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THE INTERPLAY OF STATE AND FIRM IN ZAMBIA: PATH DEPENDENCY IN THE MINING SECTOR

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Abstract

Zambia is a mineral-dependent state with a history inextricably tied to the mining of copper. The relationship between state and firm in Zambia has been contentious since independence from Britain in 1964. Since then, attempts to nationalise or curb the power of the mining firms have failed owing to the path dependence of the sector. Path dependence has led to an uneasy equilibrium in the modern day, whereby the optimal economic choice is foreign firm control over the mining sector. This optimal choice comes at the expense of the social and environmental well-being of the state. This choice is constrained and is a result of the historic development of the sector, the legacy of debt and the limited domestic capacity for large-scale mining projects in the modern day. This consequence of constrained choices has resulted in the further entrenching of imbalance between firm and state over time. This path dependence was codified through one-sided investor-state agreements through the use of stabilisation clauses and consequently, mining firms have committed environmental violations and tax evasion with impunity. Path dependence and mineral dependence are connected, and this has led to options missed through disincentive. Such as diversification and as a consequence of that, the development of international investment law and regional integration outside of the mining sector.

This research utilises the critical juncture framework to determine the genesis of path dependence in the Zambian mining sector, that of the split between mines and state. In 1924 the British South African Company retained the nation's mineral rights after the establishment of the British Protectorate. The company only ceded the administrative rights of the territory which created a clear barrier between the precursor of the Zambian state and the mining sector. The mining sector continued and developed on the basis of being as attractive as possible for external firms. In plain terms, Zambia's mining sector was born out of a split between the functions of the mines and the functions of the state. Over time this has developed a sector that operates outside of the state, whilst simultaneously exercising influence over it. This reality has rendered nationalisation and legislation relatively futile.

Key Words*: Path Dependency, Mining, British Colonial History, The British South African Company, Zambian History, Institutions, International Investment Law, Development Agreements, Stabilisation Clauses, Bilateral Investment Treaties, Expropriation, Regional Cooperation.*

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List of Abbreviations

AfCFTA - African Continental Free Trade Agreement

AU - African Union

AZWIM -Association of Zambian Women in Mining

BIT- Bilateral Investment Treaty

BSAC- British South Africa Company

CODELCO - Corporación Nacional del Cobre de Chile

COMESA - Common Market for Eastern and Southern Africa

CNMC - China Nonferrous Metals Company

EMR - EMR Capital

EV - Electric Vehicle

FDI - Foreign Direct Investment

FET - Fair and Equitable Standard

FSMAZ - Federation of Small-Scale Miners Associations of Zambia

FTA- Free Trade Agreement

FQM - First Quantum Minerals

GRZ- Government of the Republic of Zambia

ICC- International Criminal Court

IMF - International Monetary Fund

ICSID- International Centre for Settlement of Investment Disputes

K- Zambian Kwacha

KCM - Konkola Copper Mines

MCM- Mopani Copper Mines

MINDECO- Mining Development Corporation

MMD - Movement for Multi-Party Democracy

NCM - Nchanga Consolidated Mines

PF- Patriotic Front

RCM- Roan Consolidated Mines

RST- Roan Selection Trust

SADC- Southern African Development Community

SSM- Small-scale Mining

UN - United Nations

UNCITRAL - United Nations Commission on International Trade Law

UNIP - United National Independence Party

UPND - United Party for National Development

ZAPU- Zimbabwe African People's Union

ZANU- Zimbabwe African National Union

ZCCM - Zambia Consolidated Copper Mines

ZCCM-IH- Zambia Consolidated Copper Mines Investment Holdings

ZEMA- Zambian Environmental Management Agency

ZIMCO- Zambia Industrial and Mining Corporation

ZRA- Zambian Revenue Authority

WTO - World Trade Organisation

Introduction

Zambia is the second largest copper producer in Africa and a mineral-dependent state. A consistent facet of Zambian history has been the struggle for domestic control of its copper reserves (Ndulo, 1977; Slinn, 1983; Larmer, 2005; Fraser & Lungu, 2007; Fraser & Larmer, 2010; Ng'ambi, 2022; Musonda & Larmer, 2023). Power has rested with firms operating the mines and the mineral rights of the territory rather than in its executive, an outcome that has had dire consequences for the environment and the state's ability to raise public revenue. Colonial mining firms developed the territory to attract colonial miners, and the administrative functions of the state followed. Consequently, the mining sector developed outside of the reach of the state and under the direction of external firms. The state has simultaneously come to rely on mineral royalties from private firms to service ever-increasing debt and expand public services (EITI, 2020; Bank of Zambia, 2022). Firms have consistently engaged in environmental and tax violations with relative impunity yet remain required for their capital and technical ability to manage large-scale mining projects, so the state can receive the royalties. In essence, the state requires mining but the impact from firms beyond the economy is generally negative. The research demonstrates why the state has been unable to nationalise the sector or successfully legislate against foreign mining firms. This is the result of the path dependence of the sector and the constraints in the decision-making of successive Zambian administrations since independence from colonialism.

This research demonstrates that the constraints on the decision-making of Zambian governments within the state-firm dynamic is a path-dependent phenomenon. The path dependence and subsequent choice constraints stem from the split of the control of mineral production from the administrative functions of the state during the colonial period. The British South African Company (BSAC) was a colonial mercantile group focused on mineral extraction, which became a company-state across much of modern Southern Africa in the late 19th century (Libby, 1983; Phillips & Sharman, 2020). BSAC charted the rights to explore and exploit the minerals of what would become modern-day Zambia in 1889 and underwent a rapid consolidation of the mineral assets of the territory (Gann, 1958). Until 1924, BSAC effectively governed the territory then known as Northern Rhodesia, implementing taxes and policies, exploiting minerals, and maintaining an armed force (Ndulo, 1986; Pomeroy, 1994). In 1924, BSAC handed over the administrative duties to the British, who formed the British Protectorate: all mineral rights remained with BSAC (Gann, 1958; Ndulo, 1977).

The split is the crucial starting point or critical juncture at which mining was separated from the state and clarifies why the state has been unable to benefit from the sector since independence. This also explains how external firms have been able to violate environmental and tax regulations consistently. In essence, the mining sector started and has continued to develop outside of the reach of the state. This parallel development, in combination with specific economic and legal factors: particularly the issues of servicing constantly rising debt and one-sided contractual agreements, has constrained the choices of successive Zambian governments when dealing with foreign mining firms.

Path dependency is the view that history creates conditions which constrain choices. Events can determine a trajectory from which reversal becomes costly and difficult. This inability to reverse continues to entrench further over time as decisions are made within the constrained setting (North, 1991). Path dependence is a broad term utilised over many fields, this research specifically utilises the critical juncture framework of Collier and Collier (1991) to determine the starting point, that of the split between mines and state. This is used in conjunction with Pierson's (2000) definition of path dependence in public policy for the events that follow and the constrained options available for the Zambian state with the sector. In plain terms, Zambia's mining sector was born out of a split between the functions of the mines and the functions of the state. Over time, this has developed a sector that operates outside of the state whilst simultaneously exercising influence over it.

The mining sector in Zambia started with the mineral charter granted to Cecil Rhodes's British South Africa Company (BSAC) in 1889. BSAC presided over Southern African territories with varying degrees of interference from the British Empire as a company-state (Yorke, 2015; Madimu, 2017). In Northern Rhodesia, BSAC effectively retained the functions of the state without interference until independence in 1964 (Pomeroy, 1994). The territories chartered for mineral exploitation comprised multiple indigenous Kingdoms, BSAC rapidly consolidated the territories through a combination of purchase and armed conquest and took to mining copper, lead, and coal. The territories were divided into Northern and Southern Rhodesia, corresponding roughly to present-day Zambia and Zimbabwe respectively (Mvumba, 1977).

In Northern Rhodesia, BSAC oversaw the administrative duties of the state, in addition to mining, including taxation, law, transportation, agriculture, and internal security until the establishment of the protectorate. Between 1889 and 1924, the company held every aspect associated with statecraft in Northern Rhodesia, for all intents and purposes, it was the state (Pomeroy, 1994). In 1924, BSAC handed administrative rights to the Crown, at which point

the British Protectorate was established. The protectorate was established without control of the mineral rights owing to an oversight by the British establishment (Slinn, 1971). BSAC retained mineral rights both from a commercial and a policy basis: in the instance of the transferring rights only the rights to administer the colony were passed to the Crown. The poor mining yields shown by BSAC, combined with administrative oversight, meant that Britain did not determine the potential value of the mineral rights. They allowed BSAC retention of the rights to all minerals in the territory and the ability to freely franchise and regulate external firms and investors in the mineral assets of the territory, a decision the Empire came to regret. The British solely took control of the administrative rights: given the far-reaching extent of the mineral rights, the Colonial Office was unable to legislate around mining (Slinn, 1971; 1979). This split placed the mines outside of the state and set Zambia on a trajectory of having little control over its mines in the present day.

BSAC continued to administer Northern Rhodesia's mineral rights up until Zambia achieved independence in 1964. Prior to this period, BSAC franchised large tracts of land to Anglo American and the Roan Selection Trust to mine. This act gave the most easily accessible copper to foreign firms and perpetual licences to mine that would last until 1982 (Roberts, 1976; Ndulo, 1986).

Zambia was formed out of Northern Rhodesia after achieving independence in 1964. Kenneth Kaunda, a former teacher, and freedom fighter, led the ruling United Independence Party (UNIP) which was an authoritarian socialist party. Kaunda and UNIP presided over Zambia from 1964 to 1991. From 1972, it was the only legal political party, and democratic elections were suspended until 1991 (Kashimani, 1995). At the point of independence, the newly formed Zambian government had to purchase the mining rights back from BSAC (Ndulo, 1977). However, licenses granted to private firms by BSAC remained in operation after independence (Ndulo, 1986). The Kaunda administration inherited a heavily indebted nation with scant human resources to take control of the newly independent economic sectors (Burawoy, 2014). Consequently, the choices for the newly formed government were heavily constrained and many of the mining institutions introduced by BSAC endured.

UNIP sought to take control of mining through nationalisation in 1969. However, the private firms Anglo and Roan Selection Trust continued as minority partners until 1982 (Ushewokonze, 1974; Slinn, 1983). Owing to their technical capacity and the dearth of human resources with specialised mining knowledge in Zambia outside of the firms, they maintained effective day-to-day control until 1982, when the state acquired the remaining minority shares (Makuyana & Odhiambo, 2014). The process of mining nationalisation was further hampered

by the copper crash of 1975, which led to a balance of payments crisis and the need for loans based on IMF restructuring (Auty, 1991). The crisis had dual consequences: firstly, the continued reliance on the minority private partners who ran the mines until 1982. Secondly, an inability to direct economic policy owing to IMF intervention which became a requisite for economic recovery. The latter would lead to a rapid and deep privatisation from 1991 that would have long-term negative effects (Fraser & Larmer, 2010).

This combination of factors kept the mines out of state control and placed Zambia under significant external debt. Kaunda successfully nationalised the mines and removed private firms in 1982 (Makuyana & Odhiambo, 2014), however, the state remained beholden to IMF restructuring objectives, a process which kept mining policy out of state control. Five years later, Kaunda rejected the IMF package and attempted a unilateral economic policy (Adam & Simpasa, 2010). The policy caused the economic crises to deepen and was swiftly reversed. At this point, the IMF and World Bank started to focus on the end of one-party rule in Zambia. Zambia was not a unique instance of this in Africa and the wider Global South: this moment is contextualised within a global aspect of IMF reforms and broader shifts in lender conditionality towards liberalising economies with democratic elections (Bull et al., 2006). This confluence of economic decline and external support for political change led to the election of the Movement of Multi-Party Democracy (MMD) under Frederick Chiluba in 1991. It is notable that the IMF were in protracted negotiations with Chiluba before his election (van de Walle, 1999).

The MMD was a liberal democratic party that ran on a platform of economic restructuring and re-introducing democratic elections. Chiluba's administration inherited a heavily indebted state with inefficient mining structures. Consequently, the IMF advised a rapid and deep form of privatisation, whereby the mineral assets were sold off cheaply and largely without transparency and public tender to foreign firms (RAID Report, 2000; Craig, 2001). The introduction of a handful of powerful private firms into the indebted country further separated the mines from the state, and firms were able to act outside of domestic law. They engaged in tax evasion, environmental damage and labour violations, a process protected by the generous development agreements signed during the privatisation period (Lungu, 2008). These agreements gave legal protection to the firms from any legislative change that could affect their profits through the use of stabilisation clauses. These clauses were underpinned by stability periods of 15 to 20 years (KCM, 2000; MCM, 2000). The stability period is the timespan in which the clause remains in effect (Oshionebo, 2010). This specific legal aspect, that of stabilisation clauses in the agreements, further isolated the mining sector from the reach of the

Executive. The development agreements are the defining constraint placed on the government between 2000 and 2020 and are a legal expression of path dependency.

In 2011 the Patriotic Front won the election on a campaign that focused on wealth redistribution, of which the mines were the most significant target. The party itself can be characterised as populist, with an undercurrent of socialism. These vital political aims naturally ran counter to the highly restricting clauses seen in the development agreements. Under their tenure, the relations between firms and the state became tense and confrontational. The contents of the agreements became public furthering the tension (Musonda & Larmer, 2023). Throughout this period, the firms remained protected owing to these agreements, however, once the stability periods ended, the Edgar Lungu-led Patriotic Front administration sought to nationalise the two largest mining subsidiaries via expropriation, Konkola Copper Mines and Mopani Copper Mines, which were owned by Vedanta Resources and Glencore respectively. The process of expropriation occurred in 2019 in the lead-up to the 2020 presidential election. A key component of Lungu's re-election centred on taking back control of the mines. Lungu successfully expropriated Konkola and compelled the sale of Mopani, however, shortly after, he lost the election to the United Party for National Development (UPND).

The incoming UPND under Hakainde Hichilema sought to immediately reverse these decisions and place the mines back under the management of foreign firms, largely as it was viewed that the ailing economy and growing national debt could not be jeopardised further by alienating external investment. The expropriatory actions would limit investor confidence. Beyond this, the complexity of the mineral assets meant that domestic control would be difficult owing to limited human and technical resources in the sector. Additionally, the UPND had to fund their policies and, as a resource-dependent state, required the full capacity of its mineral assets to bring in much-needed domestic revenue.

Zambia has been unable to take control of its mineral assets owing to a combination of debt, lack of human and technical resources and external interference from larger bodies. All of which are a colonial legacy (Du Plessis, 2005; Noyoo, 2021). This maelstrom of factors has constrained their ability to charter different courses for the mining sector, firstly from the lack of control but secondly from the limited options available. Over time, the separation of mines and state has continued to entrench itself: each constrained option taken by the government has constrained the future decisions of future administrations. This is indicative of a path-dependent phenomenon. At each point in history where the state unilaterally tried to take control of the mines such as Kaunda in 1987 and Lungu in 2020, it has been hampered by the events that preceded it.

The split between administrative or state functions and mining policy with the creation of the protectorate in 1924 is the critical juncture, or the event that started the path dependence. This cleaved mining from the state and allows the sector to act outside of and independently of the state, whilst simultaneously exerting influence over the state. This process placed BSAC in a position where it created policy favourable for investment rather than state development. This in combination with franchising out the mines to external firms with perpetual licences, formed the antecedent conditions which would constrain the decision-making capacity of an independent state.

Independent Zambia was constrained by inherited debt, colonial firms managing mining operations and limited human resources. The state required funds to service debts, which required more lines of credit and assistance from the IMF and World Bank, which ultimately paved the way for a deeper mode of privatisation in the 1990s (Craig, 2001; Rakner, 2003). Kaunda was only able to wrestle complete control over the mines in 1982 and reject IMF plans in 1987, by which point the full nationalisation of mines exacerbated the economy and deepened the debt crisis. 1987 can be seen as an attempted path break that was immediately reversed.

The privatisation period, in and of itself, was an era where mining firms concentrated their power over the state through one-sided development agreements, which nullified much of the ability of the Executive to mete out legislation that affected the mining firms (Fraser & Lungu, 2007). Although these agreements received significant opposition from leading figures of the ruling MMD party, they went ahead further cementing the role of firms over the Executive. This legal aspect formally constrained the decision-making of the state as it meant that legislation was ineffective against its most central sector. This legal protection emboldened the firms to engage in tax evasion and environmental damage. These are the tangible detriments of the path dependence of the sector. These aspects fuelled public resentment against the mines, which was capitalised on by the Patriotic Front in 2011. This era was marked by significant tension, culminating in the expropriation of Konkola and the compelled acquisition of Mopani between 2019-2020. The actions against the mines were another attempted path break. This attempted path break was reversed by the UPND owing to the limited options available for a state-controlled mining sector.

Theoretical Framework of the Research: Resource Curse, Failed Economic Policies or Path-Dependent?

Perspectives around the development of Zambia's mining sector have centred on questions of poor governance, colonial ills, and limited diversification away from natural resources. As such, much of it has been described through the basis of the policies imposed during the one-party state period of Kenneth Kaunda (Limpitlaw, 2011), others have determined it as a clear example of the resource curse (Crain, 2010), and additional focus has been placed on the colonial period and its impact on the future development of an independent state through the transplanting of path-dependent institutions (Acemoglu & Robinson, 2001; Du Plessis, 2006). This research utilises path dependency as a framework for explaining how Zambia's mining sector developed from the basis of the split between mines and state with the establishment of the British Protectorate in 1924.

The Resource Curse has sought to place a binary in postcolonial states as to why states with mineral resources could not attain economic growth or develop institutions similar to postcolonial states unendowed with natural resources, such as Mauritius and Seychelles. For some, Zambia is an ideal example of the resource curse, given the enclavisation of the Copperbelt region, rent seeking behaviours in the period of authoritarian rule under UNIP and the lack of separation of powers seen in the democratic period that followed (Crain, 2010). In Africa, the Resource Curse has become a dominant paradigm in the policy space around transforming the mining sector (African Union, 2020). Within this paradigm, we see polarities in the role of the private sector in alleviating the issue through further investment and corporate social responsibility or, conversely, to be met with a stringent regulatory environment. Additionally, the role of China and India is polarised as ideal examples of partnership within the Global South or new Scramblers for Africa (Auty, 1993; Collier, 2008; Hicks, 2015; Gilberthorpe & Rajak, 2019). There is also some optimism shown for the positive shifts in democratic institutions on the continent, in addition to the push for continental and regional cooperation on mining policy (Collier, 2008; African Union, 2020).

