* 29 at 39.

growing investment during the early 2000s.¹¹¹ The MMD remained in power following the election held after President Mwanawasa's death in June 2008. President Rupiah Banda, who was acting president during Mwanawasa's illness, was not his appointed successor; instead, his rise to power benefitted from the influence he consolidated during his acting role.¹¹² It was not until the decline in copper prices and the Zambian population's subsequent frustration with its government's handling of the post-privatization mining sector that the MMD fell to its main opposition, the Patriotic Front. Michael Sata became Zambia's third president in three years when he won election over President Banda in 2011.¹¹³ Zambia's current president, Edward Lungu, was sworn into office in January 2015 following President Sata's death in October 2014.

Zambia's efforts to recover from privatization and neoliberal policies began in 2008 when it started the process of reforming its mineral tax regime. High copper prices saw private mining companies repatriate considerable profits while Zambia was bound by the terms of the development agreements entered into during privatization. One study conducted in 2012 by Global Financial Integrity, a Washington, DC-based think tank specializing in illicit financial flow reporting, estimated that Zambia lost approximately USD \$5 billion in revenue because of transfer pricing schemes mining companies exploited during the 2004–2008 commodities supercycle.¹¹⁴ Facing pressure from political opposition and civil society, President Mwanawasa

¹¹¹ Jonathan DiJohn, "State Resilience Against the Odds: An Analytical Narrative on the Construction and Maintenance of Political Order in Zambia Since 1960" (2010) Crisis States Research Centre Working Paper No. 75, online: London School of Economics <<http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/cscc-working-papers-phase-two/wp75.2-state-resilience-against-the-odds.pdf>> at 34

¹¹² *Ibid.*

¹¹³ Danielle Resnick & James Thurlow, "The Political Economy of Zambia's Recovery: Structural Change without Transformation?" (2014) IFPRI Discussion Paper 01320, online: <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.639.6337&rep=rep1&type=pdf>> at 13.

¹¹⁴ Dev Kar & Sarah Freitas, *Illicit Financial Flows from Developing Countries: 2001-2010* (December 2012), online: Global Financial Integrity <<http://gfinintegrity.org>>; Rupert Neate, "£5bn illegally taken out of Zambia over past decade, says report" (December 17, 2012), online: The Guardian <<https://www.theguardian.com/world/2012/dec/17/5bn-illegally-taken-out-zambia-report>>.

unilaterally announced the imposition of new windfall taxes in January 2008 to the dismay of mining companies and Zambia's foreign donors.¹¹⁵ The state's ongoing tax policy battle with mining companies continues to the present, as two of Zambia's largest foreign investors, First Quantum Minerals (owners of the Kansanshi and Sentinel mines) and Vedanta Resources (operators of Konkola Copper Mines) were hit with USD \$8 billion and USD \$18 million tax bills, respectively, over the past two years.¹¹⁶ President Lungu's administration has taken additional measures to ensure Zambia secures a greater share of its mineral wealth by launching proceedings in June 2019 to liquidate Konkola Copper Mines, in which Zambia holds a 20 percent stake.¹¹⁷ The dispute remains unresolved after Vedanta launched a lawsuit against the Zambian government in South Africa in July 2019.¹¹⁸ These actions, along with other measures Zambia has taken to secure a great share of its mineral wealth, are examined further in section 6.3.2.

Zambia's historically poor economic performance and mismanagement of its mining sector led donors to intervene after privatization and to pressure Zambia into joining and implementing the Extractive Industries Transparency Initiative (EITI).¹¹⁹ In 2007, at the request of the Zambian government, the World Bank completed a scoping study to assess whether the country should subscribe to the EITI. The final report recommended Zambia join the EITI. It

¹¹⁵ Fraser, *supra* note 5 at 19.

¹¹⁶ "Vedanta's Konkola Copper Mines disputes \$18 mln Zambia tax bill - industry source" (May 9, 2018), online: Reuters <<https://www.reuters.com/article/zambia-mining-vedanta-res-plc/update-1-vedantas-konkola-copper-mines-disputes-18-mln-zambia-tax-bill-industry-source-idUSL8N1SG3AH>>.

¹¹⁷ "Zambia's president on a collision course with mining giant Vedanta" (June 24, 2019), online: Business Live <<https://www.businesslive.co.za/bd/world/africa/2019-06-24-zambias-president-on-a-collision-course-with-mining-giant-vedanta/>>.

¹¹⁸ "Vedanta sues Zambian Government in a South African Court over KCM" (July 4, 2019), online: Lusaka Times <<https://www.lusakatimes.com/2019/07/04/vedanta-sues-zambian-government-in-a-south-african-court-over-kcm/>>.

¹¹⁹ Dan Haglund, "From Boom to Bust: Diversity and Regulation in Zambia's Privatized Copper Sector" in Alastair Fraser & Miles Larmer, eds, *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (New York: Palgrave MacMillan, 2010) 91 at 95.

concluded that tensions between the state, mining companies, and civil society could be resolved if greater knowledge and information were shared among the three parties.¹²⁰ Two years later, Zambia became an EITI candidate country; in September 2012, Zambia became fully compliant with the EITI Standard. As mentioned in Chapter 2, Zambia continues to make “meaningful progress” towards implementing the 2016 EITI Standard.¹²¹ Unlike other EITI members (such as Ghana and Nigeria),¹²² Zambia has yet to propose or introduce specific implementation legislation; instead, the 2015 *Mines and Minerals Development Act* (2015 *MMDA*) (and its 2016 amendment)¹²³ governs all aspects of EITI implementation in addition to the *Zambia EITI Strategic Plan (2016-2020)*.¹²⁴

EITI’s 2016 assessment of Zambia’s legal framework identified procedural gaps in licence allocation that had not yet been included in the 2015 *MMDA*.¹²⁵ Zambia’s EITI Council responded to these concerns in its 2017 Annual Report, stating that the Zambia Mining Cadastre Portal could be used to address this gap.¹²⁶ No reports were filed in 2018; therefore, it is unclear if the EITI’s concern has been fully addressed through the Cadastre. Nonetheless, Zambia was recently recognized for its transparency and accountability efforts at EITI’s 2019 Global

¹²⁰ World Bank Group, *Extractive Industries Transparency Initiative (EITI) Scoping Study for the Republic of Zambia* (September 2007), online: <<http://documents.worldbank.org/curated/en/134691468166493476/Extractive-Industries-Transparency-Initiative-EITI-scoping-study-for-the-Republic-of-Zambia>>.

¹²¹ Extractive Industry Transparency Initiative, online: <<https://eiti.org/zambia>>. This is the most recent evaluation conducted. The EITI introduced a new 2019 Standard at its Global Conference in June 2019. EITI members have yet to be evaluated against this new standard.

¹²² *Ibid.*

¹²³ *Mines and Minerals Development Act, 2015*, No. 11; *Mines and Minerals Development (Amendment)*, No. 14 of 2016).

¹²⁴ EITI, *supra* note 121.

¹²⁵ EITI, “Validation of Zambia: Report on initial data collection and stakeholder consultation”, online: <https://eiti.org/sites/default/files/documents/zambia_2017_eiti_validation_report_on_initial_data_collection_and_stakeholder_consultations.pdf> at 36.

¹²⁶ Zambia Extractive Industry Transparency Initiative, “2017 ZEITI Annual Progress Report”, online: <<http://zambiaeiti.org/wp-content/uploads/2018/07/zeiti-annual-progress-report-for-2017.pdf>> at 12.

Conference, where it received one of the EITI Chair's Award.¹²⁷ As Zambia continues to meet its EITI requirements, it also appears to utilize its membership in the transnational body for its own purposes too. Zambia is currently in the midst of reforming its mineral tax regime. The institutions it has implemented through the EITI have not merely promoted the body's transparency and accountability in the country, but also have given Zambia the data and financial disclosures that it could use in its reform process.¹²⁸

Like the EITI, Zambian post-privatization mining governance received mixed reviews by the Resource Governance Index (RGI). In its 2017 ranking, Zambia's composite score was 50/100, which was an 11 point decline from its 2013 assessment.¹²⁹ RGI's components differ significantly from its 2013 and 2017 indices; therefore, the cause of Zambia's lower score cannot be concretely identified. Zambia's lower subcomponent scores in the 2017 index fell under Revenue Management and Open Data, which did not have equivalent categories in 2013. Zambia's low Revenue Management score was due to the lack of an online data portal, non-existent fiscal rules, and poor fiscal rule practice.¹³⁰

Additionally, Zambia scored a failing grade in RGI's Open Data category, which was an amalgam of its ranking in the Open Data Inventory and the Global Open Data Index.¹³¹ The RGI ranked Zambia's ZCCM governance high (69/100), along with its company payment disclosure

¹²⁷ EITI, "Winners of the 2019 EITI Chair Awards announced" (Jun 18, 2019), online <<https://eiti.org/news/winners-of-2019-eiti-chair-awards-announced>>.

¹²⁸ *Ibid.*

¹²⁹ Resource Governance Index, "Zambia-Mining," online: <<https://resourcegovernanceindex.org/country-profiles/ZMB/mining>>; Revenue Watch Institute, "The 2013 Resource Governance Index - Zambia", online : <https://resourcegovernance.org/sites/default/files/country_pdfs/zambiaRGI2013.pdf>.

¹³⁰ RGI, "Zambia-Mining," *ibid.*

¹³¹ Resource Governance Index, "2017 Resource Governance Index - Method Paper", online: <https://api.resourcegovernanceindex.org/system/documents/documents/000/000/074/original/2017_Resource_Governance_Index_method_paper.pdf?1498601280> at 9.

process (83/100), and publication of its taxation rules (88/100).¹³² Even with Zambia's changing tax policy landscape, the RGI scored its recent iteration positively. However, the Natural Resource Governance Institute, the think tank that produced the RGI, published a report in November 2017 that critically examined proposed changes to Zambia's mining tax policy and encouraged the government to revisit its reforms to ensure the regime delivers the revenues Zambia requires.¹³³ These contrasting positions further illustrate the RGI's formalist limitations in assessing mining governance.