However, within this paradigm is a focus on the technical issues for alleviating the Resource Curse rather than exploring the actors that cause it. The focus is primarily centred on the lack of human resources in host states and the rent seeking behaviours of those in positions of domestic authority. Subsequently, deeper partnerships with foreign firms, combined with

increasing corporate social responsibility measures are often seen as the route out rather than the root cause (Hicks, 2015). Critical theorists within the extractive sphere have added richness in depth to the discussion, owing to their focus on the role of firms as those that cause rather than cure the issue. In addition to developing the view that the privatised period of extraction through transnational capital is not a new wave or a new future but a continuation of the colonial extraction of yesteryear and still a tool of empire building (Carmody, 2011). Gilberthorpe and Rajak (2019) offer an even richer insight through a critical anthropological lens as they interrogate actors' agency within the organisational set of mining and extractive industries. They move beyond the traditional questions in the anthropology of the agency of the subaltern but instead include the elite actors that form the many components of the dynamics in the extractive industry. Through its critical approach to history, this research complements this goal by outlining the path dependence of the mining sector and the lack of agency demonstrated by the nominally elite actors, in this instance the Zambian state. This lack of agency feeds into decision-making constraints that are a consequence of the trajectory of the mining sector from the period of colonisation.

Beyond the Resource Curse is the viewpoint that many postcolonial economies have failed when adopting a state-driven and centralised economic program. The independence period of Zambia under Kenneth Kaunda is often touted as an example of one of Africa's strongest economies becoming one of its weakest through statist economic policy (Limpitlaw, 2011; Barton, 2015). The sharp decline in GDP, mineral output, and export revenues between 1964 and 1991 supports the argument (Mills, 1992; Limpitlaw, 2011). In this vein, the viewpoint holds that Zambia's economy performed well under colonialism, performed poorly during the statist approach of the independence period, and only recovered through the liberalising program of the privatisation period. Postcolonial states that have adopted controlled or statist approaches to economic planning such as Guinea are then compared against free-market postcolonial states such as the Ivory Coast (Connor, 1972). The focus on these postcolonial states is centred on the system of economic planning, which is treated as if it occurred in a vacuum. This is, essentially, a functionalist view of institutional development. The efforts to compare without uncovering individual state-firm dynamics for each state throughout differing periods negates fundamental information for understanding where differences arise. As such, focus on the institutions inherited by postcolonial states has provided fertile ground for explaining the differences in economic performance in states (Acemoglu & Robinson, 2001; Du Plessis, 2005). The viewpoint is well placed as a starting point when discussing the institutions, or lack thereof, inherited in extractive states (Acemoglu & Robinson, 2001). The

existence of pre-independence extractive institutions, which BSAC created before the establishment of the protectorate has had long-term effects, owing to the transplantation of institutions into the postcolonial state (Du Plessis, 2005).

Path dependency offers the most compelling explanation of the development of the Zambian mining sector (Du Plessis, 2005; Noyoo, 2010; 2021). It also explains the weakness of institutions, specifically in Zambia, and the impact of the colonial legacy on their formation (Acemoglu & Robinson., 2001; Du Plessis, 2005; Noyoo, 2010; 2021). Path dependency is relevant when discussing the issues facing the lack of change in mining in Zambia, as the sector's organisation is the consequence of history.

Within path dependency, once a route is taken, change will likely be costly and complex. The incentive remains to continue the initial path, which is a process that strengthens over long periods. North's (1991) conception of path dependence within institutions drew parallels from Arthur's (1994) research on technological change, with the usage of increasing returns incorporating inflexibility to the path. Simplistically, new approaches hold high costs within an institutional context, whereby challenging the status quo can be risky and increasing returns come from maintaining the path that preceded (North, 1991). Pierson (2000, p. 263) developed the theory to make it applicable to the political sphere; he identified four criteria to identify increased returns in politics, namely: "*multiple equilibria, contingency, a critical role for timing and sequencing, and inertia*". Pierson's (2000) challenge to political science's functionalist approach to institutions, which views institutions' existence and persistence as an outcome of purpose, lends itself well to the development of Zambia's mining sector. The functionalist perspective relies on actors' rationality in responding to social needs efficiently (Keohane, 1984; Shepsle, 1986; Weingast & Marshall, 1988). As Pierson notes, functionalism discounts the multiple equilibria available at the beginning point of the institution; it also discounts that accidents could be the cause of origin and that increasing returns have locked the path in rather than the institution's efficiency. Furthermore, within the Zambian context, domestic political actors are granted far more agency than history would indicate they have or had. In essence, functionalism discounts the legacy of colonialism.

Pierson (2000, p. 263) cites four distinct features to determine path dependence: "*multiple equilibria, contingency, a critical role for timing and sequencing and inertia*". This approach lends itself well to the Zambian context. At the point of the establishment of the protectorate, *"multiple equilibria"* were available for developing mining other than control by BSAC. Control could have been directly from the British Empire, or the Empire could have renegotiated the perpetual rights to the external mining firms. The Empire could have taken

over the tendering process to bring in further economic actors or reshaped BSAC's policies to create an environment conducive to competition rather than monopoly. The Empire could have also theoretically given some indigenous control over mining, however, given the track record, this notion is fanciful. "*Contingency*", or events occurring at critical points, have enduring consequences: the critical juncture is demonstrative of this, but also IMF intervention, copper price drops, debt growth, the pace of nationalisation and the pace of privatisation, and development agreements with stabilisation clauses. The critical role of "*timing and sequencing*" is that each event occurred at points where they further locked in the path of increasing returns on the separation of mining from the state. Lastly, "*inertia*", whereby positive feedback establishes a single equilibrium that is resistant to change. In Zambia, the equilibrium is external control over the mineral assets. This single equilibrium is clearly resistant and has been reverted back to in the face of significant public and political opposition. Failed efforts to nationalise and reject external interference in policymaking occurred in 1987 and 2020. In both instances, the efforts were reversed back to the single equilibrium. The sector's development satisfies the criteria of Pierson's (2000) path dependence and Collier and Collier's (1991) critical juncture.

Zambia's path-dependent mining sector is fundamentally historic and encompasses increasing returns economically and policy lock-in from the political component. Path dependency is often observable in the institutions of resource-dependent states (Orihuela, 2013; Fadiran & Sarr, 2016) and Zambia (Du Plessis, 2005). The idea that Zambia's mineral development and many other resource-dependent states' dominant sectors remain path-dependent owing to the development model inherited is a steadily growing body of literature. Peru, for instance, is a country where the introduction of popular participation in environmental impact assessments and the involvement of regional governments with firms have led to conflict within the mining sector (Jaskoski, 2014). Botswana's success in mineral development has been identified as one whereby early forms of coalition building represented the critical juncture which led to its comparative success as a resource-dependent nation (Poteete, 2009). Geography and nature also play a part in the path dependency of a sector's policies. Although subscription to geographical determinism within geopolitics is a largely discredited academic position, the role of natural endowment in affecting the destiny of a nation is still legitimate, and the role of resources in resource-dependent states helps set trajectories (Scholvin, 2014). In the case of Zambia, endowment is related to copper reserves, which ultimately defined the nation's genesis and development.

Ndangwa Noyoo has written on the path dependence of Zambia across social policy, corporate social responsibility, and the development and mobilisation of the mining sector (2010; 2021). Noyoo views the development model of Zambia as one that is inherited based on cheap mineral extraction from the colonial period, and that path dependence has continued since, consequentially limiting the agency of Zambians, and limiting the benefits of mining towards social policy and corporate social responsibility. In addition to limiting the available economic options and diversifying away from mining (2021a; 2021b). For Du Plessis (2005; 2006), path dependence is seen in Zambia's institutions and has determined the poor economic performance of the state post-independence. These extractive institutions constructed by BSAC before independence were transplanted into the postcolonial state, consequently impacting the state's future economic development, decision-making capacity and institution building (Du Plessis, 2005).

This research builds on the viewpoint that Zambian institutions are path-dependent and have a colonial legacy. This adds to the existing literature by mapping a starting point and specific historical events that further entrenched the path owing to constraints on governmental decision-making. This aims to create a chronology whereby the genesis and inflexion points of the sector's path dependence are situated tangibly. Within this mapping is the crucial distinction that the mining sector developed as a continuation of these external pre-independence extractive institutions but that this continuation occurred in parallel to the development of the state rather than as part of it. The separation between the two highlights the state's difficulty in managing the sector. The purpose of BSAC was to create a territory which external firms would want to mine, and this reality has continued to the present day.

In Zambia, path dependency occurred with the initial critical juncture, that of mining's functions existing and, in turn, developing separately from the state's functions. This juncture occurred from the establishment of the British Protectorate in 1924, which took on the state's administrative functions, whereas mineral policy and production remained with BSAC. Beyond this, BSAC retained a monopoly on many other functions, such as the military and policing, owing to the British Empire's lack of interest in governance. This further cemented the role of mining, as being above the needs of the state but also that it was separate from it. Regarding path dependency, this moment can reflect a trajectory that occurs because of a decisive transition (David, 1985). A critical juncture can be defined via three components "(1) *a major episode of institutional innovation*, (2) *occurring in distinct ways*, (3) and *generating an enduring legacy*" (Collier & Munck, 2017, p 2). Within the Collier and Collier (1991, passim) framework it can be seen as the following:

antecedent conditions →
cleavage or shock →
critical juncture → methods of production/ mechanisms of reproduction
= legacy or, as described throughout path dependency.

Rhodesia was a colonial extractive society largely formed to provide lead, copper, and coal under the direction of BSAC. These are the antecedent conditions whereby no actual state is formed. There is a multiplicity of differing individuals from separate kingdoms with separate languages working to increase mining productivity for a separate and external entity, BSAC. This reality that is mirrored across many resource-dependent states, creates the ideal setting to develop a society that is built mainly around the cheap extraction of labour rather than the needs and goals of its inhabitants (Acemoglu & Robinson, 2001). These antecedent conditions set the course for the hegemony of mining in whichever state followed it.

Then we have the cleavage, whereby the protectorate was established in 1924. After the protectorate's establishment, BSAC retained the rights to direct policy, franchise and continue with mineral production. At the same time, nominal administrative control passed to the British Empire. The critical juncture was the outcome of the cleavage, the separation of mining from the state. Collier and Munck (2017) note that the cleavage and juncture are often incorrectly conflated. The establishment of the protectorate is not the juncture, it is the cleavage that leads to the juncture of separating mining functions from wider state functions. The mechanisms of production are the steps that include "*reactions and counter-reactions*" (Collier & Collier, 1991, passim). In the Zambian context, this relates to the attempts at nationalisation and mining legislation, and the aggressive attempts to leave the consistently growing debt cycle that has occurred since independence. From the side of mining firms, it relates to the franchising of mining, introducing multinationals and the methods of collecting revenue that would be inherited by the state at independence. The legacy *"is an enduring, self-perpetuating institutional inheritance of the critical juncture that persists and is stable for a substantial period"* (Collier & Munck, 2017, p 6). To establish something as a critical juncture, a wider legacy must occur, which is observable in the path dependency of the Zambian mining sector. The legacy relates to the inability of the Zambian state to control its mineral wealth, instead locked into an acrimonious dynamic with external forces such as foreign multinationals and the IMF. They constantly have to weigh the costs of national determination through the mines against the reality of ballooning debt and limited technical resources. The legacy of the juncture

has locked Zambia into a path with its mining sector, whereby the state is constrained in its choices regarding the sector. These constraints tend to favour the investor, which has had profound effects on the environment, tax revenues and the limitation of legislative power in Zambia. The development of this path means that the primacy of private firms will continue regardless of its impact on the environment and Zambia's citizens. The constraints imposed on the government's choices in the modern day relate to legislation and policy that do not explicitly benefit firms such as nationalising entities, taxing firms, and providing legal and equitable remedy for citizens affected by mining firms that break environmental laws.

Applying the critical juncture framework to the Zambian mining sector, we can see this as the below:

Antecedent conditions (an extractive colony) →

Cleavage (establishment of the British Protectorate of Rhodesia) →

Mechanisms of reproduction (the franchising of mining sites to external firms, leading to the primacy of foreign multinationals and the debt left to the colony at independence which has continued to grow, placing further reliance on mining)

= *Legacy* (the disparity in power between the mining firms and the state and the increasing returns of enhancing and attracting the private sector. The result of this increases tension between firms and state. It also leads to environmental damage and taxation issues as policy decisions benefit firms over the state).

Path dependence and critical junctures are distinct processes that are often conflated (Hacker, 1998; Pierson, 2000). As Hogan (2006) notes, a critical juncture does not have to be characterised by its commencing processes that are path-dependent, instead it can lead to institutions that rely on stability from elsewhere. Within discussions of critical junctures, the concept is stretched via the temporal aspect of the cleavage which lends to a blurring of whether a juncture has occurred or whether it constitutes an incremental change. Efforts to solve this relate to approaching the definition of a juncture with deeper specificity, such as whether the generative change is swift, significant, and encompassing (Hogan, 2006). The critical juncture of Zambia's mining sector is not a consequence of war, radical upheaval or crises as has often been the focal point for historical institutionalism, as random events can alter the institutional and political status quo (Tilly, 1975; Cortell & Peterson, 1999). This research follows the seemingly, less dramatic points at which path dependence can be borne out of (Hogan, 2006). In this instance, the indifferent and bureaucratic transfer of BSAC's administrative control to

the British in 1924 and the seemingly accidental failure to also take the mineral rights from BSAC is undramatic. For the lives of the inhabitants, fundamentally little had changed; they were still taxed, exploited, and removed from any form of democratic structure. However, the change was deeply significant because the separation of mining from the state led to BSAC carving out its base of power and own self-serving development, effectively in a vacuum from the state it exploited. This is demonstrable via the path-dependent processes this juncture initiated. It is swift because the cleavage occurred literally through the stroke of a pen in 1924. It is encompassing because this persistent issue has affected every administration that followed the protectorate in its ability to craft policy and make decisions free from constraint. Additionally, every inhabitant has been in some way affected by the sustained assault from mining firms on the environment and the limiting of public revenues through tax evasion since the colonial period.

The path entrenched itself further post-independence from 1964. Owing to the factors of debt incurred at the point of independence, the ownership of foreign firms after colonialism ended and the advent of IMF-directed policy. As a postcolonial state where nationalised mining was the largest employer, nominally the independence period seemed like there would be state control over mining. However, the outcomes and policies of mining were firstly held by firms that were a legacy of the colonial period and the IMF. Then after privatisation in 1991, the mines were controlled by a few large foreign firms, on whom the state is reliant for fiscal linkages. Due to this dynamic, the firms can exercise considerable influence over the sector (Sokoloff & Engermann, 2000; Acemoglu & Robinson, 2001; Du Plessis, 2005; 2006; Fraser & Larmer, 2010; Caramento, 2020). The juncture produces the outcome, but the increasing returns or positive feedback sustains the path and obstructs reversal through the arrangement of the institutions that develop (Levi, 1997). This obstruction is what makes reversal undesirable, in some instances impossible but also why when a path break or a reversal is attempted, it is often reversed back to the initial path.

Within Zambia’s mineral development, we see two attempted path breaks. One under Kenneth Kaunda in 1987 where after nationalisation, he rejected the IMF’s plan, signalling the first point in independence where mines were controlled on the majority by the state and that there was no external interference on domestic policy. Secondly, under Edgar Lungu during the acquisitions of KCM and MCM in 2020. Both instances saw an almost immediate reversal back to the initial path whereby mining is controlled outside of the state. These events define the process of Zambia’s mineral development as path-dependent.

The increased returns or positive feedback, and the constrained choices of the Zambian state relate to the separation of mining from the state in 1924 and its consequent development in parallel rather than within the state. The research demonstrates the influence and constraints on policy by the debt incurred at independence, the policy direction of the IMF and the domestic power of foreign firms to influence institutions, and the emergence of development agreements which codified a twenty-year legislative freeze on the sector through stabilisation clauses between 2000 and 2020.

This reality has meant that Zambia has been unable to develop domestic resources to mobilise the mining sector in a manner conducive to the state's benefit. This research determines that the mining sector in Zambia has and will always benefit foreign firms owing to the initial split and development of the sector under BSAC. As it stands there are no clear and feasible options beyond foreign control of the mineral assets. This outcome from the split can be seen as the single equilibrium Pierson (2000) describes. It outlines the genesis for why Zambia's sector is path-dependent and demonstrates the key events from both a legal and economic perspective that have further entrenched the path.

Comparison of the Critical Junctures of the Mining sectors of Botswana, Zimbabwe, and Zambia

This section focuses on the starting point for the development of the mining sectors of Zimbabwe and Botswana in contrast to Zambia and outlined within the critical juncture framework (Collier & Collier, 1991). Botswana and Zimbabwe offer useful comparative examples with Zambia, owing to their proximity as neighbouring states in Southern Africa and their mining sectors, which stem from Rhodes' initial industrial concerns. They were also part of British Imperial Africa rather than the differing legal regimes in Francophone and Lusophone Africa. Zambia and Zimbabwe have a similar genesis, owing to their shared experience as Northern and Southern Rhodesia under Rhodes' British South African Company (BSAC). Botswana's mineral concerns are concentrated in the joint state and De Beers firm, Debswana. Rhodes founded De Beers itself. All three states hold varying degrees of resource dependence. Botswana and Zambia are a clear example (Poteete, 2009; Kolala & Chokowa, 2021), whereas Zimbabwe has slowly shifted its reliance from agriculture to mining because of the land reforms of 2000 (Malinga, 2018).

As this research will show, the current shape of Zambia's mining sector is a consequence of path development. The sector was born out of the separation of BSAC's mineral rights from the administrative rights ceded to the Empire in 1924. The split gave the mining sector a parallel existence under the auspices of BSAC and developed the sector into a power outside of and in contention with the state. The path-dependence of the sector has constrained the state's decision-making capacity under successive governments, whose policy options are constrained to benefit external firms, often at the long-term expense of the state.

Zimbabwe and Zambia

Zimbabwe and Zambia have the same starting point for their mining sectors as they both commenced with BSAC as Rhodesia in the late 1800s. In addition, they have both emphasised a strong state presence in the industry since independence. Arguably, they have both suffered from mismanagement and poor economic performance in their state sectors (Saunders & Caramento, 2020). Zimbabwe is frequently used as an example of the worst excesses of rent seeking behaviour in a resource-rich state and one where poor economic performance has

occurred from policy initiatives that transferred resources from a white elite to an indigenous political elite (Thomas, 2003).

Historically, Southern Rhodesia (modern Zimbabwe) was under the control of BSAC (like Northern Rhodesia) from the charter for mineral exploitation of 1889 until the granting of self-rule for white Rhodesians in 1923. For Rhodes and BSAC, the mineral concession (known as the Rudd Concession) for Southern Rhodesia was comparatively secure to the concession in the North. Lobengula, King of the Ndebele, guaranteed the mineral rights for all the lands corresponding to modern-day Zimbabwe. His agreement was secured through coercion and subterfuge (Douglas, 1984). This consolidation contrasts with the multiple agreements and violence with the varying Kingdoms for Northern Rhodesia. BSAC initially sought to develop mining through legislation that would encourage mineral exploitation, starting with the Mines and Mineral Ordinance of 1895 (Gann, 1965). This policy actively encouraged European settlers to mine the land independently, which would form a bulwark for their mineral concerns from the indigenous (Vickery, 2007). BSAC crafted the legislation to give protective rights to white mineworkers (Madimu, 2017). After a series of indigenous rebellions against company rule between 1896 and 1898, the British state-imposed limitations on company governance in the south (Nielsen, 2023). Northern Rhodesia, however, remained untouched by this prerogative.

The habitability of Southern Rhodesia had a profound impact on the future development of the state's economy and society. Living conditions of the South stood in contrast to Northern Rhodesia, which received few settlers due to the less habitable conditions (Roberts, 1976). Mortality rates are a key indicator of the quality of institutions left after colonialism, as the ability of settlers to expand leads to institutions, rights and tangible infrastructure that is passed over at independence (Acemoglu & Robinson, 2001). The difference between Zambia and Zimbabwe is that white settlers could survive in the latter. Southern Rhodesia, due to the absence of the tsetse fly, was habitable in comparison to Northern Rhodesia: this, combined with the promise of gold to be mined, led to an influx of white settlers seeking fortune (Yorke, 2015; Madimu, 2017). As small-scale mining proved to be complex, many settlers turned to agriculture. To keep the settlers content, BSAC gave them the most fertile lands and relegated the indigenous population to remote and barren corners (Hill & Katarere, 2002).

After the settlers received the right to be a self-governed British Colony in 1923, the primary focus continued to be on agriculture and encouraging further white settlers to join. These settlers steadily built up the agricultural sector over the mining sector and continued to grow in number (Madimu, 2017). A further crucial difference was that the Southern Rhodesian

Government bought back their mineral rights from BSAC in 1938 for £2mn (Slinn, 1971). The difference was that what would become Zimbabwe had its mineral and administrative rights intact at the point of independence. A luxury not afforded to Zambia, which had to purchase them at the point of independence (Ndulo, 1977).

By 1960, there were 220,000 white settlers, whose political demands continued to grow (Palmer & Birch, 1992). The immediate state that followed the British self-governing rule, that of the unrecognised Republic of Rhodesia in 1965 inherited a solid institutional framework and the perceived material benefits of colonialism, such as infrastructure. The state the white Rhodesians received stood in stark contrast to the underdeveloped Zambia of 1964 (Burawoy, 2014).The differences between what was left for independent Zambia and the Republic of Rhodesia after the British left were vast. The Rhodesian settlers throughout had been able to bargain for rights from BSAC and develop agriculture as the primary sector, alongside mineral development and ownership of the mineral rights (Madimu, 2017). The ability to buy their mineral rights prior to overmining by foreign firms played a crucial role in the governmental or collective control over mineral resources, which created a significant contrast with the development of the mining sector in Northern Rhodesia and Zambia. These factors led to two differing sectors of the economy that developed over time, which were controlled to some extent by state input prior to independent Zimbabwe (Slinn, 1971; Madimu, 2017).

The unilateral declaration of independence by the white-settler Rhodesian government in 1965 prompted an uptick in hostilities with indigenous factions who were agitating for self-determination, which led to all-out war (Moorcraft & McLaughlin, 2010). The self-declared white government received no formal support from the major Western powers and would enter a period of isolationism for the duration of the conflict (Coggins, 2014). The factions consisted of the military wings of the Zimbabwe African People's Union (ZAPU) and the Zimbabwe African National Union (ZANU). Joshua Nkomo led ZAPU and represented the Ndebele people, whereas Robert Mugabe led ZANU and represented the Shona. The Soviet Union and China supported ZAPU and ZANU, respectively (Yorke, 2005; Jackson, 2011). A protracted conflict followed, which claimed approximately 20,000 lives over a 15-year period (Moorcraft & McLaughlin, 2008). In December 1979, the Lancaster House Agreement was signed, which formalised a ceasefire and the future constitutional arrangements for what would become independent Zimbabwe the following year (Gregory, 1980).

In the modern day, agriculture has remained central to Zimbabwe's economy, and much of the modern focus is around indigenisation and land reform (Thomas, 2003). Owing to the view that Zimbabwe was an unsafe state for investment after independence and the clear rent seeking

behaviours that emerged, reliance on mining dropped even further. Between 1979 and 1999, mining as a share of GDP shrank from 10% to 4% (Chifamba, 2003).

The agricultural focus has come at the expense of developing the mining sector (Malinga, 2018). Even with the outset of independence in 1980, white individuals in Zimbabwe held a disproportionate amount of land prior to the Land Reforms of 2000. As such, agriculture became the primary area of contestation between the indigenous and the remaining whites. Before the expropriations, 4,500 white farmers (which equates to 0.03% of the population) owned 42% of the agricultural land (Moyo, 2005). The Land Reforms, although brutal, were arguably the most rapid and feasible source in which an independent Zimbabwe could develop its economy (Thomas, 2003). The consequences of this have led to more rent seeking and the emergence of a wealthy political elite that supplanted the white elite. It has also led to a climate that is not conducive to raising external investment, a facet that could have developed the mining sector (Muzurura, 2016). Owing to the failed land reform aspects, a renewed interest has been placed in the mining sector (Malinga, 2018).

Agriculture, owing to the critical juncture of a white settler class being unable to mine as easily as farm and, in turn, centring the economy on agriculture is key to understanding how the economy developed away from sole focus on the mining sector. This aspect was compounded by Rhodesian ownership of mineral rights. All the contestation, institutional development and conflict between groups has been centred around agriculture rather than mining. Various outcomes of this dynamic have led to Zimbabwe becoming a risky investment for complex mineral ventures.

Botswana and Zambia

Botswana and Zambia have often been compared, given that Zambia is seen as a resource-dependent nation whose economy has struggled, whereas Botswana is a neighbouring resource-dependent nation whose economy has succeeded (Leith, 2005; Du Plessis, 2006; Crain, 2010; Barton, 2015). The economic impact of the sectors is similar. As of 2021, mining contributed to 16% of Botswana's GDP from diamonds and in the same year Zambia's mining of copper and cobalt to GDP contribution stood at 12% (Kolala & Chokowa, 2021). Botswana and Zambia hold clear parallels. At the point of independence, Botswana lacked human resources: for instance, only 22 Batswana had received tertiary education, a similar figure to Zambia in 1964. Additionally, there were minimal paved roads and limited services (Acemoglu et al., 2002). Botswana is often touted as an African economic success story. There is consensus that

Botswana's positive development stems from strong institutions, sensible policies, and limited rent seeking behaviour (Harvey & Lewis, 1990; Good, 1992; Leith, 2000; Acemoglu et al., 2002).

As discussed, mining in Zambia has developed outside of the state and operates in contention of it. Mining in Zambia preceded the existence of Zambia. For Botswana mining gave them economic independence and a renewed power to the state. Botswana had limited mining activity in the colonial period until the discovery of significant diamond reserves in 1969 which occurred shortly after independence (Du Plessis, 2005). Before the discovery of diamonds, Botswana was primarily an agricultural economy (Crain, 2010). Large-scale mining commenced later in Botswana than in Zambia or Zimbabwe with the first mine between De Beers and Botswana opening at Orapa in 1972, under the jointly owned Debswana Diamond Company (Savage, 1972).

The agreement structured between the government and De Beers was highly beneficial to the state. Botswana was initially only a 15% shareholder in Debswana when Orapa commenced, but the capital required to exploit the site would be raised by De Beers (Harvey & Lewis, 1990). Through a series of negotiations Botswana increased their share to 50% in Orapa and the new mine of Letlhakane. A combination of strategic planning and the fact that they legally held the rights to the reserves played into Botswana's favour for negotiations. This was compounded by the reality that De Beers was South African at a point where apartheid was starting to affect international business ventures. The confluence of factors and, most critically, the temporal element allowed Botswana to negotiate a highly favourable agreement (Emery, 1975; Sechele, 2019). Botswana's negotiation stands in stark contrast to the coerced and violent agreements sought from the Ngoni, the Bemba, the Barotse and the Ndebele by BSAC in the late 1800s. The element of time and the comparative lateness of reserves allowed the Batswana to commence their mining sector on their terms. They have successfully renegotiated their stake at various intervals (Wilcox, 2015).

The Debswana concern would go on to become the central economic driver of the state and by 1990 diamonds accounted for 80% of foreign exchange earnings (Du Plessis, 2005). Botswana, under the leadership of the former Paramount Chief and elected President, Seretse Khama engaged in a strategic process to negotiate, a move which likely led to the equitable agreement. This scenario clearly differs from the acquisition of mineral rights from BSAC after independence and the development agreements in Zambia during privatisation. Whereby negotiations occurred against the backdrop of chaotic economic moments and the state lacked the technical and human resource capacity to negotiate effectively (Slinn, 1971; Lungu, 2008).

The way Botswana managed the genesis of their mining concern negated the antecedent conditions seen in Zambia, that of limited human resources and available capital to engage in costly and complex mining operations. By structuring an equitable deal from the outset with the use of external consultants under their pay they reached a beneficial agreement (Suchele, 2019). The agreement itself with De Beers shifted the majority of the risk onto the mining firm and allowed them to recoup funds via the taxation and royalties agreement. Most importantly, the deal was structured to allow renegotiation and differing terms on different sites (du Venage, 2023).

The lack of diversification in Botswana's economy has not hampered its development but instead led to the creation of many of its institutions (Crain, 2010). Before the mineral discovery, Botswana was dominated by South Africa, along with the other small nearby states of Eswatini and Lesotho through the Rand Monetary Union and the Southern African Customs Union. In 1969, Botswana was emboldened to renegotiate the terms of SACU (Gibb, 2006). As Debswana progressed, it paved the way for their removal from the Rand Monetary Union and the creation of their currency, the Pula. Until this point Botswana had been financially reliant on South Africa for trade and used their currency (Hudson, 1976), this discovery of wealth allowed them to break from the union and rely on their own currency. The Bank of Botswana and the Botswana Development Corporation emerged as institutions to help manage the mineral wealth and the newly independent monetary policy (Suchele, 2019).In essence, mining gave Botswana a state, whereas for Zambia, mining has consistently hampered the development of the state.

Du Plessis (2005) views the distinction between Zambia and Botswana as a consequence of multiple factors; citing the lack of radical viewpoints in the ruling political party, which was neither socialist nor nationalist, a cultural willingness to negotiate rooted in how property rights formed amongst the Batswana cattlemen, and that Botswana had more time to view the mistakes of other resource-dependent states in their negotiation. This research views the latter as the most significant contribution because the temporal aspect is crucial in understanding how the mining sector developed positively. The late discovery gave the indigenous Batswana the upper hand in negotiations. Even though they had no capital or technical resources, they held the mineral rights. Whereas, independent Zambia had to negotiate and pay for mineral rights from BSAC who had already granted perpetual licences to foreign firms (Ndulo, 1977). Where this research departs from Du Plessis relates to the view that the distinction between Zambia and Botswana is structural as opposed to cultural and that the event that holds the most weight is a random one, that the minerals were found later than everywhere else. The critical

juncture of finding it later is what gave the Batswana negotiating leverage. A significant consequence of this is that the state preceded the mining sector rather than the state occurring after the sector, as is the case with Zambia.

Divergences between Botswana, Zambia, and Zimbabwe

The genesis from which a sector or institutions develop can have a profound impact on the characterisation of their future outcome. Critical juncture theory is useful to expound upon in this instance, as a random historic event or situation can have a wide-reaching impact on the future of the state and its ability for decision-making (Collier & Collier, 1991). In the context of Zambia, we see the critical juncture as the split between mining and administrative duties. This was a consequence of colonial indifference and poor oversight of the potential value of the mineral concession (Chanock,1968; Slinn, 1971).

In Zimbabwe, the influx of White Settlers led to the creation of a self-governing colony that administered the state and the mineral rights from together from 1938. This self-governing state was primarily comprised of white farmers, so a greater emphasis was placed on agriculture over mining (Madimu, 2017). Agriculture's primacy over mining is the critical juncture. The two-tiered split of a segregated state then compounded historic grievances, leading to the legitimate but violent overthrowing of the white settler class (Akinola, 2020). The land expropriations that followed dented investor confidence, limiting the available foreign capital to develop Zimbabwe's extensive mineral reserves (Muzurura, 2016). Ultimately, land and agriculture became the contested element, not mining. The issue of limited mining in Zimbabwe was further compounded by the rent seeking of the Mugabe era and the efforts to indigenise complex mining ventures with limited access to capital and technical human resources.

In Thailand, for instance, there is the view that land rights were deliberately under-developed as a securitisation method throughout their colonial opposition as the Kingdom of Siam. By limiting how rights were distributed across land it limited the legal take-over of land by non-Siamese individuals. This facet led to the formalisation of land rights in the 1960s, spurring unparalleled economic growth (Larsson, 2017). This seen through the lens of a critical juncture framework underscores the seemingly random happenstance of path-dependent institutions and their future impact. Botswana, as they discovered minerals later, were able to negotiate in a way that Lobengula of the Ndebele or Lewanika of the Barotse were unable to in the 1890s (Suchele, 2019). The Batswana were able to utilise the mistakes of previous states,

such as Zambia and Zimbabwe, and bargain for an equitable arrangement (du Venage, 2023). This temporal aspect negated the issues of limited infrastructure, institutions, and technical resources of the nascent state. They placed the entirety of the operation onto DeBeers but reaped financial rewards as a partner who had negotiating rights as the venture developed. The critical juncture was the temporal element.

Zambia's mining sector's development is unique. The closest comparative states have fundamentally differing paths. What is clear from how these mining sectors developed is that critical junctures offer a method to explain how variation can occur under similar settings. Vitally, these junctures then define path-dependent processes as time progresses.

The following chapter will outline the history of colonial Rhodesia and modern-day Zambia. The purpose of outlining such a vast span of history is to explain through path dependence how the split between mineral policy and domestic policy in the colonial era provided the catalyst for creating a mining sector that operates outside of the purview of the state in the modern day. The consequences of this split have limited the ability of the state to hold options in how it manages its mineral wealth and constrained its ability to legislate against firms. Various points in history demonstrate the constraints placed upon the state in its decision-making. This phenomenon has entrenched specific aspects of mineral management in the colonial era, that of providing a territory that is as attractive as possible for mining firms, an aspect which has further entrenched over time, constraining the available options of the government of the modern Zambian state. Figure 1 below shows a concise flow-chart of the path dependence of the sector.

The Path of the Zambian Mining Sector

(Figure 1, central inflection points for the path dependence of the sector. This shows the antecedent conditions, critical juncture and the points of constraint, points of positive feedback and failed path breaks)

Antecedent Conditions: 1889- the British South African Company (BSAC) is granted a charter to exploit minerals in the area that would become Rhodesia (the historic territorial extent of Zimbabwe and Zambia). They hold the mineral rights and the rights to administer the inhabitants of Rhodesia.

1901- Introduction of the Hut Tax by BSAC on the indigenous inhabitants. No funds are invested outside of mining.

1912- Introduction of the Mining Ordnance Act by BSAC. This allowed the firm to franchise tracts of land to firms and tax their revenue. Anglo and Roan Selection Trust establish their mining operations with perpetual contracts.

Critical Juncture: 1924- The establishment of the British Protectorate. The ***critical juncture*** where the mines are separated from the state. Mining law and policy is directed by BSAC and administration and governance by the British Empire. In this period external firms entrench, and the easiest to reach reserves of copper are over-mined

↓

1964- Independence is achieved under Kenneth Kaunda and the United National Independence Party (UNIP). ***Legacy of debt*** is passed on to the new state. Zambia is ***highly underdeveloped*** and ***requires capital*** for public services.

↓

1965- Mineral rights are sold by BSAC to the Zambian government. Anglo and Roan Selection Trust were ***granted perpetual licences and remain in operation***.

↓

1968- Matero Reforms, the first attempt to nationalize the mines. This still maintains the role of ***external firms who manage and direct mineral production***.

↓

1975- Copper prices crash, leaving Zambia in need of IMF intervention. Subsequently, the ***IMF directs economic policy***.

↓

1982- The mines remove external firms Roan Selection Trust and Anglo. Zambia is the sole owner of the mines. ***However, policy is still led by the IMF***.

↓

Attempted Path Break: 1987- Kaunda rejects the latest IMF offer, removing externally led policy. First point that mines and state are separated and a path break is attempted.

↓

1990- IMF works with the Movement of Multiparty Democracy (MMD) opposition party and help construct their economic plan.

↓

Path Break Reversal-Positive Feedback: 1991- MMD wins election, Kenneth Kaunda's reforms are immediately reversed. Privatisation led by the IMF is initiated. Policy options are constrained by the program.

↓

1995- Securities Exchange Act and Mines and Minerals Act provide a legal basis for external investment into the mines. This gives easy access to foreign firms.

↓

1997- Mines are divided into packages and ***rapidly sold off to foreign firms at low prices***.

2000- Konkola Copper Mines (KCM) and Mopani Copper Mines (MCM) are bought by Anglo and Glencore respectively. ***Development agreements are made with stabilization clauses with stability periods of 15-20 years***. This legal relationship constrains the options of government.

↓

2004- Anglo sell their share of KCM to Vedanta and the development agreement is carried over.

↓

2008- Development Agreements are abolished in name, however, ***the agreements remain in place owing to stability periods***. Further tax measures are passed but are diluted considerably. Policy options are severely constrained in this period.

↓

2011- Patriotic Front are elected. They are highly critical of the mines. This period sees an uptick in legal cases against KCM and MCM for tax avoidance and environmental damage. ***Firms are protected by the development agreements.***

↓

Attempted Path Break: 2020- Patriotic Front leader Edgar Lungu attempts to expropriate the mines in the lead up to the 2021 election to garner public support through resource nationalism. KCM is expropriated, MCM is subject to a compelled sale. The chaos causes institutional disruption.

↓

Path Break Reversal-Positive Feedback: 2021- United Party for National Development win the election and immediately reverse the expropriations. ***The rigidity of the path is demonstrated by this immediate reversal.***

Path Dependency and the Separation of Mines and State : A history of mining in the colonial period, the period of independence and the period of privatisation

The Colonial Period 1889-1964

This section focuses on the Colonial Period between 1889 and 1964. It demonstrates the role that BSAC played in shaping the mining sector, and why nationalisation and any alteration of the state-firm dynamic in the state's favour has subsequently failed. This research determines the development of the mining sector in Zambia as a consequence of the separation of mining and the administrative duties of the state that occurred in 1924 with the creation of the British Protectorate. Within this historic dynamic BSAC formed the initial state between 1889 and 1924 solely for profit and extraction. Once the British were given administrative duties in 1924, BSAC still controlled policy around mining, namely that of franchising and taxation. This split formed the basis on which Zambia's mining sector would develop, one that was solely created for the exploitation of minerals by foreign actors. Resultant decisions in the modern day remain constrained by path dependence from this point.