While Zambia's post-neoliberal recovery garnered mixed governance reviews, the reviews failed to account the mining sector's post-privatization human rights abuses. Copperbelt evictions continued after 2006 in northern Zambia's Luapula Province,¹³⁴ and threats of evictions near the Kansanshi mine in Solwezi were reported as recently as March 2018.¹³⁵ No complaints were filed, either under the OECD Guidelines or through another international mechanism, in response to these reported evictions, nor were disputes resolved locally. One domestic forum that was available to resolve disputes, Zambia's Lands Tribunal, has been under-utilized since its implementation in 1996 after the passage of the *Lands Act*.¹³⁶ In 2010, the Lands Tribunal was granted the authority to hear both statutory and customary land disputes in accordance with the 2010 *Lands Tribunal Act*.¹³⁷ A recent study of the conflicts brought before the Tribunal indicates

¹³² RGI, "Zambia - Mining," *supra* note 129.

¹³³ David Manley, "Ninth Time Lucky: Is Zambia's Mining Tax the Best Approach to an Uncertain Future?" (November 29, 2017), online: NRGi <<https://resourcegovernance.org/analysis-tools/publications/ninth-time-lucky-zambia-s-mining-tax-best-approach-uncertain-future>> at 17.

¹³⁴ "Land and mineral rights in conflict" (30 August 2010), online: <<http://www.irinnews.org/report/90338/zambia-land-and-mineral-rights-conflict>>.

¹³⁵ "We have not threatened to evict villagers from our land-Kansanshi mine" (27 March 2018), online: Lusaka Times <<https://www.lusakatimes.com/2018/03/27/we-have-not-threatened-to-evict-villagers-from-our-land-kansanshi-mine/>>.

¹³⁶ Anthony Mushingi, "Assessment of the Lands Tribunal in Resolving State Land Conflicts in Zambia" (2017) Research on Humanities and Social Sciences 16 at 17.

¹³⁷ *Ibid.*

that it was not adjudicating complaints against mining companies—instead, the Tribunal was primarily hearing cases between private citizens and complaints against state entities.¹³⁸ Anthony Mushinge, the study’s author, argued the Tribunal’s meagre funding limited its ability to hear complaints, particularly outside the capital, Lusaka.¹³⁹ Additionally, Mushinge found that there was a lack of public awareness of the Tribunal and its work.¹⁴⁰ The combination of these factors undermined the Tribunal’s competence to hear land disputes against mining companies. The lack of effective domestic or international options to settle land disputes and to protect the rights of local communities suggests it is opportune for the Zambian government to rethink community-mining relations. How the Draft National Land Policy, via its implementation of FPIC, can do this will be discussed further in section 6.4.

6.3. Zambia’s quest for a mining developmental state

Development was never far from the political considerations of Zambia’s ruling parties. Beginning with President Kaunda’s “Zambian humanism” to President Lungu’s current tax battles with mining companies, the socioeconomic development of Zambia has been a priority of its various governments since independence. Even when decisions were made that turned out to do more harm than good for Zambia’s economy, they appeared to be a result of economic misfortune and the external influence of the global economy, foreign donors and investors. Nonetheless, Chapter Three illustrated how developmental aspirations alone do not sustain a developmental state nor a mining developmental state. Section 6.3.1 compares Zambia’s aspiring developmental state to the model described in Chapter Three, and considers some of the reasons

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

why it has yet to come to fruition. Although it is not a developmental state, Zambia has introduced a number of mining developmental state institutions, which are discussed further in section 6.3.2. These measures are then evaluated in section 6.3.3 using Trubek, Coutinho and Schapiro's legal functionalities framework.

6.3.1. Zambia's aspiring developmental state

Whether or not a country is a developmental state has been determined by its institutional framework and developmental success (both economic and social, though economic has proven more persuasive in the African context).¹⁴¹ Development in the East Asian Tigers, Botswana and, to some extent, South Africa has been attributed to each state's institutional design and prioritization of economic growth and development. Zambia has not yet attained the levels of socioeconomic development as these developmental states—although it boasts strong annual growth rates in recent years (4.1 percent), its GDP per capita and several social development indicators (like life expectancy, education and poverty rate) are worse than the consensus developmental states.¹⁴²

This section will assess Zambia's aspiring developmental state using the criteria provided in Chapter Three. While this framework helps explain why Zambia has yet to attain developmental state status, it does not account for the overwhelming influence of external forces—notably the global economy, foreign donors and investors—that hindered Zambia's developmental institutions and prospects. To illustrate, Figure 6.1 (taken from David Manley,¹⁴³ a Senior Economic Analyst at the Natural Resource Governance Institute and former senior

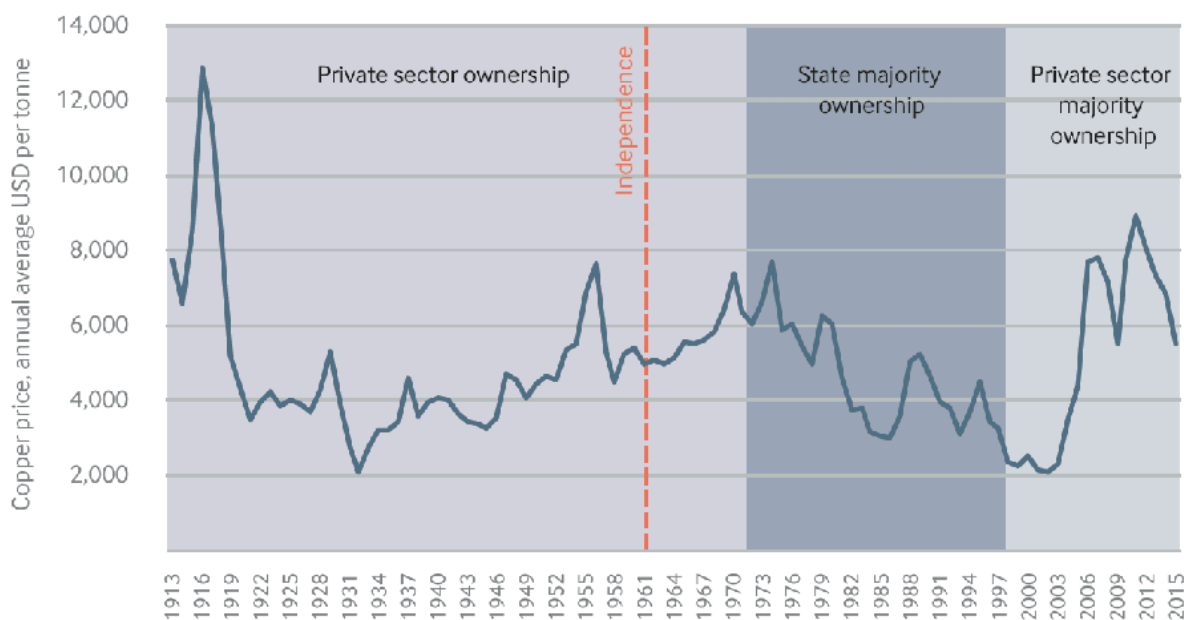
¹⁴¹ For example, as it was explained in Chapter 4, Botswana's characterization as a developmental state was due to its economic development more so than its human development.

¹⁴² World Bank, "Zambia," online: <<https://data.worldbank.org/country/zambia>>.

¹⁴³ Manley, *supra* note 133 at 3.

economist in the Zambia Revenue Authority) demonstrates past Zambian governments’ misfortunate timing of state ownership in relation to fluctuating copper prices:

Figure 6.1 – Zambian state ownership of copper mines and historical price fluctuations



(Manley, “Short- and long-term fluctuations in the real copper price [base year = 2015]).

Zambia’s copper mines were never owned by the state when copper prices were at its peak. The country’s developmental state and mining developmental state institutions were greatly affected by this reality.

a. Development-oriented political leadership

Development was an identifiable priority for all of Zambia’s administrations since independence. President Kaunda’s leadership in the years leading up to independence was shaped by his “Zambian humanism” philosophy. His party’s push for political power over white minority rule was meant to ensure political, economic, and development opportunities for Black Zambians.¹⁴⁴ President Kaunda and UNIP did not believe multiracialism in Zambia would

¹⁴⁴ Fraser & Lungu, *supra* note 47 at 7.

benefit black Zambians. Britain's colonial record proved his position: little effort was made by the British to develop Zambia's health and education systems (only 0.5 percent of Black Zambians were estimated to have a primary education at independence, while only 107 were university graduates).¹⁴⁵ Soon after independence, President Kaunda launched Zambia's first National Development Plan based on the recommendations included in the Seers Report. Securing increased benefits from mining was one of the priorities outlined in the Plan.¹⁴⁶

President Kaunda attempted to generate economic benefits by leveraging Zambian copper both locally and internationally. His international efforts through the Intergovernmental Conference of Copper Exporting Countries were explained above in section 6.2.1. Despite its failure, President Kaunda's efforts were driven by the desire to establish greater control over the global value of a commodity critical to its national economy and government revenue.¹⁴⁷ Domestically, President Kaunda began the process of acquiring shares in the mining companies, gradually expanding the state's stake until it held 100 percent ownership in all of Zambia's copper mines. These measures were also driven by his desire to secure a greater share of the country's mineral wealth.

Unfortunately, President Kaunda's plan quickly changed Zambia's developmental prospects when the price of copper drastically declined in the mid-1970s. Within a decade of independence, Zambia's development trajectory was no longer positive. During that time, President Kaunda based all of his growth and development plans on copper; once the state controlled the mines, however, Zambia did not have sufficient resources to manage the

¹⁴⁵ *Ibid.*

¹⁴⁶ Larmer, *supra* note 36 at 35.