BSAC's charter for mineral exploration in Northern Rhodesia was granted in 1889, which gave the company the right to stake out claims, a method utilised previously by the East India Company (EIC). BSAC was a company-state much in the vein of the EIC. It conducted diplomacy with the multiple kingdoms, developed policy and tax systems, and held a monopoly over justice and violence through its quasi-military police forms. As Phillips and Sharman (2020, p 1250) note, "*Company-states were quintessentially hybrid entities that combined classically sovereign prerogatives (e.g. the right to wage war, conduct diplomacy, collect taxes, and dispense criminal justice), with the profit-making imperatives and joint-stock ownership of the private corporation"*. The effects of a company-state eventually evolving into a sovereign state of multiple inhabitants helped pave the antecedent conditions for Zambia's mining sector. The entire purpose of the BSAC was to create a vast mining enterprise, the inhabitants were there purely to be exploited as labour not to be bequeathed a functioning state. As such all aspects of development revolved around the hegemony of mining, not statecraft much in line with the extractive colonies described by Acemoglu & Robinson (2001).

When BSAC started its exploration of Northern Rhodesia, there were 72 ethnic groups within the territorial boundaries of what would become modern Zambia, (Gann, 1953). Within the 72 groups sat four major Kingdoms, the Ngoni, the Barotse, the Bemba and the Chewa,

which to this day play a key role in political affiliation (Posner, 2005). The Kingdom of Barotseland were largely cooperative with BSAC and signed an agreement for protection in return for taxation and mineral concessions. Other kingdoms resisted colonial intervention and were put down by force, namely the Ngoni of Paramount Chief Mpezeni and the Chewa of Paramount Chief Gawa Undi (Mwanakatwe, 1974). The adjoining of neighbouring kingdoms that previously warred diminished the likelihood of unification and revolt. Instead, fragmented deals could be made across different groups, such as the mineral concessions gained by BSAC through treaties with the Barotse Kingdom, or the other tribes who were fought into submission such as the Ngoni (Roberts, 1976). This was an eventuality that emerged rather than a plan developed by British foreign policy. The consensus regarding the emergence of Northern Rhodesia is characterised by the perseverance and violence of Cecil Rhodes and BSAC for the purpose of mineral exploitation, and general indifference by the British Empire who were more focused on exercising control over their larger and more strategically valuable territories (Phiri, 2019). Even by the standards of colonies under the British Empire what would become Zambia was a vastly heterogeneous environment culturally. This contributed to the antecedent conditions of the mining sector arguably on the basis that there was no congruent state within the territory, this multiplicity allowed them to exercise divide and rule which allowed them to build a society solely around the act of extraction (Noyoo, 2021).

Much activity occurred on the modern-day border of Zambia and the Democratic Republic of Congo, centred around modern-day Katanga and the Copperbelt. The initial copper deposits remained unexploited between the late 1800s and early 1900s owing to the lack of reliable transportation, and high transaction costs combined with comparatively low copper prices which made the colonial venture initially untenable. However, large-scale mining occurred around copper firstly in Katanga, owing to the higher concentration of the ores which allowed for the much cheaper form of open-cast mining (Roberts, 1976). Mining on the Copperbelt required reaching significant depths, which through a combination of technological innovations around tunnelling and shaft-sinking and increasing global copper prices led to its eventual exploitation by BSAC and foreign mining firms. The further addition of the Benguela Railway in 1931 helped bring about the role of Katanga and the Copperbelt as part of the global copper supply chain (Katzenellenbogen, 1974; Rakodi, 1986).

British involvement was initially limited as the mineral concessions within the territory comprising modern-day Zambia, were first claimed through a series of expeditions, under the auspices of Cecil Rhodes', BSAC (Gann, 1958).

North Western Rhodesia and North Eastern Rhodesia's establishment of their respective councils occurred in 1899 and 1900 (Mvumba, 1977). These two were amalgamated as Northern Rhodesia by 1911. And in 1924 it was formally a British Protectorate. By definition a protectorate retained independence on domestic matters, whereas foreign policy was under the Monarch's auspices (Jenkyns, 1902). In reality, however, protectorates received exploitation without order, providing vacuums for bodies such as BSAC to effectively exercise the power of the state (Phiri, 2019).

There were issues for BSAC in this early period, as the majority of its land holdings were in Northern Rhodesia, whereas all of the profitable mining was in Southern Rhodesia. Before the creation of railways, transaction costs for mining were considerably high in the North. By 1914 only £268,544 of copper had been extracted from Kansanshi and Bwana M'kubwa, with most of the profit absorbed by the costs of extraction (Yorke, 2015). Beyond the lack of profitability was the inhospitable climate of Northern Rhodesia. Southern Rhodesia was able to colonise quickly by population transfer. White settlers in mining and agriculture were a strategic bulwark utilised against the legitimate inhabitants of the territory (Vickery, 2007). Northern Rhodesia however, had tsetse fly which made it difficult to keep white settlers alive, as such, of the 141 million acres under BSAC's control, only 66 million were habitable (Yorke, 2015). The view of disincentivised habitation ties well with the view that mortality rates limit state-building from Acemoglu & Robinson (2001) and the view that lower mortality rates led to more infrastructure and stronger institutions, in turn, providing the basis for stronger postcolonial institutions. Northern Rhodesia was an extreme example of an underdeveloped colony (Burawoy, 2014).

Owing to its position as an auxiliary arm for Southern Rhodesia's exploitation, the North remained off the Empire's radar, and BSAC continued to experiment with methods for profiting from Northern Rhodesia. BSAC's central use for Northern Rhodesia was largely to furnish the more profitable Southern Rhodesia with labour for the mines and large-scale farms (Yorke, 2015). The issue of profitability meant that Northern Rhodesia had to be kept free of any formalised governance that could advance indigenous interests. Governance could come once profitability had come, and as it stood at this point the region lacked profitability. The formal position of BSAC was to keep the inhabitants content enough to work and pay their taxes. The Hut Tax devised by BSAC and introduced in 1901, produced substantial revenue (Power & Brennan, 2022). In 1921 this figure stood at GBP 91,600 of a total revenue of GBP 235,000 (Slinn, 1971).

As time went on, a key method for BSAC to profit off the territory related to the selling of prospecting licences and in effect franchising the mineral reserves. This would represent the first mineral policy enacted, the Mining Act of 1912, which legislated the process for selling mining rights of exploration and established the royalty rates (Mining Proclamation No 1, 1912). This was timed well as World War I significantly increased demand for copper, in addition to the expansion of motor vehicles, which saved the loss-making enterprise (Yorke, 2015). By the 1920's BSAC had been able to sell off significantly large tracts of land for exploration to the Roan Selection Trust and Anglo-American, which quickly established itself as the largest mining firms in Northern Rhodesia. BSAC, as a result, was able to construct a generous program for mineral royalties whilst outsourcing the risk to private enterprises. Royalties were calculated by a percentage of the value of ores mined rather than a percentage of the mine's profits, which represented a highly advantageous position for BSAC as it allowed them to profit while outsourcing the risk to other firms (Ndulo, 1986). This aspect was reversed immediately at the point of independence, in favour of the firms. Generally speaking, mining margins tend to be thin, and the nature of exporting ore allows firms to hide profits easily (Readhead, 2016), which makes taxing profits in the modern day a very complex exercise. Selling ores at low prices to subsidiaries or transfer mispricing was a widespread practice under BSAC (Ushekozonwe, 1974). This practice has permeated through to the modern firms in the modern day (Readhead, 2016).

Between the two World Wars, we see the transition of the legal status of Northern Rhodesia. In 1924 the Protectorate was established. Within this process, the lands in Northern Rhodesia were officially transferred by BSAC to the British Empire, in return for half the net rents accrued (Mwanakatawe, 1974). This moment is the critical juncture in the path dependency of the Zambian mining sector. Whilst the British formally took administrative control, BSAC still retained all of the rights over mining outlined by the Mining Ordnance Act (1912). This aspect included franchising mining sites to other firms and collecting royalties and they maintained a process of collecting royalties based on the value of the ores mined rather than the profits. Additionally, as they controlled franchisees, they were effectively in control of the crafting of early mineral policy for franchisee firms operating under the Act (Mining Proclamation No 1, 1912). The British were more focused on building up an administrative apparatus for the new protectorate, an aspect neglected by BSAC, than focussing on the mineral reserves value (Kanduza, 1985). BSAC's retention of the mineral rights was to some extent a random event, as the Empire had been focused on other aspects such as the amalgamation of varying states, and the twin concerns of African democratic mobilisation and

white settler political demands in Southern Rhodesia. The far-reaching extent of the mineral rights retained by BSAC was demonstrated by the company's retained ability to freely franchise and in turn regulate external franchisees, and that imperial legislation could not intervene in BSAC's enterprise (Slinn, 1979).

Within the agreement, it stated that (Rhodesia, 1923, p. 3), " *the Company shall retain and the Crown shall recognise as the owner of the mineral rights acquired by the Company in virtue of the concessions obtained from Lewanika in North Western Rhodesia and concessions in North Eastern Rhodesia covered by the certificates of claim issued by Sir H. H. Johnston".* The ease at which BSAC retained the rights in negotiation aroused suspicions of corruption, especially given the seemingly warm relations between the colonial secretary of the 1930s, Arthur Ormsby-Gore and the company. However, a memorandum at the time indicated that Ormsby-Gore would have not granted the concession if he negotiated the 1923 agreement. He stated in a 1937 foreign office briefing regarding the concession, *"I fear the Company will increasingly take the narrow view of the paramount interests of its shareholders"* (FCO, 1937, p. 1). A more feasible view relates to a general lack of interest in the concession and a lack of scrutiny over the extent of the mineral rights, combined with a poor technical understanding of their value (Slinn, 1971). Once this was understood, colonial officials lamented the lack of interest in this part of the agreement, however, to cast doubt on the concession would be to cast doubt on the establishment of the protectorate (Chanock, 1968; Slinn, 1971). Thus, by a combination of indifference and haste, the split between mining and the state in Zambia occurred.

World War II represented another period in which the British Empire would pique its interest in the control and subjugation of Northern Rhodesia and attention was once again placed on the extent of BSAC's mineral rights (Slinn, 1979). On September 3rd, 1939, 15,000 indigenous people were conscripted into battalions (Gann, 1964). Not only was Zambia's human resources proffered for a fight that was not theirs, but the demand for their minerals increased substantially. Demand was increased, however owing to colonial control the laws of economics were thwarted, and costs for resources went down considerably as Westminster sought to utilise every advantage at its disposal. This occurred across all of Africa whereby bulk-purchasing, monopolisation, and regulatory and exchange controls became commonplace which held constraints over prices (Hargreaves, 2014; Tembo, 2015). Up until the war Northern Rhodesia had been a loosely held protectorate of little interest to the British and largely under the control of BSAC and mining (Pomeroy, 1994). However, during the war, Tembo (2015) notes that colonial control became more defined as there was a greater push to formalise the

role of the mineral supply chain. The economic control was significant, concerning the increase in base metal production but also the adoption of price controls and rationing. Zambian labour was conscripted into other key industries, and domestically the nation's markets were chaotic. Commodities were in short supply, inflation grew, and black markets flourished (Jackson, 1999). The question of the rights loomed after the close of the war (Slinn, 1979). However, expropriation at this point would have been costly as the post-war boom for copper had increased BSAC's royalty profits from £300,000 to £1.25m in 1947 (BSAC, 1947), thus making potential expropriatory compensation for the firm considerable. Andrew Cohen, then head of the East and Central African Department of Foreign Office stated that amendments or introduction of law around mining was "*pointless*" without a renegotiation of BSAC's mineral rights (Colonial Office, 1946, p.1). An agreement was struck by the Colonial Office and BSAC that granted an expiry date for BSAC's mineral rights whereby it would cease and revert back to the Crown or State in 1986, in the interim a modest profit tax of 20% would be imposed (Colonial Office, 1951). As the value of copper continued to grow in this period, the 20% proved to be marginal. BSAC recorded royalty profits of £12.3mn in 1956 (BSAC, 1955).

BSAC's control of the mineral rights and its ability to set policy and revenue rates against firms guaranteed its profitability. This ability was not sufficiently held by the Empire and its 20% received from this point was marginal in comparison to the returns seen by BSAC, in many ways reflecting the poor returns seen by successive Zambian governments in its efforts to tax mining firms.

Even with this flurry of renewed interest, the British Empire was entering it's twilight and implementation of the 1950 agreement did little to allow for the legislation of mining law (Slinn, 1979). The Colonial Office had sought to rein in a measure of the control over mining prior to the war with a draft of mining legislation. This legislation would be heavily debated behind closed doors up until 1958, and only at this point was the state able to input some legislation over mining (Slinn, 1979).

As such, the mining enterprise that was modern-day Zambia effectively remained under the control of BSAC up until Independence. The firm owned the mineral rights and royalties of the major mining firms (until 1965) and the railways (until 1947), in addition to forming a paramilitary police service (Pomeroy, 1994). In effect, BSAC had a monopoly on violence in addition to economic rights in Northern Rhodesia for much of its existence. Given that it had control over the royalties process as well and that Zambia's only real economic driver was copper, it could be argued it had usufructuary rights. As such by every available definition BSAC was the state in the legal sense before 1924 but after, remained so in every practical

matter. BSAC's far-reaching control over the process of mining gave it the ability to control the state, however, its control over state functions was not the aspect that gave it control over the minerals. The latter rested on the ability to franchise their mining control in licences and their ability to collect royalties. Given that the main viewpoint of BSAC was to resist any form of codification and state-building, the mining policies did not extend to the environment or to improving labour conditions but instead focused on how to make Rhodesia as attractive as possible to mine.

The war created new sets of regulatory measures and positioned the economies of British colonial possessions even more towards the survival of imperial power. Although the reliance had increased substantially during the war, it increased even more so in the post-war period which historians have termed the Second Colonial Occupation, whereby an aggressive pursuit of the (loosely described) economic development of the colonial possessions occurred (Hargreaves, 2014). This economic development in effect was an aggressive form of privatisation in the favour of Western power structures, mining had become even more valuable as an enterprise on the eve of the global war and private firms were determined to keep the dollar earnings of the Copperbelt's heaving enterprise (Tembo, 2015). Arguably, the position of the British Government further entrenched the powers of BSAC.

By the end of the war, copper accounted for 90% of all of Northern Rhodesia's exports (Roberts, 1976). Further indicating the role that BSAC had in shaping the colony, to be in effect a series of mines with labourers, and workers to be exported, rather than a collection of nations and kingdoms with inhabitants. The Empire sought to amalgamate Northern and Southern Rhodesia with Nyasaland in 1953. This action further limited the revenues for developing Northern Rhodesia, as the resources of three colonies were now pooled, with the majority of funds utilised for developing the infrastructure of Southern Rhodesia (Yorke, 2015).

Northern Rhodesia suffered a significant economic drain owing to how BSAC had structured mining, which also had long-term impacts on the state of mining for future administrations. BSAC would grant mining charters to firms and take 12-13% of the *value* of the copper produced, this meant that firms took on considerable risk to mine as they would be liable for royalties to BSAC regardless of profit. As such, this created a system whereby only large firms such as Rio Tinto, RST and Anglo would take on projects, predominantly in areas which were much easier to access, such as those closer to railways or adjacent to existing operations. Subsequently, this led to a situation whereby the majority of less-labour-intensive copper was mined, and other resource-rich areas were left underdeveloped (Ndulo, 1986; Roberts, 1976). A further externality of this was the encouragement by BSAC to overmine the

territory, an aspect that drained the easiest to reach reserves but also had profound environmental effects. The mines held by Anglo in this period would go onto be one of the most polluted areas in the world (Waters, 2019). By the time of independence, the easiest copper to mine had gone, and the resulting reserves were harder to access and required expertise to exploit, in essence only foreign firms could access the remaining ores (Roberts, 1976). This technical issue has persisted into the modern day, deepening reliance on external firms with technical expertise and technological advancements.

By 1964 BSAC had accrued approximately £135mn purely in mining royalties alone with a further £4mn at the time of independence for the mineral rights they sold back to the state (Ndulo, 1986). However, as BSAC had granted Anglo and Roan perpetual licences, the newly independent Zambia had to allow them to retain the mines (Ushewokonze, 1974). As such, BSAC had also developed all of the mining laws that would be inherited by the independent Zambian state. This left the resultant firms, even in the face of nationalisation with the upper hand for negotiations. The genealogy of Zambian mineral law concerning BSAC's control, in addition to BSAC's structuring of an entirely copper-dependent economy, and its colonial roots would play a role in the future issues Zambia faced against foreign mining firms and the power they exercise. This period demonstrates negative practices around environmental damage, overmining of areas, the underdevelopment of other areas and most saliently, an inability for the Empire to legislate effectively against BSAC. The latter issue would characterise the future interplay of state and firm in Zambia.

The Independence Period 1964-1990

This section focuses on how path dependence in the mining sector continued in the independence period under President Kenneth Kaunda's United National Independence Party (UNIP) between 1964-1990. The decision-making ability of the administration was heavily constrained by the legacy of colonial debt and the limited human resources to manage the sector. Further issues were the continued running of the mines by foreign firms after nationalisation in 1969 until their removal in 1982 and the crash in copper prices that resulted in IMF direction of economic policy. The research challenges the view that mining was truly nationalised in 1969 and demonstrates the control of firms over the direction of the mines. The section also explores the first brief path break in 1987 after the mines were placed under total state control and the IMF adjustment was rejected. A reversal of the path break occurred shortly

after with the advent of the Chiluba-led MMD administration. The period is characterised by constrained choices.

In 1964 Zambia gained independence from Britain however, there were systemic issues with the economy that transferred over. Firstly, they received a debt of K50mn, from which they never truly recovered. This formed the base of debt which required domestic revenue to service the interest, this was further exacerbated by the eventual copper price crash a decade later, which led to further debt. In effect, Zambia from the moment of independence was trapped in a cycle of using domestic revenues to service debt (Unicef, 1986). This debt cycle, naturally constrained choices and kept the mining sector path-dependent, as it had to find capital from somewhere, the most straightforward options being foreign firms and the IMF. Secondly, the structure of colonial economies lent an urban bias, whereby rural Zambians were largely left to subsistence farming and the majority of manufacturing and commerce were localised in Lusaka and the Copperbelt. This laid the foundations of severe income inequality. For instance, a decade after independence the top 10% held 46% of all income, whereas the bottom 20% accounted for 3.4% (World Bank, 1976). A few years later studies showed that the poorest provinces, all five of which were rural held only 1% of manufacturing employment (Clark & Allison, 1989). The economy was not just under-developed but also, as a consequence of its extractive origins heavily dependent on mining. The following table indicates the reliance on mining in the run-up to independence.