¹⁴⁷ *Ibid* at 40.

unexpected turn in global events. Zambia could neither diversify the industry and establish more downstream production linkages nor invest in cross-sectoral linkages that may have reduced the country's reliance on copper. The little revenue generated through ZCCM was used to support the provision of other services; necessary investments were not made to sustain the mines and construct infrastructure that could support future exploration and extraction when prices recovered.¹⁴⁸ The country plunged into debt and turned to international donors to sustain its economy. Doing so set Zambia on the course of conditioned loans and structural adjustment.

Zambia's economic liberalization in the 1980s was not a crisis of development-oriented political leadership. With the country's economy in the hands of foreign donors, President Kaunda had little choice but to accept conditioned loans and implement neoliberal economic policies. The results were devastating: cuts to state subsidies raised the cost of living, layoffs in the civil service increased unemployment, and increased donor involvement in the Zambian economy reduced the mining unions' influence on industry-related decisions.¹⁴⁹ President Kaunda's and UNIP's political downfall were equally due to the country's discontent with his party's structural adjustment failures and the opposition MMD's belief that it could restore Zambian development through privatization.¹⁵⁰

President Chiluba and the MMD's election was due to the overwhelming support of the mining unions in their plans to privatize the sector and attract new investment.¹⁵¹ Nationalization under UNIP proved to be a failure; under President Chiluba's leadership, Zambia's economy and development prospects would be restored through foreign investment. Buoyed by MMD's

¹⁴⁸ Fraser & Lungu, *supra* note 47 at 8.

¹⁴⁹ Larmer, *supra* note 36 at 46.

¹⁵⁰ Fraser & Lungu, *supra* note 47 at 9.

¹⁵¹ *Ibid* at 10.

privatization plan, foreign donors provided the aid necessary to sustain government services while ZCCM's assets were sold. Like President Kaunda's development-oriented leadership during nationalization, President Chiluba's similar aims directed the state's privatization efforts. In both instances, both presidents' intentions to secure the best possible deal for Zambia's development were thwarted by the country's weak economy and desperate negotiation position. President Kaunda overpaid to nationalize the mining companies, and President Chiluba undersold the mines at a steep price that affected his successors' development-oriented leadership.¹⁵²

When copper prices rebounded in the early 2000s, Zambia's political leadership once again considered policy reforms to benefit from the commodities boom. President Mwanawasa's administration began the process for reforming the mining sector by eliminating all development agreements and replacing them with the new fiscal regime defined in the 2008 *Mines and Minerals Development Act* (2008 *MMDA*).¹⁵³ The new regime included a heavily disputed windfall tax that operated similarly to a variable royalty rate.¹⁵⁴ Although the mining companies did not launch investment disputes against Zambia,¹⁵⁵ the new mining tax regime faced so much opposition that it was abandoned a year later. President Banda's government oversaw the amendments to the 2008 *MMDA*, which included the abolition of the windfall tax.¹⁵⁶

President Mwanawasa's government also wished to foster Zambia's mineral wealth into greater development opportunities by establishing a new partnership with China, which was

¹⁵² Larmer, *supra* note 36 at 38; Adam & Simpasa, *supra* note 3 at 66.

¹⁵³ *Mines and Minerals Development Act*, No. 7 of 2008.

¹⁵⁴ David Manley, "A guide to mining taxation in Zambia" (June 2013), online: Africa Portal <<https://www.africaportal.org/publications/a-guide-to-mining-taxation-in-zambia/>> at 34 [Manley, "Guide"].

¹⁵⁵ *Ibid* at 36.

¹⁵⁶ *Ibid*.

expanding into African extractive markets. In 2007, President Mwanawasa agreed to the creation of the Zambia–China Cooperation Zone (ZCCZ), China’s first economic and trade co-operation zone in Africa.¹⁵⁷ The zone created near the Chambishi copper mine was intended to create industrial facilities for copper processing and supporting facilities in Zambia.¹⁵⁸ Although the intention to establish ZCCZ was to maximize the benefits of Chinese interest in Zambian copper, the Chambishi ZCCZ has yielded mixed results since its launch in 2007. These outcomes are discussed further below in section 6.3.2.

After President Banda’s defeat in 2011, President Sata and his successor President Lungu have both attempted to reform Zambia’s mining governance to secure better developmental outcomes for the country. Like their predecessors, both experienced challenges to the successful implementation of their mining reforms. President Lungu’s ongoing attempts to capitalize on mining benefits, which were described briefly in section 6.2.3, are examined further in section 6.3.2. The challenges Zambia’s post-colonial political leadership faced illustrate the limits of development-oriented governance to advancing socioeconomic development—a developmental vision is not enough to secure its reality. Other developmental state institutional arrangements must also be effective, as the next section contends.

b. The missing elements in Zambia’s developmental state

As the Botswana and South Africa case studies revealed, an autonomous and effective bureaucracy, performance-oriented governance, and production coordination and conflict management are critical developmental state institutions. Zambia has lacked all three.

¹⁵⁷ Ana Cristina Alves, “The Zambia-China Cooperation Zone at a Crossroads: What Now?” (December 2011), online: The South African Institute of International Affairs <<https://saiia.org.za/research/the-zambia-china-cooperation-zone-at-a-crossroads-what-now/>> at 2.

¹⁵⁸ *Ibid.*

An autonomous and effective bureaucracy never emerged in Zambia in the decades following independence. The country had a small, educated non-settler population and opted to rely on expatriates in the same manner as Botswana. Unlike its neighbour, however, President Kaunda's government quickly embarked on "Zambianizing" the civil service, replacing settler bureaucrats, who dominated senior positions in the bureaucracy, with Zambians.¹⁵⁹ Doing so was essential to the realization of self-determination that independence brought to bear, particularly in a country with a politically and economically powerful white settler population. Recruiting more Zambian civil servants was also conducive to President Kaunda's socioeconomic development goals. Despite these efforts, Zambian bureaucratic capacity in mining was slow to change.¹⁶⁰ Due to this knowledge deficit, much of Zambia's early economic policy was implemented top-down from the highest levels of government rather than researched and interrogated in the bureaucracy before reaching the upper echelons for approval. Additionally, Zambia's civil service shrunk considerably during structural adjustment, further inhibiting the development of an autonomous and effective bureaucracy.

Zambia's shifting mining policy positions since independence also point to the state's deficient performance-oriented governance. Instead, Zambia's approach could be better described as goal-oriented: its mining governance typically reacted to changes in the global market rather than proactively sought opportunities based on evident trends that could have better managed the boom and bust commodities cycles. Both the nationalization and the privatization of Zambia's mining companies were donor-influenced responses to the global

¹⁵⁹ Mokubung O Nkomo, "A Comparative Study of Zambia and Mozambique: Africanization, Professionalization and Bureaucracy in the African Postcolonial State" (1986) 16:3 *Journal of Black Studies* 319 at 326.

¹⁶⁰ *Ibid.*

market that neglected to consider the mid- to long-term implications of such policies. In more recent years, however, Zambian governments have shown less consideration for the concerns of these external actors and instead have implemented institutions aimed at maximizing the state's benefits from mining.

6.3.2. Zambia's mining developmental state institutions

Despite the country's weak developmental state institutions, various Zambian governments have attempted to reverse the toll of neoliberal privatization on its mining sector. Over the past decade, the state has enacted mining developmental state institutions (MDSIs) focused on promoting Zambian participation in the mining sector, developing cross-sectoral linkages and increasing tax revenue. This section examines Zambia's recent MDSIs in these three areas.

a. Enhancing local participation and content

Privatization did not yield many of the presumed benefits for the local economy: many local suppliers that had previously conducted business with ZCCM lost out on new opportunities as foreign investors procured materials from suppliers and manufacturers outside Zambia.¹⁶¹ Paradoxically, this occurred even though the Government of Zambia negotiated local procurement provisions into the development agreements that finalized privatization.¹⁶² Failure to enforce the local procurement provisions was partly due to the state's efforts to recapitalize the mines, which neglected local private sector development.¹⁶³ Nonetheless, the Zambian government soon undertook two policy measures aimed at enhancing local participation and

¹⁶¹ Fraser, *supra* note 5 at 15.

¹⁶² Judith Fessehaie, *The Dynamics of Zambia's Copper Value Chain* (PhD Thesis, University of Cape Town School of Economics, 2012) at 178 [unpublished].

¹⁶³ *Ibid* at 179.

content in the country's mining sector. First, the *Citizens Economic Empowerment Act (CEEA)*¹⁶⁴ was passed in 2006. Second, the unilateral cancellation of the DAs under the 2008 *MMDA* ushered in new and more robust indigenization obligations.

The 2006 *CEEA* introduced broad-based economic empowerment provisions that were applicable across Zambia's economy. The Act aimed to promote the participation of specific groups in Zambian society:

- "Targeted citizens," which were defined as marginalized or disadvantaged citizens whose access to economic resources were constrained by such factors as race, sex, education and disability;
- "Citizens empowerment companies," which were companies where 25-50 percent of its equity was owned by citizens;
- "Citizen influenced companies," which were defined as companies that had 5-25 percent of its equity owned by citizens, and in which citizens maintained significant control of the management of the company; and
- "Citizen owned companies," which referred to companies in which at least 51 percent of its equity was owned by citizens and citizens maintained significant control of the management of the company.¹⁶⁵

Provisions specific to the mining industry were not included in the Act. However, s. 21 outlined obligations that extended to all investors:

21(1) Notwithstanding any other law, after the commencement of this Act, the Ministry responsible for commerce, trade and industry shall reserve, as prescribed by the President, specific areas of commerce, trade and industry for targeted citizens, citizen empowerment companies, citizen influenced companies and citizen owned companies.

¹⁶⁴ *Citizens Economic Empowerment Act*, No. 9 of 2006.

¹⁶⁵ *Ibid* at s. 3.

(2) Notwithstanding any other law, after the commencement of this Act -

...

(b) licences to foreign investors to engage in specific businesses, as prescribed by the President, shall be granted on the basis of joint ventures and partnerships with citizens and citizen empowered companies;

...

(d) priority for concessions, licences and incentives given under any law shall be granted to companies that are implementing broad based economic empowerment programmes under this Act.

More robust local content and procurement provisions were included in the 2008 *MMDA* and were strengthened in the 2015 *MMDA* update.¹⁶⁶ Four distinct areas related to enhancing local content were contained in the 2015 *MMDA*: holders of certain mining rights, training and employment of Zambians, procurement of Zambian goods and services, and enforcement.¹⁶⁷

Section 13(3) of the 2015 *MMDA* limited mining rights to certain Zambian companies:

13(3) A mining right [an exploration licence and a mining licence] over an area between a minimum of two cadastre units and a maximum of one hundred and twenty cadastre units in extent shall only be granted to the following companies:

- (a) citizen-influenced company;
- (b) citizen-empowered company; and
- (c) citizen-owned company.

Definitions for the three types of companies were adopted from the 2006 *CEEA*.

Obligations to train and employ Zambians and procure local goods and services were outlined in s. 20 of the 2015 *MMDA*:

20(1) A holder of a mining right or a mineral processing licence shall, in the conduct of mining operations or mineral processing operations and in the purchase, construction, installation and decommissioning of facilities, give preference to the —

- (a) materials and products made in Zambia; and
 - (b) contractors, suppliers and service agencies located in Zambia and owned by citizens or citizen-owned companies.
- (2) A holder of a mining right or mineral processing licence shall, in the course of operations—
- (a) give preference in employment to citizens with relevant qualifications or skills; and
 - (b) conduct training programmes for the transfer of technical and managerial skills to Zambians.

All mining licence applications must include plans to satisfy the above requirements:

32(2) There shall be attached to a mining licence as part of the conditions of the licence

...

¹⁶⁶ Only the 2015 *MMDA* provisions are discussed here to limit the analysis to current law.

¹⁶⁷ Columbia Center on Sustainable Investment, “Local Content – Zambia Mining,” online: Columbia Center on Sustainable Investment <<http://ccsi.columbia.edu/files/2014/03/Local-Content-Zambia-CCSI-December-2014-.pdf>>.

- (b) the applicant's undertaking for the employment and training of citizens;
- (c) the applicant's undertaking for the promotion of local business development;
- ...

Mining licence holders are obligated to carry out the local procurement and employment and training programs in accordance with the plan included in their application:

35(1) A holder of a mining licence shall—

- ...
- (d) for large-scale mining—
 - (i) implement the local business development undertaking attached to the mining licence; and
 - (ii) employ and train citizens of Zambia in accordance with the proposal for employment and training attached to the licence;

Violating these provisions subjected the rights holder to fines. This enforcement provision was outlined in s. 20(3) of the 2015 *MMDA*:

20(3) A person who contravenes subsection (1) or (2) is liable to pay a fine of five hundred thousand penalty units and an additional fine of twenty thousand penalty units for each day during which the default continues.

Extensive data illustrating the impact of these local participation and content obligations has not been published. The only research that appears to be available—included in a 2014 study¹⁶⁸ of four copper mines by the Zambia Chamber of Mines and the International Council on Mining and Metals—suggested differing effects on local employment and procurement. According to the report, direct employment at the mines increased after 2008, and expatriates only represented 1–2 percent of all employees in 2013.¹⁶⁹ This could suggest that Zambians comprised the majority of new hires as a result. Local businesses also dominated local procurement. However, while all goods and services were procured from local businesses, Zambian-produced goods made up only five percent of all goods procured in 2012, compared to almost 100 percent of services.¹⁷⁰ Such a conclusion suggests that opportunities remain to

¹⁶⁸ Zambia Chamber of Mines & the International Council on Mining & Metals, “Enhancing mining’s contribution to the Zambian economy and society,” online: ICMM <<https://www.icmm.com/website/publications/pdfs/mining-partnerships-for-development/enhancing-minings-contribution-to-the-zambian-economy-and-society>>.

¹⁶⁹ *Ibid* at 63

¹⁷⁰ *Ibid* at 66.

develop sectoral linkages through the increased local production of mining inputs. However, more research needs to be conducted in this area, as no official statistics were available to support the study's conclusions.

b. Developing sectoral linkages

Zambia has implemented few MDSIs aimed at developing cross-sectoral linkages in its post-neoliberal era. While the state was focused on perfecting its mineral tax regime (see the section below), modest commitments to developing linkages were included in two new policy instruments: the 2013 *Mineral Resources Development Policy*¹⁷¹ and the *Seventh National Development Plan (2017–2021)*.¹⁷² Although neither policy has the force of law, both outline the state's commitments to developing linkages with the aim of integrating mining into Zambia's economy and reducing poverty.

Three distinct efforts to promote sectoral linkages were included the *Mineral Resources Development Policy*:

7.8 Integrating the mining sector in the domestic economy

To enhance the contribution of mining to the national economy, Government will:

- a) Encourage mining cluster development to link the mining sector to the broader economy;
- b) Promote linkages between mining and agriculture, mining and tourism, and mining for the value-adding processing industries;

...

7.10 Value addition

Government will promote and facilitate the development of downstream processing capacities for minerals by

- a) Providing an appropriate legal and fiscal regime;
- b) Exploring opportunities to expand the local metallurgical plant capacity in the country; and
- c) Identifying market potential for national and regional consumption of value added products.

7.11 Marketing of Gemstones

To ensure realisation of the full value of gemstones, Government will devise mechanisms of auctioning gemstones within the country.

¹⁷¹ *Mineral Resources Development Policy* (July 2013).

¹⁷² *Seventh National Development Plan (2017–2021) – Accelerating Development Efforts towards Vision 2030 without Leaving Anyone Behind*, Volume I, online: <<https://www.mndp.gov.zm/wp-content/uploads/2018/05/7NDP.pdf>>

Similar commitments to developing linkages were identified in the *Seventh National*

Development Plan:

7.5 Development Outcome 2: Diversified and Export-Oriented Mining Sector

... Under this Plan, emphasis will be on broadening the range of minerals to cover non-traditional mining of gemstones, gold and industrial minerals as well as promotion of value addition to mining products and include energy and material efficiency strategies to increase productivity and reduce environmental pollution.

...

7.5.1 Strategy 1: Promote exploitation of gemstones and industrial minerals

Focus will be on increasing exploration, mining, processing and promoting use of industrial minerals and gemstone products, to increase contribution to the growth of other sectors.

...

Programmes:

...

b) Mineral processing technology development;

...

e) Market linkages development.

...

7.5.2 Strategy 2: Promote local and foreign participation in mining value chains and industrialisation

This strategy is aimed at enhancing capacities to participate in mining value chains that have the highest potential to impact economic growth and poverty reduction. Further, efforts will be made to facilitate mining-based value addition and industrialisation by supporting the development of manufacturing industries to produce inputs for other sectors, to contribute to the growth of other sectors.

Programmes:

a) Capacity development;

b) Policy and regulatory framework review and enhancement;

c) Access to finance promotion;

d) Mining value-chain development;

e) Research, innovation and technology promotion; and

f) Investment Promotion.

Abundant downstream linkages in minerals processing and beneficiation, particularly of copper, exist in Zambia. Refined copper, for example, accounted for 27 percent of all Zambian exports in 2017 compared to raw copper at 47 percent.¹⁷³ However, the development of sectoral linkages beyond this minimal-level beneficiation appears to be negligible. Other than the Chinese-led Chambishi ZCCZ, no meaningful investments have been made in activities that can further integrate mining into Zambia's economy. Additionally, infrastructure challenges are limiting the economic impact of the Chambishi ZCCZ. The transportation network near the

¹⁷³ The Observatory of Economic Complexity, "Zambia," online: OEC <<https://oec.world/en/profile/country/zmb/>>.

ZCCZ is poor and restricts the distribution of both supplies and products.¹⁷⁴ Furthermore, local industry has yet to be fully integrated into the ZCCZ due to the lax enforcement of local content regulations.¹⁷⁵

The limited expansion of sectoral linkages in Zambia over the past decade, as well as the Chambishi ZCCZ's challenges, highlight the difficulties with developing sectoral linkages in an ineffective mining developmental state. Zambia's inability to sensibly conclude its mining tax reforms also demonstrates the constraints of implementing MDSIs without securing institutions that promote effective legal functionalities. Before assessing Zambia's mining developmental state using Trubek, Coutinho, and Schapiro's legal functionalities framework, the next section describes Zambia's primary MDSIs focus: broader resource nationalism via mining tax reform and restructured ownership stakes in mining companies.