Table 1 Origin of GDP in Zambia 1954-1961 (Percentage Distribution) (Baldwin, 1966, p.35)

Industry	1954	1955	1956	1957	1958	1959	1960	1961
Agriculture	13.0	10.4	10.2	13.3	13.3	11.9	11.4	12.6
Mining	52.4	56.8	54.0	39.0	32.6	45.4	47.5	44.0
Manufacturing	4.0	3.9	4.4	6.4	7.1	5.6	5.5	5.9
Construction	6.1	6.2	6.7	8.6	9.7	5.8	4.5	4.1

BSAC left the independent state in a debt cycle with an underdeveloped and undiversified economy (see Table 1) and inhabitants who lacked the technical resources to manage the mining assets. The state inherited an economy that had been shaped throughout colonialism by BSAC to largely benefit foreign mining firms. Beyond this Zambians were not involved with managerial roles within the mines and were utilised for hard, unskilled labour (Makuyama & Odhiambo, 2014). Given that BSAC had left in effect an economy entirely underscored by copper mining with white managers and Zambian labourers, the lack of human resources created a significant gap to be filled. In total at the point of independence, out of 4mn Zambians,

only 1200 had secondary school certificates and only 100 had tertiary-level education (Burawoy, 2014). Educational institutions implemented under colonialism have played a significant role in the future viability of the state (Acemoglu & Robinson, 2001). Furthermore, taxation was restructured to tax the profits of the firm rather than the value of the ores mined, which meant that the central point for revenue raising was curtailed (Munene, 2020). Given the reliance of the state on mining and the need for development and debt servicing, the focus on mining had to continue. This is the clearest example of the constraints placed upon policymakers at the time of independence. The focus had to be mining, and as such the policy lock-in on mining continued. However, the ability for the independent state to legislate successfully around the sector remained limited, echoing the issues the Empire had with BSAC in the previous period.

Kenneth Kaunda, the leader of the first Zambian political party, the United Independent Party (UNIP), at Mulungushi Rock in 1968 laid out the first of a radical upheaval of reforms to the Zambian economic system which sought to nationalise the economy. 26 foreign firms were partially nationalised swiftly under the Industrial Development Corporation (INDECO), which took a 50% or more stake in each firm. Mining was initially not going to be nationalised but owing to its sheer weight within the economy, the following year the intention was clear that the mines were to be consolidated under nationalisation. This was demonstrated by the creation of the Mining Development Corporation (MINDECO) (Musambachine, 1999). By 1970, the two largest mining firms Anglo-American and the Roan Selection Trust, had a 51% majority share acquired by the government and the firms' names were changed to Nchanga Consolidated Copper Mines (NCCM) and Roan Consolidated Mines (RCM). The remaining shares of NCCM were retained by Anglo and a 20% share of RCM was retained by the Roan Selection Trust, the previous owners of the mines. The readjustment of the mining sector was a continuation of the Mulungushi Reforms; however, it is demarcated as its own set of reforms known as the Matero Reforms, which specifically focused on the nationalisation of the mining sector (Makuyana & Odhiambo, 2014). After this MINDECO and the two other Zambian parastatals of INDECO and the Finance and Development Corporation (FINDECO) became sub-holding companies of a new unified parastatal. The resultant body the Zambian Industrial and Mining Corporation (ZIMCO) was one of the largest economic actors in Southern Africa. With assets of K695mn, after the amalgamation, the parastatal was the 123rd largest corporation outside of the US (Craig, 1999). Economic reform was coupled with a reform of the human resources of the state and a general policy of Zambianisation. The purpose of this approach in

the mines was to reverse the decades under a white managerial class and to implement Zambian-led mines, within a Zambian-led economy (Burawoy, 2014).

UNIP understood that power did not lie within the apparatus of the state but instead within the economic sectors, of which mining was the most considerable. Zambia's act of nationalising its largest resource was in line with the actions of most resource-dependent nations in Africa that were undergoing independence. Ghana nationalised their gold mines in 1973 and Tanzania nationalised their mines after the Arusha Declaration (Loxley, 1990). Zambia's approach to nationalisation was hurried, which was demonstrated by the retaining of the previous owners as minority shareholders. Owing to the development agreements in place the 51% takeover of the mines required further compensation to Anglo and Roan (Slinn, 1983).

Anglo and the Roan Selection Trust were kept on as minority shareholders in NCCM and RCM, however, the structure of the new agreements gave them considerable day-to-day control over the management of the mines (Slinn, 1983). The minority shareholders were needed, owing to the lack of expertise in the cohort of politicians who took over the mines. Lack of expertise was a considerable issue across the sector, although the government did invest in education considerably, the impact of it was not immediate. Whilst there were many trained miners, there was a lack of specific skillsets in more specialised areas related to safety, policy design, mineral processing, and estimating ore volume, in addition to more advanced methods of regulating the industry (UNECA, 1996; Lombe, 2018). The latter issue, that of regulating, allowed minority shareholders to tilt the balance in their favour with how the contracts were structured, and the limitations imposed on the mines concerning labour rights and the environment. This same issue has persisted, that of mines establishing the lines under which their work is achieved. Development agreements in the case of Konkola and Mopani Copper Mines allowed firms to draw up environmental programs and insulate themselves from legislative shifts affecting the environment and taxation (MCM, 2000; KCM, 2004).

There were issues around the conduct of Anglo and Roan in this period, Simwinga (1977) noted that they engaged in transfer mispricing. O'Faircheallagh (1984) argued that this would have been unlikely given that it would have only taken MINDECO a simple invoice audit to confirm the matter. This viewpoint however overemphasises the role MINDECO played in the day-to-day running of the mines, given its composition was largely politicians, who were ill-equipped to oversee the complexity of transfer mispricing. In this period much of the management was outsourced to the minority shareholders (Craig, 1999). Within the context of path dependency, transfer mispricing continued to be a significant problem within the development of the sector. In the deterioration of the relationship between the state and both

Konkola and Mopani Copper Mines between 2000 and 2020, both subsidiaries engaged in transfer mispricing, a key reason being that the state lacked the technical capacity to monitor export and production activities effectively, which allowed the under-reporting of ore value. In addition to this the structure of the firms' development agreements left space for excessive hedging which also played into tax evasion (KCM, 2000; MCM, 2000; Readhead, 2016).

From a macro-economic perspective, the initial partial nationalisations proved to be a success, with Zambia achieving GDP growth of 4.8% in 1970, 9.2% in 1972, 6.4% in 1974 and 6.2% in 1976 (World Bank, 2022). ZIMCO additionally recorded profits of 16.3% between 1971 and 1974 (Makuyana & Odhiambo, 2014). However, the success was short-lived as by 1970 the process of nationalisation triggered a response. Anglo disinvested $350mn and the Matero reforms led to the emigration of large swathes of European mining experts who had previously held senior positions in the country's mining projects, leading to a brain drain within the key sector (Barton, 2016). Zambia's economy suffered considerably in the following years, owing to the collapse of the copper market in 1975, the drastic reduction in copper prices over the following decade and the subsequent impact of the balance of payments crisis, alongside the steep uptick in IMF reliance are demonstrated in Table 2 and 3 below .

Table 2: Zambian Copper Exports and Prices 1970-85 (World Bank, 1986, p.1)

Year	Exports COOO tonnes) (1)	LME Copper Price (2)	Export value as % of 1970/72b
1970/72 (average)	677	148	100
1974/76 (average)	687	109	75
1979/81 (average)	609	87	53
1982	607	67	41
1983	551	74	41
1984	530	60	32
1985	479	61	29

Table 3: Summary of Balance of Payments, Zambia 1974-1985 (US $ mn) (World Bank, 1985, p.1)

Year	1974	1975	1978-80	1981	1982	1983	1984	1985
Current items								
Exports	1397	800	1259	1000	923	992	883	829
(of which copper)	(1300)	(732)	(1014)	(866)	(799)	(859)	(723)	(646)
Imports	793	945	989	1238	1158	839	742	752
Trade balance	604	-145	270	-238	-235	153	141	77
Services (net)	-538	-536	-327	-468	-373	-357	-394	-217
(of which interest)	(126)	(117)	(191)	(210)	(250)	(252)	(277)	(121)
Current transfers (net)	-61	-61	-84	-157	-91	-55	-51	-51
Current account balance	5	-742	-141	-863	-699	-259	-304	-191
Capital items								
Grants	9	5	30	27	40	36	53	71
Medium and long term loans (net)	105	382	269	208	258	104	212	209
Net IMF flows	-	23	96	368	-57	64	76	-97
Other capital, plus								
errors/omissions	-107	174	-297	213	-19	-207	-401	-574
Overall balance	12	-158	-43	-47	-477	-262	-364	-582
Arrears (- means reduction)	-	158	43	47	477	-51	-118	567
Debt relief/ Exceptional financing	-	-	-	-	-	313	482	15
Memorandum								
Current A/C deficit/GDP (%)	-	29.7	4.2	22.1	18.1	7.7	11.1	8.1

The crash led to a 5% drop in GDP two years later and the halving of copper exports over ten years as shown in Table 2 above (World Bank, 1986; 2022). In addition to a balance of payments crisis (which is summarised in table 3 above) and a run-on foreign exchange (IMF, 2004; Barton, 2016). The ensuing crisis led to demand for reckless loans from Western banks, and by 1978 Zambia's debt rose from $813mn to $2.57bn (Macrotrends, 2022). That year, Zambia turned to the IMF for help and was offered a rescue package of funds to service the debt, in return for currency devaluation, controls placed on imports and a freeze on public sector wages (IMF, 2004). The IMF believed at the time that copper prices would rise, however, they continued to decline, which left Zambia with austerity policies that affected the nation's poorest in addition to further loan repayments to the IMF on top of their existing debts (Clark & Allison, 1989). Barton (2016) argued that the policies enacted by Kaunda deterred further foreign investment to the point that by 1972 productivity went below consumption, owing to under-capitalisation, which triggered the balance of payments crisis. Whilst, these are the immediate sequence of events leading to the crisis, this perspective only takes a snapshot of the events at the point of independence. By highlighting the lack of diversification that occurred through BSAC's era, the debt transferred over and the dearth of infrastructure that resulted from the consistent pooling of funds extracted from the north into the south: a clearer picture emerges as to why Kaunda needed control over the economic levers of the state to develop a national welfare program. The lack of infrastructure Zambia had was significant, even by colonial standards, and drastic measures were needed to rapidly rectify it. Also, the perspective that Zambia would have enticed more foreign investment into the volatile copper market is a matter of conjecture. Owing to the subsequent oil crises of the '70s and the winding down of the Vietnam War, analysts had already anticipated a downturn in copper demand (Ng'ambi, 2022).

Up until the crash Zambia had been servicing colonial debt, building a nation, and attempting to meet the basic needs of a population that had been neglected under British rule. The latter relied on interventionist policies to expand the formal sector and keep the costs of food low. To do this UNIP subsidised Mealie Meal (a maize-based food staple) and rapidly increased public sector employment, the effects of which in the aftermath led to a high budget deficit, whereby government spending was double that of revenues. This combined with the increasing debts to service, left the Zambian economy in an untenable position. (Clark & Allison, 1989).

In 1982 Zambia Consolidated Copper Mines (ZCCM) was formed which marked the first point that private actors were removed from the management of the mines (Limpitlaw, 2011).

However, even at this point, Anglo retained a 27.3% share in ZCCM itself (Larmer, 2005). ZCCM amalgamated RCM and NCCM, which until this point had been self-regulated. This was the first point at which Zambia had some tangible control over the mines, however, the copper price crisis was deepening and by 1983 further external intervention occurred, with additional policy adjustments from the IMF. The situation by 1983 was dire. A striking example relates to debt servicing, which in 1974 stood at 8% of export earnings, by 1983 debt payment stood at $ 550mn, or 52% of export earnings (Colclough, 1988). Zambia, after this point, had to borrow even more to service the debt of Western banks (Auty, 1991). The key tenets of the IMF program were a 60% exchange rate devaluation and a 40% depreciation of the Kwacha. From a policy basis, government spending was reduced, specifically on important subsidies and an efficiency program was levelled against the mining sector, which would largely affect wages and the additional benefits given to mineworkers. Further resources were diverted into a hurried and overdue foray into diversification, largely around agribusiness and manufacturing. In return for the enactment of this program, donors had agreed to offer vital rehabilitation loans (Colclough, 1988).

The IMF focused on what could be privatised and diversified however a component of taxation that differentiated between BSAC and UNIP arguably held effects over the ability to generate revenue in this complex moment. BSAC constructed policy so that they taxed the value of the copper, which naturally generated revenue without the risk. Royalties over firms' profits does not carry a risk to an investment but it does guarantee a significantly higher risk on the financial gains of the royalty owner. Mining is highly complex, requires significant sunk costs and it is difficult to track where profits go, given that ores can be under-reported, or transfer mispricing can be achieved via a subsidiary on the ore cost (Readhead, 2016). This makes taxing profit much harder, as margins tend to be slimmer, and the actual profits can be easily unreported. Especially at this point in history, whereby the ability of the Zambian government to audit mines was less feasible, given the dearth of technical and financial resources for this type of endeavour.

The effects on foreign exchange exacerbated the economy further when the IMF – World Bank implemented a devaluation of the Kwacha. This action had wide-reaching ramifications, on Zambia's copper-dependent economy. The IMF-led Kwacha devaluation had effects firstly owing to the high import content of copper which stood at 55%, well above the average for most copper-producing nations (Limpitlaw, 2011). In this instance an exchange rate devaluation manifests two-fold- firstly the product is restricted by foreign exchange in the short run and secondly any increase in the net exports is further negated by the devaluation, as an

increase in exports would reflect in foreign exchange earnings (Loxley, 1990). As a result of the destabilisation led by devaluation by 1987, 95% of export earnings accounted purely for servicing their debt. This had a wider impact on domestic spending as in this period it absorbed 52% of recurrent budget revenues, widely impacting the budget deficit (Loxley, 1990). The foreign exchange crisis led to multiple domestic issues, notably the importing of medicine. Owing to the exchange rate crisis Zambia was only able to buy roughly 15% of the basic medicines needed in this period (Clark & Allison, 1989).

Figure 2 Copper Production - 1935-2010 (Limpitlaw,2011, p. 1)

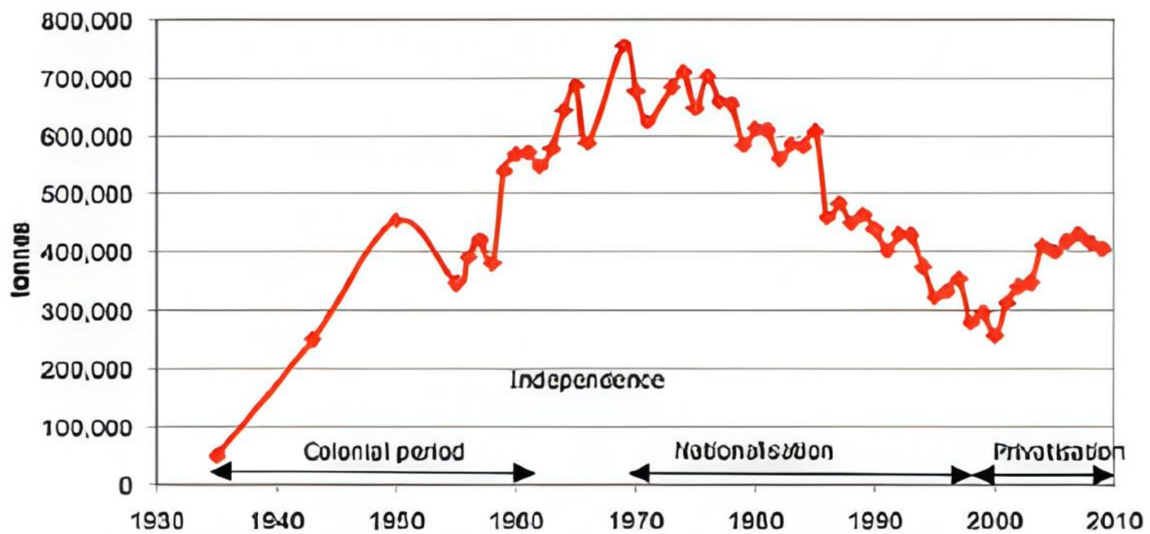
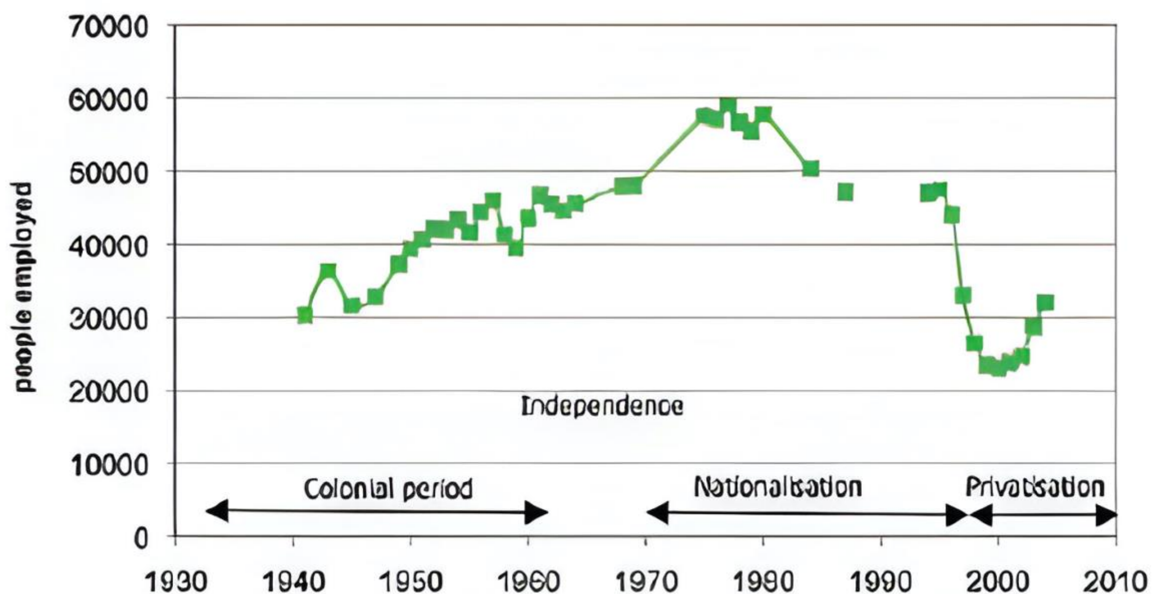


Figure 3 Mining Employment – 1940-2010 (Limpitlaw, 2011, p. 1)



Partial nationalisation in Zambia was linked to the steady decrease in copper production, from 720,000 tonnes at the end of the colonial period of mining to a low of 250,000 just before privatisation as shown in Figure 2 above (Limpitlaw, 2011). It is unclear how private firms having majority control during a crash as significant as 1975, would have altered production outcomes drastically, the crash is often overlooked in favour of the partial nationalisation.