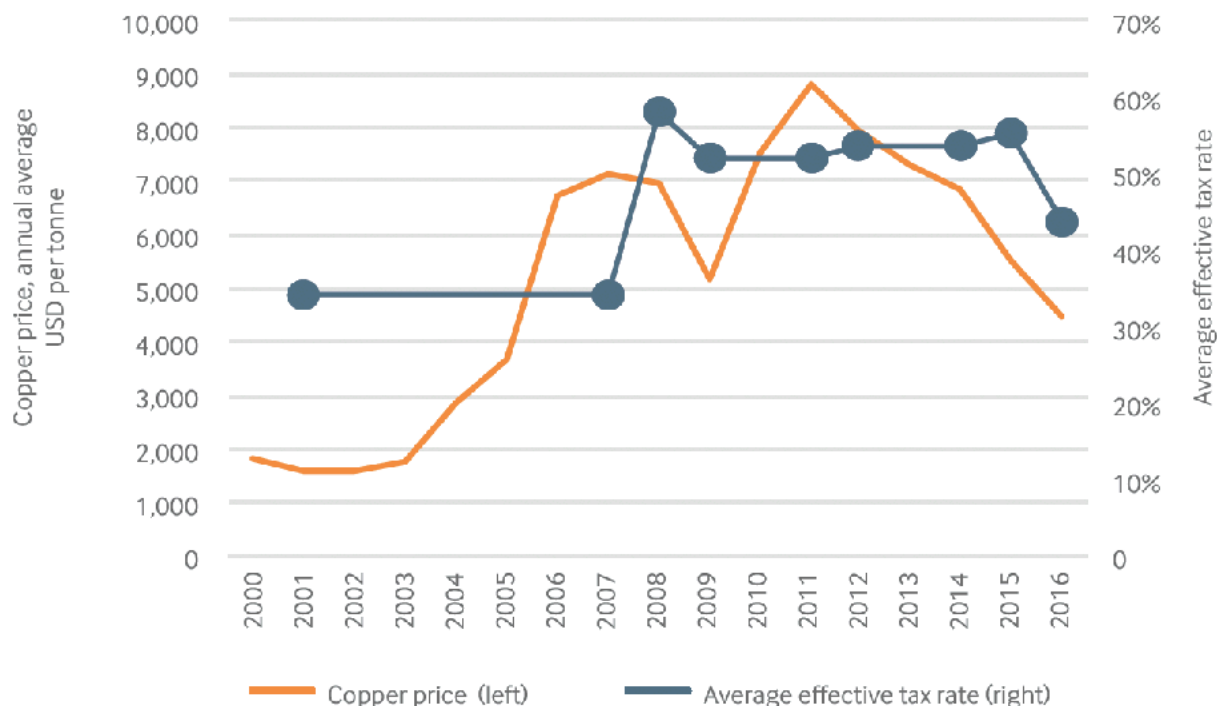
c. Broader resource nationalism

Zambia has been impacted by commodity price volatility throughout its post-colonial history. As Figure 6.1 above illustrates, copper prices have risen and tumbled unpredictably over the past century. State ownership in the industry since independence reacted to these changes. Mining tax rates have similarly risen and fallen post-privatization:

¹⁷⁴ Alves, *supra* note 157 at 4.

¹⁷⁵ *Ibid.*

Figure 6.2 – Zambian tax reforms and the price of copper



(Manley, “Copper price and tax reforms measured by the average effective tax rate for each).¹⁷⁶

Since 2001, Zambia has undertaken the following changes to its mineral tax regime:¹⁷⁷

Table 6.1 – Zambia’s mining tax reforms since 2001

Year	Summary of mining tax reform
2001	Development agreements instituted: <ul style="list-style-type: none"> • 25 percent corporate income tax; • 0.6 percent royalty rate; and • Stabilization clauses locked in the terms of the agreement for 15-20 years.
2008	Development agreements were cancelled and new regime implemented: <ul style="list-style-type: none"> • 30 percent corporate income tax; • 3 percent royalty rate; and • Windfall tax calculated from monthly gross sales revenue.

¹⁷⁶ Manley, *supra* note 133 at 3.

¹⁷⁷ *An Act to amend the Mines and Minerals Development Act, 2015*, No. 14 of 2016; Taonga Clifford Mistiming & Matthew Hill, “Zambia to Raise Mine Royalty in 10th Tax Change in 16 Years” (September 28, 2018), online: Bloomberg <<https://www.bloomberg.com/news/articles/2018-09-28/zambia-to-raise-mine-royalties-in-bid-to-trim-budget-shortfall>>; Adam & Simpasa, *supra* note 3 at 67-68; Manley, *supra* note 133 at 4; Manley, “Guide”, *supra* note 154.

2009	After industry pressure, the state abandoned the windfall tax; all other rates remained the same.
2012	Royalty rate increased to 6 percent.
2015	Royalty rate increased to 9 percent after the state considered a 20 percent rate for open-pit mines.
2016	Royalty rate decreased to 4 percent.
2018	Royalty rate increased again to 6 percent.

The multiple changes to Zambia's mineral taxes over a short period exemplify the country's arduous balance between industry and development. Multiple foreign investors expressed opposition to various iterations of Zambia's tax regime, including against the most recent change that resulted in high tax bills for Vedanta Resources and First Quantum Minerals. Despite investor opposition, the Zambian government has shown that it is not reluctant to use the MDSIs at its disposal to ensure an equitable return for the state. The state's position was made clear in comments made by Zambia's Minister of Finance, Margaret Mwanakatwe, soon after the latest change: "As mineral resources are a depleting resource, it is vital to structure an effective fiscal regime for the mining sector to ensure that Zambians benefit from the mineral wealth our country is blessed with."¹⁷⁸

Zambia's state-owned investment holdings firm, ZCCM-IH, has been Zambia's other main resource-nationalist MDSIs since privatization. Although created to hold the state's equity participation in the newly-privatized mines, ZCCM-IH's shares have not exceeded 20 percent, despite multiple announcements by the state over the past ten years of its intention to increase its

¹⁷⁸ Mistiming & Hill, *ibid*.

stake.¹⁷⁹ Like the changes to the mining tax regime, the government's pronouncements of the desire to increase ZCCM-IH's stake in the mines were reactions to higher copper prices.¹⁸⁰ However, unlike mining tax reform, Zambia has yet to act on this desire.

6.3.3. Assessing legal functionalities in Zambia's mining developmental state

Zambia's mining developmental state and its institutions embarked on an ambitious legal and policy agenda aimed at maximizing the state's benefits from mining and promoting socioeconomic development. Despite these intentions, Zambia's MDSIs have proven to be ineffective. Trubek, Coutinho and Schapiro's legal functionalities framework offers an explanation for why this was the case.

a. Flexibility, synergy and orchestration were missing

For state activism to succeed, Trubek, Coutinho and Schapiro argued that the legal system governing state action should safeguard flexibility, frame synergy and stimulate orchestration.¹⁸¹ Zambia's MDSIs failed to perform any of these functions well. The state's reactionary approach to implementing its MDSIs, particularly its tax reforms, was not coordinative, nor did it effectively frame state-investor relations. Additionally, several of Zambia's weak MDSIs, notably in the area of enhancing local participation, lacked the flexibility to allow for experimentation and promote innovation because they did not encourage collaboration or ensure the sustainability of local businesses.

¹⁷⁹ Andrew Topf, "Zambian gov't to increase mines ownership to 35%" (February 1, 2012), online: MINING.COM <<https://www.mining.com/zambian-govt-to-increase-mines-ownership-to-35/33/>>; Zandi Shabalala, "Zambia's state-controlled investment firm wants bigger stake in copper mines" (November 29, 2017), online: Reuters <<https://www.reuters.com/article/zambia-mining/zambias-state-controlled-investment-firm-wants-bigger-stake-in-copper-mines-idUSL8N1NZ51K>>.

¹⁸⁰ Shabalala, *ibid.*

¹⁸¹ David Trubek, Diogo Coutinho & Mario Shapiro, "New State Activism in Brazil and the Challenge for Law" in David M Trubek et al, eds, *Law and the New Developmental State* (Cambridge: Cambridge University Press, 2013) 28 at 55.

b. The absence of legitimacy

The implementation of many of Zambia's recent MDSIs was also a response to changing popular opinion and the demands of the general public, mining labour and local communities.¹⁸² One constituency the state increasingly ignored—potentially to the detriment of the MDSIs' effectiveness—was the private sector. However, the state often took action unilaterally and failed to engage in consultative and participatory processes that included civil society and the general population in policy formation.¹⁸³ Zambia's Draft National Land Policy may be an attempt to reverse this practice. The next section considers its efficacy.

6.4. Going beyond revenues: constructing a rights-based approach to mining governance in Zambia

The state's vision for its mining sector was outlined in a set of general principles adopted in the 2015 *MMDA*:

4. The following principles shall apply to the mining and development of minerals—
 - (a) mineral resources are a non-renewable resource and shall be conserved, developed and used prudently, taking into account the needs of the present and future generations;
 - (b) mineral resources shall be explored and developed in a manner that promotes and contributes to socioeconomic development and in accordance with international conventions to which Zambia is a party;
 - ...
 - (e) citizens shall have equitable access to mineral resources and benefit from mineral resources development; and
 - (f) development of local communities in areas surrounding the mining area based on prioritisation of community needs, health and safety.

Objective 34 of Zambia's Draft National Land Policy fits squarely within the commitments articulated in s. 4 of the 2015 *MMDA*.

Mandatory consultation and consent as currently conceived in the Draft National Land Policy would be the first time the principle is adopted in Zambia and applied to all land occupied

¹⁸² Larmer, *supra* note 36 at 42.

¹⁸³ Manley, *supra* note 133 at 17.

by a local community, regardless of tenure. The lack of consultation and participation in Zambian mining governance is presumably a concern that the Draft National Land Policy aims to redress by empowering local communities through the FPIC principle. Since ZCCM was privatized in the late 1990s, several local communities have been either evicted or threatened with eviction in the Copperbelt region of the country, home of many of the country's mines.¹⁸⁴

If implemented in its current form, Objective 34 of Zambia's Draft National Land Policy would require "that mining developers adopt principles of Free, Prior and Informed Consent of local people for decisions that may affect them." This twofold obligation would mandate (1) "that developers and communities conclude agreements that recognize the land rights of local communities" and (2) that mining companies "develop specific policies to address involuntary displacement in line with international best practice."¹⁸⁵ What would this obligation entail if the draft policy is approved by parliament? This section will analyze its specific components and will consider certain questions the Zambian government should resolve before implementation.

a. What does FPIC encompass?

FPIC was not defined in the Draft National Land Policy. Instead, its language suggests the government of Zambia recognized FPIC as a single right enjoyed by Indigenous peoples. By describing FPIC as "principles," rather than a single obligation, the Zambian government could be conceding that the requirement does not yet extend to non-Indigenous peoples under international law. Regardless of how it is interpreted, the obligation to adhere to "principles of FPIC" risks limiting the protections local communities could enjoy under this policy. Although

¹⁸⁴ Examples include the evictions in Mufulira by Mopani Copper Mines, and alleged threats of evictions in Solwezi by Kansanshi Mining Plc (Umuchinshi, *supra* note 32; Lusaka Times, *supra* note 135).

¹⁸⁵ *Draft National Land Policy* (2018), *supra* note 12.

international best practices regarding FPIC are lacking,¹⁸⁶ it has been understood that the obligation goes beyond principles of consultation and participation, and that it encompasses the right of peoples to “be informed about projects that may affect their land, resource and other rights in a timely manner, free of coercion and manipulation, and have the opportunity to approve or reject a project prior to the commencement of all activities.”¹⁸⁷ The Draft National Land Policy is potentially calling for these principles to be treated as separate obligations without specifying which ones are required by mining developers.

Additionally, the two measures included in Objective 34 do not offer any clarification. Concluding an agreement recognizing the land rights of local communities does not equate to consent. The land rights could be recognized in an agreement, but the mining developer could still proceed with a project if FPIC is treated as distinct principles. Nor does the second measure—to develop specific policies to address involuntary displacement—indicate that the Zambian government is imposing an obligation for mining companies to obtain the full FPIC of a local community before operating. Without further clarification of what this objective entails, the Zambian government risks weakening this obligation.

b. Who holds the community mandate?

Determining who represents the local community during the FPIC process and can ultimately provide consent is an important consideration for the Draft National Land Policy to succeed. In its current form, Objective 34 applies to all local people that may be affected by a

¹⁸⁶ Ricarda Roesch, “The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa” (2016) AHRLJ 505 at 507.

¹⁸⁷ Oxfam & Legal Resources Centre, “Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An Analysis of Legislation and their Implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia” (3 October 2018), online: <<https://policy-practice.oxfamamerica.org/publications/free-prior-and-informed-consent-in-the-extractive-industries-in-southern-africa/>> at 9.

decision made by a mining developer. Without specifying how a local community participates in the FPIC process, the Zambian government risks emboldening powerful community members, such as local chiefs, to speak for the entire community.¹⁸⁸ Chiefs could potentially play a dangerous gatekeeping role and could make harmful decisions for the community while personally benefiting from their leadership role.¹⁸⁹ Finding consensus among a community could be challenging, as members may not all be from a single ethnic group and could hold differing views on the mining project's impact on their individual socioeconomic circumstances. Balancing individual rights with collective rights requires a robust legal definition of the peoples benefiting from the FPIC obligation.¹⁹⁰

c. What is the role for Zambia's government?

Clearly defining the government's role is vital to identifying the rights holders and their representatives. Unlike in other jurisdictions where the duty to consult is required of government, Objective 34 imposes the obligation to obtain FPIC directly on mining developers. Does the Zambian government envision acting as an intermediary to bring local communities and the mining companies together, and to outline what the FPIC process involves in one community versus another? Whatever role the government decides to play, it is crucial that it remains a neutral and unbiased party that is not unduly influenced by the desire to attract foreign investment.¹⁹¹

¹⁸⁸ *Ibid* at 70.

¹⁸⁹ *Ibid*.

¹⁹⁰ Manirakiza, *supra* note 15 at 5; Roesch, *supra* note 186 at 518.

¹⁹¹ Gavin Hilson, "An overview of land use conflicts in mining communities" (2002) Land Use Policy 65 at 65; Oxfam & LRC, *supra* note 186 at 70.

d. What does community consent/agreement look like?

Additionally, what community consent/agreement includes must be clarified for FPIC implementation in Zambia to be effective. Objective 34 envisions an agreement including, at a minimum, recognition of land rights and potentially some measures to address involuntary displacement. Based on available international examples, the community agreement could encompass more. Substantive rights of access to land and benefit-sharing could be included.¹⁹² Such measures should consistently recognize customary land tenure and customary law. Principles of customary law could help better understand the nature of the community mandate, and the relationship of each community to their land.¹⁹³

Furthermore, FPIC should be conceived as an ongoing right that does not end when an agreement is concluded between the company and the community. Communities should be granted the right to later challenge or change agreements depending on how the mining project progresses and community expectations evolve.¹⁹⁴

Lastly, the different FPIC principles envisioned by the Zambian government should not be conflated with consent and used as a way to legitimize the mining project and land alienation.¹⁹⁵ Ultimately, “local communities should meaningfully and effectively participate [in the FPIC process] in a way that they can substantially influence the decisions...a mere formalistic attempt to consult does not constitute consultation”¹⁹⁶ nor consent.

¹⁹² Roesch, *supra* note 186 at 525.

¹⁹³ Oxfam & LRC, *supra* note 187 at 71.

¹⁹⁴ Charis Kamphuis, “Contesting Indigenous-Industry Agreements in Latin America” in Dwight Newman & Ibironke Odumosu-Ayanu, eds, *The Law and Politics of Indigenous-Industry Agreements* (Routledge, forthcoming), online: <<https://ssrn.com/abstract=3215369>> at 11.

¹⁹⁵ George C Schoneveld, “Governing large-scale farmland investments in sub-Saharan Africa: Challenges and ways forward” (May 2014), online: CIFOR <http://www.cifor.org/publications/pdf_files/infobrief/4560-infobrief.pdf>.

¹⁹⁶ Manirakiza, *supra* note 5 at 6.

6.5. Conclusion

Mining governance in Zambia has been affected by its political and economic history, which was often shaped by external actors and forces. The price of copper influenced government intervention in the mining industry, turning the newly independent state into an owner in the early 1970s; then a seller in the 1990s at the behest of foreign donors, and then once again a minority owner in the 2000s as it grappled with structuring the mineral tax regime to maximize full benefits from mining. Local communities remained vulnerable to these changes, particularly over the past 30 years, as the state retreated from its development role in the wake of neoliberal policy proposals imposed by foreign lenders and donors.

Despite strong development-oriented political leadership, Zambia's mining developmental state and its institutions faltered under the weight of various external and internal forces: commodity price fluctuations, neoliberal structural adjustment conditionalities, foreign investor interests, and weak legal functionalities. Additionally, the state's focus on maximizing the economic benefits of mining delayed the adoption of a robust rights-based to mining governance for development that prioritized human rights and the rights of local communities in addition to implementing economically driven MDSIs. Zambia's mining developmental state offers lessons for understandings of transnational mining governance, law and development that are considered further in Chapter Seven, the conclusion.

7 Re-visiting the ‘Resource Curse’: Findings and Conclusion

*“We have to change the landscape of the mining industry on our continent...
It is not only about growth. It is about development.”*

-Mrs. Graça Machel¹

7.1. Introduction

I began my doctoral program near the end of the last commodities supercycle in 2014. The wealth generated during the boom had changed coverage of Southern Africa, as well as other parts of Africa, in the Western press—stories of despair and extreme poverty were no longer the dominant headlines. Instead, narratives of “Africa rising” and “the hopeful continent” were emerging and transforming perceptions of the continent’s economic potential.² All of my knowledge about Southern Africa—both as an aspiring academic and a member of the African diaspora—made me sceptical. Was the “resource curse” no longer a concern? Had “good governance” principles successfully transformed mining governance across Southern Africa? Curious about what was transpiring across the region, I learned that Southern African governments were, contrary to many good governance tenets, attempting to capitalize on the wealth potential of the new minerals rush by reinserting themselves in the mining sector and creating more policy space for development-driven state activism. Wishing to situate myself in law and development scholarship, I decided to interrogate this conflict using an emerging theory—the developmental state—that had not yet been used to examine mining developmentalism or the potential for long-term socioeconomic development in the Southern African context.

¹ Comments by Ms. Graça Machel at the Alternative Mining Indaba (February 12, 2015) in “Official Report of the 2015 Alternative Mining Indaba”, online: Alternative Mining Indaba <<http://altminingindaba.co.za/wp-content/uploads/2015/11/AMI-2015-Final-Report.pdf>>.

² “Africa rising—the hopeful continent” (December 3, 2011), online: The Economist <<https://www.economist.com/leaders/2011/12/03/africa-rising>>.

Over the course of my studies I began to better understand the limitations of orthodox law and development theories, and gradually, my conceptualization of mining developmentalism and the myriad policy frameworks conceived to sustain it (mainly good governance principles that were grounded in neoliberal notions of the state) embraced a model for mining governance that mirrors the above quote from Mrs. Graça Machel. Speaking at the 2015 meeting of the Alternative Mining Indaba,³ Mrs. Machel spoke of the urgent need to restructure mining, not just for growth but for *development*. Notwithstanding the debate over what development entails, her comments reflected my concerns with the limitations of the mining developmental state (MDS): without being framed using a rights-based approach to mining governance, economic growth would continue to dominate its developmental agenda with little to no consideration for the communities and populations directly affected by mining.