However, the inverse occurs in relation to employment, mining under the nationalisation programme proved to be, to date, the most significant employer in Zambia, reaching a height of just under 60,000. Figure 3 above demonstrates the steep reduction in employment that occurred with privatisation. The nationalisation program of Kaunda was to grant employment to the nation and to that extent it succeeded. The economic picture of the nationalisation period is nuanced and the need for employment cannot be understated in a newly independent state. Irrelevant as to the overall success of the nationalisation programme was at least a clear understanding that control of the mines equated to control of Zambia. Kaunda, through the initial nationalisation, sought to wrestle control from Anglo and the Roan Selection Trust which failed owing to their minority ownership. Throughout the early growth years up until 1975, Zambia held little tangible control over the mines other than the ability to garner 51% of the profit. Day-to-day control remained with the minority shareholders who held the knowledge of how to run the mines, this is widely demonstrated by the profitability of Anglo and RST in these years but also from the reality that MINDECO were not prepared for tasks such as an audit of the mining firms (Craig, 1999). This imbalance of power in ownership negated the majority-minority dynamic. Control still rested with the minority shareholders owing to their considerable knowledge of mining operations and the lack of Zambian citizens trained to take over the tasks. When the process of restructuring commenced the government was unable to wrestle control without significant financial penalties. Anglo and the RST were able to navigate the crises of the copper crash in a way a resource-dependent state could not, there were no shareholders to fall back on and there was an entire population dependent on the 51% share to continue developing the nascent state. And in the aftermath of the chaos was a substantial amount of debt which widened the deficit, owing to the crisis.

The last notable act of Kaunda occurred in 1987 when his administration decided to push back against the IMF, after a decade of failed adjustment measures. This strategy was named the Growth from Own Resources Economic Recovery Plan. Within this price controls returned, all reforms related to exchange rates were reversed and the plan also capped debt service payments at 10% of export earnings (Adam & Simpasa, 2010). This point is the only true attempt at a path break for the Zambian mining sector. Nationalisation as discussed, never

removed external control over the mining operations. Legacy firms such as Anglo and RST exercised control up until the point that the IMF implemented restructuring programs. 1987 is the first point since independence, whereby the Zambian state has most of the control over the mines and no external interference. It is worth remembering though that Anglo throughout this period still retained a 27.3% share in ZCCM (Larmer, 2005). This removal of the IMF and majority ownership of mines represents somewhat of a path break, but one that was almost completely reversed within four years. Ultimately, the plan failed and resulted in a further exhaustion of mineral taxation and further examples of the rent seeking behaviour of some actors in the government. Within two years the plan was abandoned in favour of further IMF adjustments, and by 1991 the country held its first multiparty elections, whereby Kaunda's UNIP lost to the Movement of Multiparty Democracy (MMD).

Within the context of path dependency Kaunda and UNIP consistently sought to take control of the mines, however, each move to do so entrenched the path that kept the mineral assets separate from the state. Independence placed Zambia in a position with a legacy of transferred colonial debt that needed to be serviced, a mining sector which had to compensate BSAC and legacy private firms in RST and Anglo who held perpetual mining licences and maintained effective control until 1982. In addition to this the mineral firms had exploited the easiest-to-access ores, this technical aspect meant more complex forms of mining were needed to access the remaining ores (Yorke, 2015). This required private firms with better technology and human resources. Structurally Zambia inherited a resource-dependent economy with no diversification, other sectors could have eased the reliance on mining, but this would involve placing limited resources on unproven sectors. Furthermore, within the context of structural issues, was the deficiency in human resources another legacy of the colonial period which placed no emphasis on education. The confluence of these factors constrained the state's available options. Full nationalisation required funds and technical knowledge, which given the status of the debts and the limited indigenous human resources for mining left this option impossible.

The quasi-nationalisation seen in the Matero Reforms of 1968 which granted the state majority ownership was a rational move, which sought to take control of the nation's assets without destabilising the nascent economic condition of the newly independent state. However, the minority shares owned by private firms allowed them to run the day-to-day activities of the mines until 1982 (Limpitlaw, 2011). This technical aspect kept the control of the mines away from state functionaries, further entrenching the limited human resources and the ability of the state to effectively run the mines. Beyond this, negative aspects of private firms flourished in

this period chiefly that of transfer mispricing, an action the private firms were able to achieve owing to the lack of oversight by the state authorities and the lack of technical knowledge of the newly minted political and bureaucratic elite. The issue of tax evasion through this method is still seen in the present day. The issue of minority ownership with day-to-day control allowed for these activities to flourish and entrench the path further. The retention of the firms as minority partners further demonstrates the difficulty for the state to successfully and tangibly legislate it goals and aims against the unwieldy mining sector. This reflects the issues the Empire had legislating against BSAC. This inability to legislate against external forces is also underscored by the difficulty in removing IMF direction and the failed attempt to break the path dependence of the sector in 1987.

The issue of IMF involvement from the point of the Copper Crash in 1975 meant that although the state successfully took full ownership of the mines in 1982, it had already effectively transferred the management of economic policy to the IMF. In a resource-dependent state, control of economic policy is control of the mines and vice versa. By outsourcing the control over policy to the IMF Zambia started the route to privatisation, the period that would significantly entrench the path and further separate mines from state.

The Privatisation Period 1991-2011

This section focuses on the outcomes of the electoral victory of the Movement for Multi-Party Democracy (MMD) under Frederick Chiluba in 1991 and the subsequent constraints placed on governmental decision-making owing to the path dependence of the mining sector.

The 1991 election saw the end of nearly 30 years of Kenneth Kaunda and UNIP's rule. The MMD was elected on the basis of reversing the economic crises and adopting a policy platform centred on liberalising the economy. The victory led to a rapid adoption of privatisation which was largely directed by the IMF (Rakner, 2003). Which further entrenched the path dependence of the sector as it paved the way for an aggressive re-entry to the Zambian economy by foreign firms under heavily favourable conditions.

This period saw the establishment of development agreements between firm and state an action which would have profound effects on the decision-making capacity of the government and its ability to legislate against the mines (Lungu, 2008). The agreements are a definitive expression of the path dependence of the sector because they included stability clauses which would prevent the application of legislation that could affect mining profitability for 20 years.

This period demonstrated and further entrenched path dependence. The economic conditions required immediate capital to reverse the economic crises, which led to the cheap sale of the mining assets and the signing of the unfavourable development agreements with foreign firms. These economic conditions were due to how the mining sector developed over the colonial and independence period: that of the legacy of colonial debt that continued to grow but also that profits were largely retained by foreign firms. Beyond this, the agreements themselves *legally constrained* the governments from acting in national interest through the stability clauses within the contracts.

There is considerable debate over how privatisation occurred. Although the MMD government was the conduit for privatisation, the influential role of the IMF and the World Bank in this period is well documented (Craig, 2000; Rakner, 2003; Larmer, 2005; Fraser & Lungu, 2007; Lungu, 2008) . The IMF and or World Bank sponsored approximately 40 African states in economic reform through balance of payments loans with policy conditionalities attached. Some states such as Ghana flourished through the restructuring whereas many states, especially those with ideological opposition to Western interventionism, such as Tanzania, Zaire and Zambia were touted as the failures of the programme of reforms (Loxley,1990).

A key aspect of the policy platform of the MMD in 1991 was its program to privatise the ailing Zambian economy. Given that the Zambian economy had suffered significant consequences and food riots broke out against the policies of UNIP. It was logical that a party that said it would improve economic conditions would win, this coupled by the view that 27 years of one-party rule made the electorate want change (Momba & Mandimutsa, 2009). It is also notable that the IMF and World Bank had approached Chiluba prior to his election with discussions on economic reform and a new lending program. After the election the donors doubled aid (van de Walle, 1999).

Within the IMF-led program of economic reform, the mines represented the most significant industry, much like the point at independence in 1964. Much of the policy direction was centred around raising capital via external multinationals rather than scaling the industry via domestic actors (IMF, 1997). The period prior to the MMD victory was characterised by a one-party state and nationalised industry, as such there was no need for specifically raising capital, the mines effectively acted as the primary method for raising funds for every aspect of public spending. Subsequently, Chiluba embarked on a rapid program to thrust Zambia into a neoliberal economic order. This began with the Stock Exchange Act of 1990 and culminated with the Securities and Exchange Commission Act of 1993, which established the Lusaka Stock Exchange and the regulations around it (Rakner, 2003). This ushered in a new method

for firms to raise capital in Zambia but also gave a gateway for foreign firms to set up subsidiaries to be listed on the exchange (Kapumpa, 1995).

The Mines and Minerals Act (1995) explicitly formed a legislative mechanism to sell off the mines into multiple privatised pieces (Craig, 2001). Within the legislation, it also allowed the state to form bespoke development agreements, or investor-state contracts, an aspect deemed necessary to raise interest from foreign firms. These agreements included preferential tax rates which were protected by the stabilisation clause for stability periods of 15 years in the instance of Mopani Copper Mines (MCM) and 20 years in the instance of Konkola Copper Mines (KCM). This guaranteed that profits could remain unaffected by any future governmental decisions or legislation. In addition to this firms could carry forward losses which effectively shielded them from increased taxation in boom periods for copper (KCM, 2000; MCM, 2000; Bova, 2012). The first wave of development agreements were signed between 1997 and 2000, and indirectly they were encouraged by the IMF as methods to attract foreign investment and increase the profitability of the mines. The IMF's restructuring required the mines to be privatised quickly, as such the imbalanced nature of the negotiations were firmly in the favour of the investor. They were able to not only guarantee development agreements, but generous ones. This is demonstrated by KCM's stability period of 20 years (KCM, 2000; Situbeko & Zulu, 2004; IMF, 2004; Lungu, 2008). Given the chaotic nature of the period and the low prices for copper, the Zambian government had limited capacity in terms of negotiating a favourable position. The conditionalities and external agreements imposed by the IMF at this point gave rise to what has been referred to as the period of "*choice less democracy*", whereby lender conditionality meant that competing political parties offered similar policy platforms owing to the external constraints of the terms (Mkandawire, 1999; Hinfelaar & Achberger, 2017, p. 24). The Minister of Finance at the time Edith Nawakwi stated that the conditions faced by the mines -chiefly that they were recording losses of $1mn a day- meant that the negotiations and the need for deeper privatisation were "*like someone was pointing a gun to your head*" (BBC World Service, 2007, as cited in Lungu, 2008, p. 2).

Table 4, Breakdown of the Assets Sold during the Privatisation of ZCCM (RAID Report, 2000; Kangwa, 2001).

Date	Asset	Interest Sold	Buyer	Cash at Close	Deferred Cash	Firm & Conditional Commitments
1996	Bwana M'kubwa	80%	First Quantum	N/A	N/A	$30mn
March 1997	Konkola North Development Area	Option over 80-85%	AVMIN	$0.5mn	N/A	$12mn
March 1997	Kansanshi Mine	80%	Cyprus Amax	$ 3mn	$ 25mn	$ 28mn
October 1997	Luanshya and Baluba Mines	85%	Binani Group, Daliah Alabaraka Group, Allenby Finance Ltd.	$ 35mn	N/A	$ 172mn
October 1997	Chibuluma Mine	85%	Metorex, Crew Dev. Corp, Maranda Mines, Genbel Securities	$ 17mn	N/A	$ 34mn
November 1997	Power Division for Mining Sector	80%	Cinergy and National Grid Company	$ 50mn	N/A	N/A
July 1998	Chambishi Mine	85%	China Non-Ferrous Metals	$ 20mn	N/A	$ 70mn
September 1998	Chambishi Cobalt Plant & Naka Slag dumps	90%	Avmin Ltd	$ 50mn	$ 0.35mn	N/A
March 2000	Mufulira Mine, smelter & refinery & Nkana mine & cobalt plant	90%	Glencore (Majority Share) and First Quantum (Minority Share)	$ 20mn	$ 23mn	$ 502mn
March 2000	Konkola, Nchanga & Nampundwe mines. Nkana smelter/ refinery, Konkola Deep Mining Project	80%	Anglo-American (Majority Share). IFC	$ 30mn	$ 60mn	$ 731mn

By 2000, the largest mining assets were sold, most notably MCM to Glencore and KCM to Anglo-American. Just four years later Vedanta had purchased KCM from Anglo for a majority share (of 51%). The total amount paid by Vedanta to eventually own 79.4% of KCM was $261mn, however, the initial majority share was purchased for $25mn (Ng'ambi, 2018). Between 2004 and 2008 copper prices per ton increased from $2,500 to $8000. This increase allowed Vedanta to recoup their investment in less than a year, which in turn led to accusations that mine had been undersold (Lungu, 2008). A reasonable assertion given that its valuation now stands at over $1bn.

The privatisation process in Zambia was designed to sell 280 state assets in a short period of time (Kabala et al., 2020). This hasty process combined with weak copper prices meant that the assets were sold off for very little, as Table 4 above demonstrates. A further issue within this hasty process of mine sales, related to the development agreements which were primarily signed between 1997 and 2004. This occurred often in opaque settings with no clear public tendering process (Raid Report, 2000). Throughout this seven-year period the agreements were agreed upon effectively in secret between a handful of senior ministers and the firms. Access was limited to the point that many governmental departments including the tax authority were unable to access their contents (Lungu, 2008; Manley, 2013; Kabala et al., 2020). The year following the final sales in 2004 Zambia were admitted to the Heavily Indebted Poor Country Initiative by the IMF and World Bank, which resulted in debt relief totalling $ 5bn (Larmer, 2005). As stated in Article 78 of the initiative *"An appropriate policy environment remains the essential ingredient to reduce poverty, and the first priority of efforts to assist HIPCs should be to encourage adoption of such policies. The HIPC Initiative provides debt relief in a framework which gives incentives for countries to adopt and maintain such policies…"* (IMF, 1999, p. III B). The framework for the HIPC follows the stated goals of the OECD Development Committee's Targets of sound macroeconomic policy and tax efficient systems (OECD, 1996; IMF, 1999). The privatised framework for IMF and World Bank lending and assistance conditionality was hastily implemented and consequently resulted in systemics flaws such as the development agreements (Fraser & Larmer, 2010).

Even with debt relief and economic restructuring the state lacked revenue. To receive much needed funds for the state, the MMD Administration -at this point under the leadership of Levi Mwanawasa- introduced the 2008 Mines and Minerals Act. Within this Act the corporate tax rate was raised to 35% from 25%, the Mineral Royalty went from 0.6% to 3% and a windfall tax was introduced, in addition to the abolition of development agreements (Fraser & Larmer, 2010; Ng'ambi, 2010). The financial crisis of 2008 occurred shortly after

and the architect of the plan, Mwanwasa died. Subsequently, Rupiah Banda was elected to lead the MMD and in turn, reversed the majority of the Act after mining firms threatened to reduce their labour force, furthermore the abolition of the development agreements were nullified by the stabilisation clauses in the agreements (Ng'ambi, 2018). This last facet demonstrates the difficulty faced by the state in legislating against the sector in this period, reflecting the issues faced by Kaunda and the mines perpetual private shareholders, and the Empire with BSAC.

The agreements effectively orchestrated in line with IMF conditionalities and the goals of external firms were able to withstand any legislative approaches by future administrations to change them, owing to the stabilisation clauses. This aspect ironically meant that the development agreements which were abolished in 2008, were still legally active for the remainder of the stability period (MMA, 2008; Mulenga, 2017). These constraints meant Zambia was unable to capitalise on the boom periods for copper that followed through increased taxation (Fraser & Larmer, 2010). The development agreements themselves, were both a symptom of path dependency itself, in the sense that the development of the mining sector outside of the state meant that conditions around mining would be drawn to favour the investor over the state. But also, that they contributed to path dependency in striking terms, as it would -in the most conspicuous way possible- constrain the ability of the state to alter the path via legal consequences. These agreements froze the one weapon the state had, legislation. The stabilisation clauses within these agreements would become the most enduring aspect of the privatisation period in maintaining and further entrenching the path dependence of the mining sector. Stability clauses were and remain largely common across Africa specifically around oil, gas, and mineral projects (Oshionebo, 2010; 2020).

Much of the debates around private involvement in mines relate to access to investment, however, historically, the mines under the control of BSAC, RST and Anglo in the colonial period were not heavily invested in. One of Kaunda's chief concerns at the point of nationalisation was the lack of re-investment that had occurred in the colonial mines (Lungu, 2008). Furthermore, the argument that the privatisation period brought an immediate and substantial investment increase is questionable. Fraser and Lungu (2007) demonstrated that while ZCCM remained a nationalised entity investment between 1990 and 1996 from the national body stood at $ 125mn a year. Whereas in the period after its privatisation between 1997 and 2003, this only increased to $ 135mn. Some investors even pulled out prior to 2003. It was only after the Copper price increase of 2004 that investors started placing substantial sums (Lungu, 2008). As it stands the KCM Deep Mining Project still requires further investment (Ng'ambi, 2022).

A large emphasis of the IMF reforms of the 90s related to efforts to make exports competitive, however, exports actually dropped in the wake of privatisation. Between 1992 and 1996 total exports fell from $ 1120mn to $967mn, and copper fell from $ 867mn to $ 568mn (see Table 5). The IMF wished Zambia to diversify, but not at the expense of mining, diversification was supposed to compliment it.

Table 5 Zambia's Composition of Recorded Exports ($USmn) 1992-1996

	1992	1993	1994	1995	1996
Copper	867	717	729	851	568
Cobalt	144	149	131	133	187
Lead and zinc	8	4	0	0	0
Floricultural products	3	6	9	14	18
Horticultural products	3	2	2	4	9
Primary agricultural commodities	20	25	10	24	18
Processed foods	14	15	22	25	34
Semi-precious stones	10	13	9	8	11
Textiles	14	11	20	39	41
Building materials	4	4	3	5	8
Engineering products	25	31	35	39	37
Other	8	6	10	20	17
Total recorded exports	1120	983	1039	1162	967
of which metals	1019	870	910	984	755
of which non-traditional products	100	113	129	17%	212

(Bank of Zambia & IMF, 2004, p. 1)

The question of whether this aggressive form of privatisation increased profits is also debatable. The commodity price boom had a larger part in the process as well (Lungu, 2008). In 1998 global copper prices stood at $0.62 per lb, by 2006 they stood at $3.71 per lb and as of 2022 it is $4.1 per lb (Comex, 2024). KCM between 2005 and 2006 had quadrupled operating profits from $52.7mn to $206mn. Ultimately, the way the privatisation period formalised the relationship with external firms meant that the Zambian government missed out on royalties that occurred in the immediate boom and the consistent growth seen since. In 2006 Chile received $8bn in royalties whereas Zambia only accrued $10mn (Chirwa, 2008; Fraser & Lungu, 2007). The vast discrepancy between resource-dependent nations relates to how the mining sector developed. Chile, although a stalwart of privatisation had significant periods of nationalisation in their mining sector, largely through CODELCO. In addition to this, Chile also heavily invested in education around mining and developed the sector within the confines of the state (Lagos, 1997). Chileans were equipped to manage the mines at independence.