Accordingly, this dissertation reflects the arc of my doctoral studies. It began with a critique of the resource curse and the transnational good governance norms that have dominated policy responses to it. Then, this dissertation transitioned to its examination of the developmental state. Using literature from other social science disciplines—namely political science and development studies—I proposed a developmental state framework that was based on “successful” East Asian models. Since resource extraction was not a component of these models, I then proposed the MDS to account for recent interventions of mining-dependent Southern African states. However, this framework suffered from the same faults as the conventional developmental state: it centred economic development (represented in such indicators as

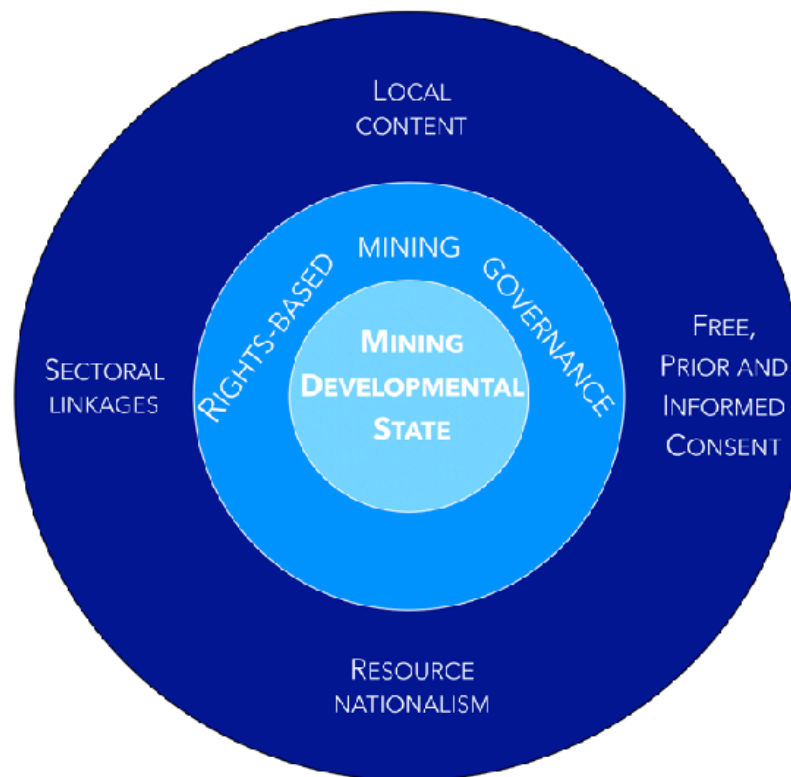
³ Over the past 11 years, civil society organizations in Southern Africa have gathered in Cape Town, South Africa to hold the Alternative Mining Indaba alongside the annual investment conference. The alternative gathering seeks to provide mining-affected communities from across Africa a forum to discuss and seek solutions to their concerns with industry (Alternative Mining Indaba, online: <<http://altminingindaba.co.za>>).

economic growth and Gross Domestic Product per capita) and neglected to consider the social impacts of the primary economic activity propelling the developmental state. Given the significant effects of mining on communities, the MDS proposed in this dissertation could not be isolated from these considerations. Consequently, this dissertation proposed and evaluated a rights-based approach to governance in the MDS with a focus on components of both economic and social development of the state and local communities. Along with examining state interventions in mining, assessing state implementation of community participation, consultation and consent using the principle of free, prior and informed consent (FPIC) was a central tenet of the proposed MDS.

Using the case studies of Botswana, South Africa and Zambia, the research has confirmed the importance of a rights-based approach to mining developmentalism. First, while good governance has dominated mainstream approaches to mining for over 30 years, it has proven to be an insufficient policy response to the resource curse and sustainable development needs. The developmental state model potentially offers ways to better promote developmental goals. However, there are a number of shortcomings in a purely economic MDS (which will be discussed in greater detail below): the domination of foreign capital, the emphasis on achieving traditional economic metrics of development, and the neglect of mining-affected communities. The research showed the continued deployment of mining developmental state institutions (MDSIs) as Southern African states attempt to expand their developmental strategies in this direction.

Looking at my research collectively, Figure 7.1 captures the proposed framework and the opportunities to expand the rights-based approach to mining governance in the mining developmental state:

Figure 7.1 – The rights-based approach to mining governance in the MDS



7.2. Re-visiting the “resource curse” and transnational “good governance” norms

There is no doubt that the importance of mining developmentalism and the subsequent rise of transnational good governance norms have affected state practice in Africa since neoliberal economic intervention across the continent began in the early 1980s. Although the effects on state practice were more obvious where direct intervention by the Bretton Woods Institutions (BWIs) occurred, such as Zambia, the influence of transnational good governance

reforms was evident in various aspects of international relations (trade and aid negotiations) and global economic movement.⁴ In addition to shaping relations in the global political economy, the intersection of state formation and mining developmentalism remains a subject of interest among academicians across disciplines. From the origins of the resource curse thesis to contemporary studies examining the efficacy of the developmental state (including this one), the prospects for mining-led development and its governance challenges have presented complicated questions that will continue to occupy scholars' attention.

This dissertation has traced the emergence of contemporary transnational good governance norms as a response to the perceived failures in Africa's post-colonial minerals management. From the World Bank's early interventions via its *Strategy for African Mining* through to the current Extractive Industry Transparency Initiative, these norms have all asserted a neoliberal role for the state in mining that lacks any critical assessment of foreign corporate interests and the state of the global political economy in shaping mining developmentalism. By critically dissecting this arc, and then conducting a parallel examination using the developmental state paradigm, this dissertation has confirmed particular shortcomings in good governance discourse that limit the efficacy of its tenets to resolving the resource curse and promoting mining developmentalism. These shortcomings stem from the discourse's unbridled critique of

⁴ Jon Schubert, Ulf Engel & Elísio Macamo, "Introduction: Boom and bust: extractive industries and African states in the twenty-first century" in Jon Schubert, Ulf Engel & Elísio Macamo, eds, *Extractive Industries and Changing State Dynamics in Africa: Beyond the Resource Curse* (New York: Routledge, 2018) 1 at 2 .

the African state,⁵ which critics have argued produces “one-size-fits-all” outcomes.⁶ This study further presented factors that support this critique, and the contention that the discourse *de-historicizes* and *de-politicizes* mining across Africa.⁷

First, good governance discourse neglects to account for the state’s position at independence, and its subsequent effects on the state’s developmental agenda. The case studies have illustrated how this can affect state capacity over the course of the post-colonial period. Botswana, having experienced less intrusive colonial intervention than South Africa and Zambia, was in the more politically advantageous position at independence. With fewer colonial institutions to dismantle and the retention of some traditional forms of governance, Botswana was well-suited to strategically retain those that were beneficial to advancing its development objectives at the time, which aided the creation of its early post-colonial developmental state and mining developmental state institutions. When diamonds were discovered in the country in 1968, Botswana’s government, under the leadership of President Seretse Khama, was free to implement economically beneficial institutions that were not hindered by foreign corporate or political interests.

⁵ Pablo Idahosa, “Good Governance, Corruption and the Resource Boom: Africa and Canada in the Global Order” in David Leadbeater, ed, *Resources, Empire and Labour: Crises, Lessons and alternatives* (Black Point, Nova Scotia: Fernwood Publishing, 2014) 200 at 203; J Andrew Grant et al, “‘New’ Approaches to the Governance of Africa’s Natural Resources” in J Andrew Grant, WR Nadège Compaoré & Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 3 at 5.

⁶ Mari-Lise du Preez, “Interrogating the ‘Good’ in ‘Good Governance’: Rethinking Natural Resource Governance Theory and Practice in Africa” in J Andrew Grant, WR Nadège Compaoré & Matthew I Mitchell, eds, *New Approaches to the Governance of Natural Resources: Insights from Africa* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2015) 25 at 39.

⁷ Jewellord Nem Singh & France Bourguin, “Introduction: Resource Governance at a Time of Plenty” in Jewellord Nem Singh & France Bourguin, eds, *Resource Governance and Developmental States in the Global South: Critical International Political Economy Perspectives* (Houndmills, Basingstoke, Hampshire: Palgrave MacMillan, 2013) 1 at 10.

Comparatively, colonial institutions were deeply embedded in South African and Zambian governance. In South Africa, the end of colonial rule gave way to an apartheid regime that established brutally invasive institutions that created a two-tier system of economic, social, and political rights. Although South Africa's mining industry became a global leader, it exacerbated societal inequities by entrenching wealth and economic power amongst an elite few while confining the country's non-white population to low-wage, unskilled jobs. Reforming these institutions has been a significant challenge for the African National Congress (ANC), South Africa's only post-apartheid governing party. Similarly in Zambia, the discovery of copper and other minerals during colonialism placed the country in a disadvantageous position at independence. Unlike Botswana, Zambia did not have a "clean-slate" where it could freely establish its developmental state and mining developmental state institutions. The post-colonial Zambian government under President Kenneth Kaunda also faced significant opposition to reform efforts from foreign corporate interests. Since these were less entrenched than in South Africa, Zambia's political leadership was better able to complete some reforms, although the country continues to deal with the legacy of neoliberal intervention today.

Along with a state's position at independence, this dissertation also confirmed the influence of the global political economy and minerals prices on mining governance, which are important considerations good governance discourse has yet to adequately account for. The volatility of Zambia's mining industry—in contrast to the relative stability of Botswana's and South Africa's industries—illustrates this contention. Over the past 50 years, the prices of diamonds, gold and platinum group metals (the minerals which dominate production in

Botswana and South African) experienced less fluctuation than the prices of copper and zinc,⁸ which are the main minerals mined in Zambia. The volatility of copper prices reduced the ability of Zambian governments to create sustainable MDSIs. Income generated from copper was reduced significantly when prices collapsed in the 1980s. Consequent constraints on the state's budget led the government to seek assistance from BWIs that subsequently attached conditions on Zambian mining governance that further restricted the state's ability to implement MDSIs and meet its developmental objectives in the ensuing decades. This was not a challenge the Botswanan and South African governments experienced, given the relative stability of diamond, gold, and platinum prices.

Lastly, good governance discourse misconstrues the relationship between states and mining companies. It requires that states unilaterally implement norms (transparency, accountability, and the rule of law), without any view to the state's capacity and its unequal power relations with transnational corporations. In some instances, state and corporate interests have aligned, with beneficial results for the state's developmental agenda. Botswana's longstanding partnership with De Beers supports this contention. However, it is more often the case, especially in countries with large corporate entities, that governments are in disadvantaged positions where they might be forced to concede to private interests over state interests. South Africa's recent difficulties implementing the Mining Charter illustrate the extent to which corporate power can hamper development goals. Additionally, Zambia's experience with inequitable mining contracts and community evictions further demonstrate the challenges states

⁸ United Nations Economic Commission for Africa and the African Union, *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes* (United Nations Economic Commission for Africa, 2011) at 34-35.

must contend with when attempting to implement their development agendas. Good governance discourse fails to account for these dynamics when it suggests states are the only actors that should abide by its prescribed norms.