The agreements and the privatisation process mirrored many of the mistakes made by Kaunda in the 1970s. Whereas the Kaunda administration expected the boom to be permanent and the drop to be temporary, the IMF viewed it from the other way around and did not anticipate the copper demand of China, and its central role in the Electric Vehicle revolution. The IMF effectively locked Zambia in just before they would have benefitted from the boom, this meant that Zambia suffered economically throughout the difficult decades for copper between the 70s and 90s, were put into a debt cycle and then exactly at the point they could have earnestly serviced their debt they were pressured into agreements that took that ability away (Rakner, 2003; Fraser & Lungu, 2007).

Within the context of path dependence, the advice of the IMF in the privatisation period further constrained the choices of the incoming MMD government. There were limited available options in 1991 owing to the economic crisis. The incoming government had liaised with the IMF in the build-up to the elections and built a policy platform around the general improvement of the economy. Given the state's reliance on mining this would be the sector that would receive the most change in the event of economic liberalisation. The option to continue the nationalisation of the state's mines was constrained by the conditions that became further entrenched under Kaunda in the independence period. These constraints were centred around a poorly performing economy and spiralling national debt, combined with an inability for the state to exploit their mineral resources owing to the continued dearth of technical human resources for complex mining.

The constraints on available options were further exacerbated by the asymmetric negotiations of the period between the MMD government and the IMF, from the available evidence the MMD government were unable to push back on the worst excesses of liberalisation (Fraser & Lungu, 2007). The words of the first MMD finance minister Edith Nawakwi ring through, underscoring the asymmetric nature of the period, "*negotiations were like having a gun to your head*" (BBC World Service, 2007, as cited in Lungu, 2008, p. 2). This factor also meant that legislating against the newly minted firms was complicated and unsuccessful. A hallmark of the path dependence of the sector. The stabilisation clauses within the agreements embedded in this period would be central to constraining the options of the next government, the Patriotic Front during the period of contention with two of the largest mining firms, Konkola and Mopani Copper Mines.

The Period Leading up to the State Acquisitions of Konkola Copper Mines and Mopani Copper Mines and their Immediate Reversal 2011-2021

This section outlines the emergence of the Patriotic Front (PF) in 2011 after an electoral victory over the MMD, along with the tension between state and firm in the mining sector. Tensions rose between the PF and mining firms which resulted in the state acquisitions of Konkola Copper Mines (KCM) and Mopani Copper Mines (MCM) between 2019-2020. Which are two of the largest mining operations in Zambia and were owned by Vedanta Resources and Glencore respectively. The drastic action taken against KCM and MCM relates to harnessing public sentiment for the 2021 Presidential Elections which had grown unfavourable to the foreign mining firms. The expropriatory action and state acquisitions that took place represented for a brief moment a path break. Momentarily, the mining sector was primarily brought under state control. The path dependence of the sector had created an environment where mining firms could act with impunity, specifically around environmental and tax violations. This earned the ire of Zambia's inhabitants and increased public demand for nationalisation (Caramento, 2021; Musonda & Larmer, 2023). Subsequently, the conditions resultant of the path dependence of the sector led to the point at which nationalisation and expropriation would benefit short-term electoral gains. These acquisitions were reversed shortly after the 2021 election, where the United Party for National Development won. The rigidity of the path is demonstrative of why the acquisitions were reversed with such immediacy.

The dual acquisitions of KCM and MCM were unexpected, owing to the reliance Zambia has on external firms for mineral production and its substantial national debt (Myaba & Kayizzi-Mugwera, 2021). The outcome between the government and KCM was hostile, and a clear example of expropriation. Whereas the outcome of MCM was arguably a compelled sale. Regardless of the technical and legal fine points of the acquisition, the outcome placed the Zambian state as the largest majority shareholder of the mines for a moment in time. This represented the most significant path break in the history of Zambia's mining sector since Kaunda rejected the IMF restructuring in 1987. The tables below demonstrate that brief but marked shift in the control of mineral production back to the state.

Table 6 (Mine ownership distribution prior to acquisitions of KCM and MCM (ZCCM, 2020)

Mining Asset	Kansanshi Mining Plc	Kalumbila Minerals Ltd	Konkola Copper Mines Plc	Luanshya Copper Mines Plc	Lubambe Copper Mines Plc	Lumwama Mining Company Ltd	Mopani Copper Mines Plc	NFC Mining Plc
Parent Company	FQM-80%	FQM 100%	Vedanta-79.2%	CNMC-80%	EMR-80%	Barrick-100%	Glencore-80%	CNMC-85%
State	20%	N/A	20.8%	20%	20%	N/A	20%	15%

Table 7 (Mine ownership distribution post acquisitions of KCM and MCM in 2019-2020 [prior to reversals in 2021])

Mining Asset	Kansanshi Mining Plc	Kalumbila Mining Ltd	Konkola Copper Mines Plc	Luanshya Copper Mines Plc	Lubambe Copper Mines Plc	Lumwama Mining Company Ltd	Mopani Copper Mines Plc	NFC Mining Plc
Parent Company	FQM-80%	FQM-100%	N.A	CNMC-80%	EMR-80%	Barrick-100%	N/A	CNMC-85%
State	20%	N/A	100%	20%	20%	N/A	100%	15%

KCM was a subsidiary of both Anglo and Vedanta, as a consequence of the expropriation it was held in total by Zambia Consolidated Copper Mines – Investment Holdings (ZCCM-IH) as a nationalised entity between 2019 and 2021. What is comprised under KCM includes four mining sites, in Chingola, Chililabombwe, Nampundwe and Kitwe, where copper is primarily mined, in addition to cobalt, pyrites and acids. KCM is one of the most sophisticated mining ventures in Zambia. As it is one of the few operations which processes copper it is more profitable. It is able to utilise the entire value chain as it comprises both open-pit and underground mines, in addition to concentrators, smelters and a tailing leach plant (KCM, 2021). The ability to process the minerals through concentration and smelting, in addition to utilising the tailings (mineral remains) for heavy metal extraction makes it an integrated copper producer which can profit off each stage of the extractive process. The many arms of the firm make it versatile for profit-making in the event of an economic downturn or market volatility (Runge, 2012).

MCM became a subsidiary wholly owned by ZCCM-IH after the compelled sale. Like KCM, MCM is one of the other few operations that both extract and process minerals in Zambia. MCM, in Mufulira, operates underground mines, concentration, smelting and refining operations. In addition to sites around Nkana, which comprise of underground and open pit mining, concentration facilities and a plant for cobalt (MCM, 2021). In effect, Lungu took aim at the most profitable operations of the sector, and in doing so brought not just a majority ownership back into the state but also the most complex and profitable mineral operations available.

This contention between the PF and the established foreign mineral firms before Lungu's ascension was complex under Michael Sata's leadership. Sata a noted populist, oscillated between punitive action against the firms and advocating for policies that would enhance their profits, so that further taxation could be accrued, but also to help gain support from Western Aid donors (Fraser, 2017; Kabala et al., 2020). After Sata's death, Edgar Lungu was elected by the party to fight the 2015 election. The relationship between firm and state after Lungu's election was highly contentious and this period saw multiple legal issues for KCM and MCM. A key message of the 2015 electoral platform was that of national development and the role of the state in facilitating this. This leveraged the contention between mining firms and state as a key aspect of their developmental agenda. By 2019 faced with a Presidential Election in 2021 Lungu sought to utilise public sentiment against mines as a key part of his campaigning platform (Musonda & Larmer, 2023).

The PF under Lungu can be seen as a vague continuation of UNIP's approach to Zambianisation, an anti-neoliberal position characterised by state involvement that sought to place more domestic control over economic sectors (Hallink & Siachiwena, 2023). A central aspect relating to the political benefits of expropriation was the public support for resource nationalism. Resentment against the mining firms is related to myriad factors. Such as a nostalgia for the perceived higher standard of living under the nationalisations of Kaunda, the publicization of the development agreements and public legal issues relating to environmental, tax and labour violations (Fraser & Larmer, 2010; Larmer, 2017; Musonda & Larmer, 2023; Waters, 2019). Some have argued that the viewpoint that the mines were sold cheaply had a tangible effect on the PF, who voiced a desire for a greater, national share of the mineral wealth (Larmer, 2017; Ng'ambi, 2022).

Given that these assets would, after significant investment, go on to generate considerable revenues and increase in value, (for instance MCM at $1.5bn), the manner of the process and value that the mines were sold for affected the public perception around the nature of private firm ownership (Ng'ambi, 2022). Prior to the shift to public ownership between 2019-2020, much of the packages had been consolidated around the operations of Glencore, Vedanta, FQM and Barrick. With further smaller operations consolidated by EMR and CNMC. The subsidiaries of MCM and KCM were the largest mines by copper output prior to the state action (Aurelien et al., 2022).

Since the privatisation of ZCCM, Glencore and Vedanta (who took on Anglo's share in 2004) steadily grew to dominate more of the mining sector. In 2013 KCM mined 132,318 tonnes and MCM mined 111,000 tonnes out of a total of 751,600 tonnes (Sasu, 2022). As such, given their size in combination with their public legal issues, these two firms were the most conspicuous focal points for growing public sentiment for nationalisation.

Much of the political victory of the PF in 2011 revolved around drawing similarities between multinationals and colonialism and harked back to Kaunda's Zambianisation. Michael Sata's acerbic rhetoric towards foreign capital is well documented, however, the PF leader also ushered in further public scrutiny around the role of the MMD in privatising the mines, and the issues of the foreign firms operating in that sector (Fraser, 2017; Mulowa, 2011). In the immediacy the PF sought to restructure taxation, which was stifled by the development agreements in place. In 2015 following the death of Sata, Edgar Lungu took the helm of the PF and won on a platform of further public spending and attempted to increase mineral royalties (Fjelstad, et al., 2016; Sanches, 2016).

What is observable in the run-up to the shift to public ownership, is that the PF represented a vehicle whose political capital was reliant on increasing national infrastructure and delivering pro-poor policies. This created a complication to the path dependency of Zambia's mining sector which under colonialism, nationalism and the MMD had seen mining policy constrained by a combination of external forces and external actors, namely foreign firms, and the IMF. The element of increasing returns to the status quo of the mining sector had been convoluted, by that of a political party whose central force for re-election was reliant on national development, made at the expense of sound economic planning. The idea of expropriation as a method for executing a political short-term goal is well-established in the literature. Expropriation of a notable foreign-owned asset can not only raise funds – which is often the primary reason- but can demonstrate to an electorate prior to an election that the candidate has national interests at the heart of their program (Esberg & Perlman, 2021). The near path break seen by the acquisitions under Lungu were more aggressive and immediate than the one seen under UNIP in 1987.

The feasible explanation for the acquisitions carried out by Lungu was the short-term gains for generating support in an upcoming election, given that the economic consequences for external investment were a considerable risk, along with the lack of technical capacity within the state to manage the mines. The mining unions of which the PF shared warm relations had long called for expropriation and nostalgia for nationalised mining amongst the public has been well-documented, in addition to the general use of resource nationalism by the PF for elections (Fraser, 2008; Ng'ambi, 2018; Larmer, 2021; Musonda & Larmer, 2023). The outcome meant that for the first time in Zambian history it had achieved a path break in the mining sector, as the state finally had control over policy and production. The potential opportunities available were myriad, however the UPND ultimately sought to reverse this path break as quickly as possible. This was demonstrated by the renegotiation with Vedanta, and the acceptance of an offer on MCM from UAE-based International Holdings Company (Banya & Mfula, 2023).

The UPND Reversal

The victor of the election in August 2021, Hakainde Hichilema of the United Party for National Development was elected on a platform of improving the economy. After the electoral victory finding investment for KCM and MCM became a key governmental priority (Kabuswe, 2022). The act of acquiring the two largest mining under the previous administration cannot be understated, it was a fundamental shift in the dynamic between state and firm in Zambia.

However, the path dependence of Zambia's mining sector is exemplified by the rapid reversal of both acquisitions back into private hands. Constrained choices and increasing returns of the original path are starkly clear in the reversal undertaken by Hichilema. The UPND has determined their mineral strategy will almost entirely rest on the bolstering of the private sector. They have set a highly ambitious target of more than tripling the copper output to 3mn tonnes (Cotterill, 2023). And their immediate actions since assuming office in relation to the mines have been proving that Zambia is an investor-friendly environment. This has been done via renegotiation on KCM, a public tender process on MCM and efforts to root out elements of corruption from the previous administration. The choices available to the UPND were constrained. Debt has continued to grow, and domestic human resources remain unfit to solely manage the mines, additionally, there are limited avenues for raising capital to invest in them domestically. These factors have emerged out of the separate development of the mining sector from the state and consequently constrained the decision-making of the UPND.

Hichilema as of 2021 was placed in a novel position as a Zambian leader, his administration would be the first to hold the majority of mining ownership under the state, with limited interference from external bodies since Kenneth Kaunda in 1987. However, given the UPND's support for external investment and the prioritisation of reversing the acquisitions of KCM and MCM, foreign firm dominance will remain. The position of reversal is consistent with the policy aims of the UPND, that of economic growth and liberalisation. Even though the policy actor in this instance the UPND is aligned with the path dependence of the mining sector, to view the position as one of free will rather than the optimal outcome from constrained choices neglects the historic development of the sector. Even if the PF had won the election, reversal would have occurred owing to the equilibrium of the path. That of foreign firm control over mineral assets owing to the significant constraints on any nationalised format. Arguably, the policy position held by the UPND is one that is rooted in the reality of the path dependence of the sector.

Findings

Power and mining are interconnected in Zambia. The power of the Executive was limited across multiple historic points from the colonial period to the present day. The separation of mines and state left power in the hands of those who controlled mineral production. Consequentially, the path dependency of the sector has further entrenched issues from the colonial period to the present day. The first structural issue relates to the easiest to reach ores

being mined intensively, in the modern day Zambia requires highly complex and very deep drilling to access ores. The technology of which to do these projects are solely with large external firms and not domestic ones owing to the legacy of compounded limited technical and human resources at the point of independence. The negative outcomes of foreign mines have also persisted from colonialism to the modern day, that of transfer mispricing and environmental damage.

The difficulty of legislating against the mines has been apparent since the British Colonial Office failed to pass legislation against BSAC during colonialism. The Colonial Office demonstrated a general disincentive to engage with the legislative process whilst the mineral rights remained with BSAC (Colonial Office, 1946). This issue of failed legislation and general disincentive to commit political capital to legislation persisted. Kaunda failed to legislate against the mining firms and neither could the successive MMD and PF governments. Legislation proved difficult, whereas nationalisation on two attempts proved impossible.

There were specific issues that passed through these periods, constraining future governments. BSAC and the Kaunda Administration differed as the bearers of mineral royalties, the ability of the party who sets the rates to have control over *how* the rates are set is crucial to determine who held the upper hand. BSAC through their mineral rights were able to profit off the value of copper extracted, whereas the Kaunda Administration could only tax the profits (Ndulo, 1986). This discrepancy in the ability to set rates is even more conspicuous in the context of the development agreements signed by the MMD in the privatisation period. These agreements lowered the royalties collected to 0.6%, with corporate tax capped at 25%. Beyond this were the favourable taxation provisions underscored by the stabilisation clauses, which included the ability to carry forward losses (KCM, 2000; MCM, 2000). What we can determine from the interventionist approach of the IMF, is that they set the rates, rather than the Zambian administration. As such, the bargaining occurred between the mining firms and the IMF rather than the Zambian Executive. This facet demonstrates that power in Zambia relates to who holds the mines and also who sets the rules for the mines. What we can determine from the nationalisation and privatisation periods is that the Zambian Executive, both UNIP and the MMD were effectively removed from the equation. Throughout Zambia's history both the colonial and privatisation periods were marked by limited domestic control of the mines by the state.

Contrary to much of the perception around the period of independence in Zambia, it did not equate to much domestic power for Kaunda's administration. The colonial period left Zambia indebted and with a series of mines that had not been invested in, foreign mining firms

retained control of the day-to-day operations until 1982, by this point, when mines reverted to Zambian control, the state was plagued by economic crisis which handed domestic policy over to the IMF (Ushewokonze, 1974; Ndulo, 1986). Nationalisation is blamed for many of the economic ills of Zambia; however, this viewpoint negates the role of colonialism in creating both a debt cycle and uninvested mines. Mines operated with scant change up until 1982 and by then the IMF had effectively commandeered the state's domestic economic policy. The very little nationalisation had been able to achieve to under the complex circumstances was a functioning state program, which in hindsight was a considerable achievement. The mines under Kaunda operated a cradle-to-grave policy in caring for workers, which explains what Larmer (2017) notes as the strength of nostalgia in Zambia's Copperbelt for the nationalisation period. Beyond, this Kaunda was able to implement a successful education program which has resulted in some senior roles within privatised mining occupied by Zambian nationals (Besa & Banda, 2021). Much of the criticisms of the period are legitimate, however, many are also rooted in colonial and or neo-colonial perspectives. By interrogating where power truly lay in these periods, much of the blame for any economic failings within Zambian mining rests in the lack of development in colonialism and the role of the IMF in restructuring mining during a low price point and not forecasting the global role copper would play in the future.

The privatisation period that followed not only entrenched much of the colonial legacy that plagued Kaunda's period but led to further entrenchment, which meant Zambia could not capitalise on the copper boom nor could it start to develop a domestic led- mining sector. The combination of external forces controlling mineral production, an undiversified economy and spiralling debt to service constrained the available options considerably (Du Plessis, 2005).

Within the privatisation period it is clear that the government were constrained in their choices when opening up the economy. A combination of a failing economy and a hurried effort to open it led to decisions that further entrenched the separation of mining from the state. The decision to utilise development agreements was the result of a constrained decision. The government did not have domestic actors with the required capital or technical capacity to take over the assets. The mines even as production waned, were still the chief source of national revenue and the options for selecting new investors was limited. Instead, Anglo were able to buy in early with Glencore and utilise the desperate position of the government to implement one-sided development agreements with stability periods of 15 to 20 years. These agreements further entrenched the sector and constrained the choices of the government further. The constraints at this point mirror the constraints on legislation seen by the Colonial Office while BSAC retained the mineral rights.