Consequently, good governance discourse continues to treat Southern African mining governance and its developmental impacts as if it operates beyond the reach of external forces, such as foreign corporate interests and the effects of the global political economy.⁹ Framing minerals management in this way not only hinders state practice, it also constrains the role for law in transformational mining developmentalism that attempts to redistribute power within state-corporate relations.

Despite these shortcomings, good governance norms can serve a purpose in the rights-based approach to mining developmentalism. As it is currently conceptualized, good governance discourse prioritizes its norms as the end or objective that states must achieve to realize development. As this dissertation has shown, this approach is unlikely to meet these aims because of the way the role for law is conceptualized—laws should not merely be enacted to ensure good governance norms are adopted in statute. Instead, transparency, accountability, and the rule of law should be regarded as means of facilitating the rights-based approach to mining governance.¹⁰ These norms can aid in concretizing the rights-based approach in order to legitimize governance,¹¹ because what is most lacking from the discourse are meaningful

⁹ Alastair Fraser, “Introduction: Boom and Bust on the Zambian Copperbelt” in Alastair Fraser & Miles Larmer, eds, *Zambia, Mining, and Neoliberalism: Boom and Bust on the Globalized Copperbelt* (New York: Palgrave MacMillan, 2010) 1 at 7.

¹⁰ Patrícia Galvão Ferreira, *Breaking the Weak Governance Curse: Global Regulation and Governance Reform in Resource-Rich Developing Countries* (SJD Thesis, University of Toronto Faculty of Law, 2012) at 260 [unpublished].

¹¹ Edward Kofi Quashigah & Obiora Chinedu Okafor, “Legitimate Governance in Africa – International and Domestic Legal Perspectives: An Introduction” in Edward Kofi Quashigah & Obiora Chinedu Okafor, eds, *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) 3 at 5.

enforcement and accountability mechanisms that ensure mining developmentalism is practiced for the benefit of communities, not merely state economic growth. This dissertation interrogated these lessons from Botswana, South Africa and Zambia as each state has attempted to implement, or entrench, MDSIs in its minerals governance.

7.3. Insights from Botswana, South Africa and Zambia

Attempts by Botswana, South Africa, and Zambia to implement developmental state and mining developmental state institutions offer reflections on the paradigms described in Chapter Three and further explored in the case study chapters. As discussed earlier in this dissertation, the developmental state paradigm emerged from an inductive analytical process that identified successful criteria from case studies—namely the East Asian Tigers—that limited its applicability to other countries. Nonetheless, scholars have advocated for the replicability of the developmental state model in Africa. Motivated by this academic endeavour, this dissertation also examined recent state practice in mining-dependent countries to identify additional characteristics of the mining developmental state. Recognizing that the function of these institutions would be critical to the favourable outcome of the mining developmental state—and would distinguish the paradigm from good governance norms—this dissertation also adopted Trubek, Coutinho, and Schaprio’s framework to assess their legal functionalities. However, it is acknowledged that both paradigms—the mainstream developmental state and the proposed mining developmental state variation—were insufficient to account for the concerns of communities directly impacted by mining. Therefore, it was stipulated that the rights-based approach to development that considers both the human and economic development of

communities should frame governance in the mining developmental state. Conducting this three-tiered analysis—mainstream developmental state, mining developmental state, and the rights-based approach—of mining governance in the three case studies contributed to expansive understandings of the framework proposed in this dissertation.

Due to its theoretical origins, the developmental state paradigm had never contemplated the effects of natural resources on the institutions that became synonymous with its success. In fact, the absence of natural resources from the commonly accepted developmental states—Japan, South Korea, Taiwan, and Singapore—led proponents to conclude that the model could not be replicated in resource-dependent countries. The resource curse has also contributed to this contention, with Botswana regarded as an exception to the rule. More recently, as African states have turned away from neoliberal economic policies and revitalized interventionist institutions, some scholars argue that resource-dependent African states are implementing developmental states.¹² This dissertation also seeks to contribute to this scholarship by further examining the limitations of the developmental state paradigm in mining-dependent Southern Africa.

Each case study explored in this dissertation illustrated three key ways in which successful implementation of the mining developmental state would necessarily diverge from the mainstream model. First, the model would need to account for the state's relationship with mining capital.¹³ Botswana revealed one relationship that proved beneficial to the state's longterm economic growth and development, although structural inequities were exacerbated

¹² See Jesse Salah Ovadia & Christina Wolf, "Studying the developmental state: theory and method in research on industrial policy and state-led development in Africa" (2018) 39:6 Third World Quarterly 1056; Richard Saunders & Alexander Caramento, "An extractive developmental state in Southern Africa? The cases of Zambia and Zimbabwe" (2018) 39:6 Third World Quarterly 1166; Chilenye Nwapi & Nathan Andrews, "A 'New' Developmental State in Africa? Evaluating Recent State Interventions vis-a-vis Resource Extraction in Kenya, Tanzania, and Rwanda" (2017) 13:2 McGill Journal of Sustainable Development Law 225.

¹³ Saunders & Caramento, *supra* note 12 at 1172.

and local communities have been disadvantaged. Alternatively, South Africa and Zambia have both had problematic relationships with mining capital. While the MDSIs being implemented in both countries have attempted to reshape this relationship, mining capital has strongly resisted these efforts and has blocked these initiatives through court action (the judicial review of the South Africa's Mining Charter, and threats of legal action and eventual lawsuits opposing Zambia's tax reforms).

Second, the developmental state paradigm would need to consider the effects of the commodities price cycle. Both Botswana and South Africa have benefitted from more stable commodities prices (diamond, and gold and platinum metal group minerals, respectively). In Botswana's case, stable diamond prices have contributed to the longterm sustainability of its mining developmental state. South Africa, meanwhile, has been able to link its developmental agenda to its mining industry due to the sector's viability, which stable prices provide. In contrast to the relative stability in Botswana and South Africa, severe fluctuations in copper prices over the past 40 years have impaired Zambia's ability to fully implement a sustained mining developmental state. Instead, Zambia's inability to effectively manage copper price volatility in the 1980s led the state to seek debt assistance from the World Bank. By the time prices recovered in the 1990s–early 2000s, most of the industry had already been privatized, which instilled more power in mining capital and made it difficult for the state to reverse course and introduce interventionist policies in subsequent years.

Connected to the preceding two considerations is the legacy of neoliberal interventions. Botswana was spared from foreign intervention, although its economic positions have entrenched structural inequalities in the country. Of the three case studies, the presence of foreign neoliberal

interventions was most pronounced in Zambia, which undertook a mandatory World Bank structural adjustment programme in exchange for debt relief in the 1980s. That intervention had a longterm effect on the state's ability to constitute mining developmental state institutions, as the reforms expanded and strengthened the role of private capital in the industry. Similarly in South Africa (although it was not subject to structural adjustment), neoliberal interests that were entrenched during apartheid proved difficult to reverse in the early post-apartheid period. In an effort to maintain national unity and peace, these interests remained untouched. The state's unwillingness to confront these interests ensured they remained in place as various administrations subsequently tried to introduce redistributive mining developmental state institutions, with little success.

The varied replicability of the developmental state and mining developmental state model in Botswana, South Africa and Zambia also raises the question of how the paradigm's success should be measured. This dissertation measured success, to some degree, by assessing to which extent each case study mirrored the established paradigm. Additionally, this dissertation also used Trubek, Coutinho and Schapiro's legal functionalities framework to measure the efficacy of the various mining developmental state institutions that have been introduced in each case study. The results revealed the limitations of this approach, particularly since the paradigm does not account for the concerns of affected communities. Nor does the framework interrogate a state's ability to integrate their mining developmental agendas into the global economy. This remains a critical consideration given the ongoing influence and interest of foreign capital in Southern

African mining, as well as the lingering uncertainty that arises from the ongoing cycle of boom and bust commodities prices.¹⁴

7.4. Conclusion and areas for future research

Recognizing the shortcomings of the above paradigms, this dissertation proposed the adoption of a rights-based mining developmental state that incorporated institutions that advanced both human and economic development. Of course, it is acknowledged that the institutions this framework could encompass are likely not confined to the ones explored in this dissertation. For example, labour and environmental policies were not considered. Neither did it consider the rights of women and girls in mining, or the growing move to formalize artisanal and small-scale mining. Due to the exclusive focus on studying the developmental state framework, which does not account for these issues, they were not included in the analysis undertaken in this dissertation. Instead, the proposed rights-based approach accounts for a significant human right in relation to mining—free, prior and informed consent of affected communities and Indigenous peoples. While this approach helps expand conceptions of the developmental state paradigm, it is acknowledged that it may still not account for the concerns of extractivist critics with the harm that can arise from the close relationship between the state and industry.¹⁵

This dissertation has attempted to revisit the resource curse and good governance paradigm by examining its limitations and considering developmental state theoretical framework as an alternative governance model for Southern African states attempting to leverage mineral wealth to promote developmentalism, in clear conflict with traditional good governance

¹⁴ Schubert, Engel & Macamo, *supra* note 4 at 4.

¹⁵ Jide James-Eluyode, “The blurred lines: analysing the dynamics of states’ duty and corporate responsibility to consult in developing countries” (2015) 23:3 Afr J Int’l & Comp L 405 at 431.

norms that seek to limit the role for the state in mining. Mining governance in Botswana, South Africa and Zambia illustrates this conflict, and has revealed shortcomings of the traditional good governance approach—namely, that it neglects the structural inequities embedded in the paradigm. Thus, as part of its contribution to the field of law and development, this dissertation has sought to offer an expansive view of the mining developmental state that entrenches a human rights approach to mining governance. As a governance framework, the developmental state on its own embeds the interests of powerful local elites who often collaborate closely with foreign capital. While this model may yield significant economic outcomes for the state, it overlooks the harmful effects of these structures and the ways in which they exacerbates economic, social and political inequalities.

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