The path carved out by the juncture separating mines from the state has constrained available options in every period analysed and maintained negative practices around the environment and tax. Path dependency demonstrates how Kaunda's Economic Plan of 1987 and the acquisitions of KCM and MCM represented brief path breaks or at least attempted ones. The relationship between the state and firm in the instance of MCM and KCM, also generates a deeper understanding of the consequences of the early colonial relationship between Zambia and large-scale mining. This rupture and its subsequent reversal by the UPND further determine the limited decisions at play for the Zambian economy and political actors in general.

The decision-making capacity in the long-term is always constrained in the government by the factors of historic debt, limited technical capacity and reliance on copper for domestic revenue, which always places the government's optimal choice as relinquishing the assets to the private sector. This optimal choice supersedes the issues of environmental damage, tax evasion and eroding labour rights because the outcome of nationalised control – the only feasible method to regulate the industry of these issues- is impossible owing to the antecedent conditions laid out by the development of the sector for private firms outside of the interests of the state.

Chapter 2
The International Legal and Economic Context

The following chapter outlines the economic and legal theory used to analyse the path dependence of the Zambian mining sector in the following chapters of this research. As discussed in the previous chapter the split between the mining sector and the state in 1924 created a parallel development, whereby the mining sector and the state developed independently. Owing to the reliance of the state on the mineral sector for public revenue the focus for the state remains on the mining sector, rather than diversifying the economy away from it. As the state is not in control of the mining sector it is constrained in its options when dealing with the sector, specifically in relation to legislation. As the mining sector from the time of BSAC was designed purely to be an attractive investment for external investors rather than a sector necessary for the economic security of an independent state, the manner in which the economic and legal landscape developed around this interplay between state and firm has disincentivised economic diversification and the development of international investment law that could aid diversification. This is demonstrated by the fact that Zambia has drafted 33 Bilateral Investment Treaties (BITs) yet only 10 were ratified. This runs counter to prevailing norms that investment is encouraged by the adoption of legal instruments that protect investors. This contrast relates to mining being the primary economic driver, where investment has continued to flow into Zambia only around this sector regardless of BIT adoption.

In addition to disincentive, the constraint on options available during the privatisation period in 1991 meant that the Zambian state entered into one-side development agreements. These asymmetric agreements provided considerable protection for Konkola Copper Mines (KCM) and Mopani Copper Mines (MCM) for 15-20 years and as a consequence gave the firms the ability to utilise the domestic legal space for disputes (KCM, 2000; MCM, 2004). The interplay between state and firm in Zambia in relation to mining has affected its engagement with the international legal sphere. Instead mining firms have been able to utilise their weight to lean on weak domestic institutions and engage in one-sided contractual arrangements. This will be fully outlined in Chapter 3.

The prevailing view is that states in the Global South require institutional strength, legal regimes, and foreign direct investment (FDI) to achieve growth and development (Sachs & Sauvant, 2009; Collier, 2009; Adam et al. 2014; Collins, 2023). The following chapter outlines

specific perspectives on the structural issues associated with Africa and the Global South generally. In addition to the theory of development through growth and the specific legal instruments analysed in the context of Zambia in Chapter 3. This includes a broad overview of development agreements, the stabilisation clauses within the agreements and BITs.

2.1) General Constraints in Africa and the Economic and Legal Requisites for Development

In the context of Africa and the wider Global South much focus for the overall development of these states has related to institutional strength and economic growth from increased foreign direct investment (Tirole, 1996; Acemoglu et al., 2002; Collier, 2006; Sachs & Sauvant, 2009). Institutional strength in this context relates to the effective separation of powers, democratic legitimacy, and legal certainty for investment. These facets play a central role in increasing foreign direct investment. FDI coupled with enough institutional strength to prevent rent seeking and corruption leads to state investment within public services (Collier, 2010). Generally speaking there has been a wholesale interrogation into the effectiveness of aid for the Global South and instead a clearer focus on good governance and improving market efficiencies (Easterley, 2006)

Paul Collier (2006, p. 2) argued that Africa as a whole had been subject to a further disadvantage, that of divergence at a point in the time when the world was undergoing international convergence, during the 1980s. He relates this to four specific "*policy syndromes*"; that of conflict, fractionalised society, primary commodities, and corruption. The 1980s were a crucial decade for global economic integration and international cooperation and the following decade saw a formalisation of this with the expansion of bilateral investment treaties and international investment law (Kurtz, 2012). Africa was beset by the "*syndromes*" described by Collier (2006, passim) in the 1980s, as such FDI was not forthcoming. By the following decade many African states tried to catch-up by liberalising their economies and improving their institutions (Bond & Dor, 2003; Napier, 2017). Zambia is an example of state that tried to play catch-up and liberalise rapidly through the 1990s but also in the spirit of Collier (2006) an example of a state beset with the primary commodity syndrome, in this instance copper.

The flaws that are met from the primary commodity syndrome, are in accordance with this research the factor that retains the state in a cycle of mineral dependency and in turn, path dependence within the mineral sector. The first and most obvious flaw is that the state is

susceptible to market shock such as copper price drops. A facet which has constrained multiple Zambian administrations. Most notably Kaunda in 1975 when he turned to the IMF, but also during the privatisation process which saw assets sold off cheaply at a time poor for copper prices (Fraser & Lungu, 2007). Diversification becomes more difficult as primary commodities affect real exchange rates, as such other exports are less profitable (Corden, 1984; Collier, 2006). Collier & Hoeffler (2004) quantified this claim by measuring World Bank ratings against resource dependent states, these states had worse ratings. This economic issue is compounded by the fact that mineral receipts also limit economic policy considerably. From a path-dependent perspective mineral dependency or resource dependency limits the incentive for policy decisions that do not relate to the primary commodity, thus creating a self-reinforcing policy directive that continues to entrench mineral dependency. Collier (2006) also notes that the 1980s was also the period that Asia slowly established itself as a manufacturing base for the developed economies of Europe and North America receiving considerable FDI inflows. Africa in effect missed the opportunity to utilise its cheap and relatively abundant labour source. Consequently industrial agglomerations developed over time in Asia, making it an attractive space for manufacturing while also creating its own large domestic enterprises within the agglomeration (Hamaguchi, 2008). As a consequence now Africa's labour is not much cheaper than Asia's but without the benefit of agglomeration. As such manufacturing, which is a route out of resource dependence or the primary commodity syndrome is removed along with its potential FDI (Collier, 2006).

FDI is viewed as crucial for the development of states in the Global South (Enderwick, 2005). This is backed by comparative success stories such as Mauritius who have been able to build institutional strength and increase FDI (Subramian, 2013). However, FDI in the context of resource dependent states is much more complex (Auty, 1991; 2008). FDI in the case of Zambia flows freely but only into the mineral assets not into diversifying the economy (Bank of Zambia, 2022). Subsequently, FDI plays a role in the path dependence of the mineral sector and its development outside of the state. FDI was needed at the time of privatisation owing to the dire economic position of the state, as a consequence the state engaged in a raft of unbeneficial reforms and development agreements to receive it. Once received the firms were able to maximise profits at the expense of the environment and the tax system owing to the agreements they were constrained into entering. As the sector gained size throughout this period it became even more difficult to manage, as demonstrated by the legal issues outlined in Chapter 3.

Zambia would theoretically benefit from economic diversification and FDI into other sectors, as this would aid the economic growth of the state whilst curbing a path-dependent mineral sector that is out of the regulatory reach of the state. This could have been achieved in the privatisation period, however, the focus was drawn to mining (Rakner, 2003). As it stands Zambia has done little to develop its international legal regime for investment. Instead in the privatisation period it relied on bilateral relationships with a handful of mining firms underpinned by development agreements, as opposed to attracting FDI for other sectors (Fraser & Lungu, 2007; Adam et al., 2014). This reality is a consequence of the path dependence of the mineral sector, whereby limited incentive is placed on developing the international legal regimes for both state and mining firms.

Contextualising Differing Periods for International Investment Law

As Collier (2006) noted much of Africa missed the period of international convergence throughout the 1980s. At this point many states were authoritarian with statist economies of which Zambia under Kenneth Kaunda was an example. International cooperation both economically and legally is ever evolving. The 1960's saw the emergence of the first BIT between Germany and Pakistan and the formation of ICSID and UNCITRAL. The 1980s with the advance of neoliberalism and the dawn of the Cold War sparked a boom decade for internationalised trade and the pressing need for a clearer legal framework. Up until this point in time investment between a firm from one state and a differing host state was less governed by treaties but instead by diplomatic pressure (Collins, 2023). BITs were the legal instrument that gave foreign investors protections. Beforehand they were reliant on customary international law related to minimum standards of treatment. Procedurally this was flawed, as the investor had to settle in the host state or via diplomatic protection, whereby the home state of the investor would take up a direct claim against the host state of the investment. The advent of BITs did not solely grant investors concrete protections from expropriation but also offered a procedural change, in the sense that they could initiate arbitral proceedings against the host state without the involvement of their home state (Bosman & Kimani, 2018; Collins, 2023). Multiple states in the Global South attempted to nationalise foreign owned assets between the 1980s and 1990s (Salacuse, 2007; Wellhausen, 2015).

The 1990s saw the formalisation of international cooperation marked by the establishment of the World Trade Organisation (WTO) in 1995 and a significant growth in the adoption of BITs (Salacuse, 2007; Kurtz, 2012).The world of trade and investment differ

greatly. Trade is reasonably simple owing to the WTO, which has almost the totality of states in its membership and a clear system for settlement of disputes. FDI on the other hand is governed by a vast array of BITs and differing arbitration bodies such as ICSID and UNCITRAL (Collins, 2009). Investor-state dispute resolution evolved considerably in this period, moving from what can be deemed as a private and opaque mechanism to one that is high-profile, increasingly more public and with the ability to settle complex claims. International investment in this period became governed via these multiple treaties and arbitration mechanisms (Collins, 2023).

Prior to the 2008 financial collapse BITs between developing states reached over 600 and in total there were over 3000 worldwide. Global FDI inflows at this point reached $ 1.8bn (UN, 2008; Collins, 2009). The financial collapse saw a backlash from the Global South against many of the aspects of the legal regimes and disputes arose. Most notably South Africa and Brazil withdrew from the use of BITs (Sornarajah, 2017). The Government of the Republic of Tanzania (2010) amended the Public Private Partnership Act to remove international investment arbitration. Zambia also amended the Minerals and Mines Act (2008) to abolish the provisions of development agreements. Additionally, high profile ICSID cases occurred in this period involving Benin, Egypt, Equatorial Guinea, Libya, Madagascar, Mauritius, Sudan, and South Sudan (Ofodile, 2020). African states have rightly expressed criticism at the process at which disputes are settled under ICSID, UNCITRAL and the international legal system at large. Arguing that the system favours the investor over the state (Okafor, 2006; Maklanron, 2016; Banai, 2017; Sornarajah, 2017; Qumba, 2021).

The following period then led to a renewed focus on sustainability principles owing to the infringement of sovereign environmental rights by existing investor legal regimes. Questions around the definitive extent of expropriation arose, especially if it constituted a necessary legislative change in light of growing global calls for environmental change (Collins, 2003).

These specific time periods outlined reflect in the Zambian experience. The 1980s was the last decade of authoritarian and isolationist rule under Kaunda (Limpitlaw, 2011). The 1990s was the privatisation period in Zambia which much like the rest of the world saw a flurry of BIT activity, large inflows of FDI into mining and the establishment of development agreements (Rakner, 2003). The post-financial crisis era is marked by increased opprobrium against the mining firms for environmental, taxation and labour infringements and violations, much in line with the trends seen globally. However, a key difference between Zambia and for instance South Africa, was that while South Africa could remove BITs and place pressure on external firms the Zambian state was locked into one-sided development agreements. These

agreements insulated the firms throughout this period from domestic legal repercussions and the environmental and tax violations never reached the international legal sphere.

Expropriation, Corruption and Development Agreements

Investor-state contracts or development agreements are a contract between a host nation and a state. These contracts provide a method for foreign firms to hold a set of guarantees when engaging in economic ventures in other states. The contract itself outlines the relationship between an investor and a host state. These contracts and agreements are governed by a framework comprised of customary international law, the BITs and treaties in place, the contract itself and previous arbitration decisions (Dolzer et al., 2022; Collins, 2023). Expropriation is the central risk for a foreign investor and as a consequence are specifically protected against in the contract. This risk is especially heightened in states with weaker institutions (Sornarajah, 2017; Dolzer et al., 2022).

Expropriation can often be characterised as creeping or indirect, in which the host state slowly encroaches on the rights of a foreign investor, in a manner which negatively affects the value of the investment (Dolzer & Schreuer, 2012). The line between expropriation and necessary legislative change is a blurred one, on the one hand the agreements provide protection on any form of encroachment and as a consequence this affects the ability of the host state to engage in legislation (Collins, 2023). For instance environmental legislation could place a new requirement on an already operational project that affects profits. This could be classified as creeping expropriation even if the legislative change is necessary for the environmental well-being of the state. This conflict is particularly commonplace in relation to extractive industries and new environmental legislation. Some agreements are robust enough to insulate firms from any form of legislative change by the host state. This reality has greatly disincentivised the policy-making capacity of states in the Global South (Shemberg, 2008; Oshionebo, 2010).

Expropriation is a particularly common place issue for mining projects. Duncan (2006) provides three definitions of expropriation in the mining sector. (1) the seizing of equipment, reserves, or mining rights, (2) compelling the sale to the government or domestic nationals and (3) raising taxes (specifically on company profits). These definitions can be linked with the Zambian mining cases of KCM and MCM in 2020. KCM constituted a direct expropriation as the subsidiary was unilaterally liquidated against the express wishes of the parent company Vedanta who held the majority share. At which point the legal title of KCM was transferred in

full to the state-owned ZCCM-IH (Ng'ambi, 2022). The case of MCM was more complex. Actions undertaken by the government which are discussed in the following chapter demonstrate that of a compelled sale through a series of threats and legal actions. However, it was eventually sold at fair market value by Glencore to ZCCM-IH. The MCM case is slightly less clear as a consequence of these competing factors.

Mining, as a dynamic, is often between an external or foreign firm and a host state. It is underpinned by a contractual relationship, between a multinational firm from the Global North and a host nation from the Global South. There are few firms within the Global South capable of undertaking large-scale mining projects except for a few nationalised firms and private South African firms. Foreign firms are often accused of flouting domestic law, endangering host citizens and the environment through malpractice (Dougherty, 2015; Williams & Dupuy, 2016; Rauter, 2019). Whereas Global South host states are often risky environments for investment owing to opportunism, rent seeking behaviour, and resource nationalism (Daniel & Sunley, 2010; Venables, 2016; Ng'ambi, 2018). Corruption affects many aspects of the dynamic and there have been empirical studies into issues of corruption in the Global South. Corruption is not only found within the accrued revenue in the sector but also during the contracting and licencing process (Petermann et al., 2007). Perceptions may skew towards the view that Global South governments are the actors that are engaged in corruption and discourage transparency (Kolstad & Soreide, 2009), however, this perspective dismisses the power imbalance between firm and state. Historic examples of firms engaging in corruption to win industrial contracts are rife, such as that of Mittal Industries Liberia, in addition to petroleum contracts won on Lake Congo (Frank, 2019). Firms have taken advantage of an imbalanced dynamic to negotiate favourable contracts, which are then entrenched through stabilisation clauses for the duration of stability periods.

2.2) Stabilisation Clauses

Stabilisation clauses are a contentious aspect of investor-state contracts. The purpose of the clause is to protect investments from legislative change that could harm the profitability of a venture (Cameron, 2006; Sornarajah, 2017; Dolzer et al., 2022). These clauses are furnished with periods of time until they elapse, known as stability periods (Oshionebo, 2010). These clauses constrict the introduction of legislation that could be detrimental to the project. These clauses are generally categorised as intangibility, freezing, equilibrium or hybrid clauses. (Oyewunmi, 2011). Freezing prevents the state legislating in a way that affects the project.

Equilibrium clauses do not stop changes of law, but instead finds ways to make the investment immune to it, this can be either through direct compensation or through immunity to policy measures (Cameron & Kellas, 2008; Oyewunmi, 2011). Stabilisation clauses limit subsequent governments renegotiation capacity and inhibit the development of domestic laws. Developing countries have an evolving legal system, which may be stunted by multiple large-scale contracts in differing sectors constricting the development of a variety of domestic laws (Oshionebo, 2018). For instance, key tenets of stabilisation clauses inserted into one agreement may be replicated across all. If this is in an integral sector, such as copper mining in Zambia, most of the intended legislation should be created to enhance or regulate that key sector. Conversely, stabilisation clauses protect the central target from potential legislation, for instance pertaining to the environment which limits the incentive to develop policy around benefitting the environment, as the intended recipient would be immune to the effects. There is little incentive in using political capital to pass legislation that will not affect the intended target and subsequently key areas of legislation remain undeveloped (Singh, 2015; Oshionebo, 2018).

Entrenchment of stability periods is another aspect worth further consideration, especially within the context of corporate issues around labour, the environment and tax. Flexibility in contracts which allow renegotiation, arguably play a role in the long-term feasibility of an investor-state dynamic. Fluidity occurs as states develop and evolve during the stability period, the exclusion of key economic actors from the effects of fiscal and regulatory regime changes is unlikely to sit well with democratic shifts between political parties with competing economic and legislative agendas (Sauvant & Wells, 2021).

Within the wider context of international law, investor-state agreements are full of complexities that evoke competing viewpoints on their wider validity. Proponents of stability clauses and periods often point to their necessity on the basis that they give developing states access to foreign capital (Cameron, 2014). Additionally, many external constraints are imposed by all international treaties and international political groupings, in essence the ceding of sovereignty in return for a trade or diplomatic benefit, stabilisation clauses can be presented as the trading of policy options for capital and technological advancement (Van Harten, 2007) . This poses the question of whether representatives of the state could cede sovereignty to a multinational firm but more explicitly whether sovereignty can be ceded to an investment contract. A contract is fundamentally different to a treaty, as the contract is underpinned firstly by domestic law. Proponents of the theory of internationalisation of contracts, perceive stability clauses outside of the domestic sphere. This is arguably not possible given that the contracts

are subject primarily to domestic law of the host state, even if dispute provisions are international (Sornarajah, 2017). In SPP v. Egypt (1983) the ruling took the view that a state is not party to a contract merely because officials of the state signed it, which reinforces the view that a state official cannot cede sovereignty over the basis of a contract and impede its legislative powers in the process. This is the contention at the heart of the legitimacy of stabilisation clauses, that of whether the state can cede these rights over the basis of an investment contract (Sornarajah, 2017). However, within the framework of juridical sovereignty, a state could bind itself to a contract to secure foreign capital and in turn constrain itself (Mclean, 2003; Van Harten, 2007). De Jure, stabilisation clauses are valid and have been used in multiple cases of international arbitration. The initial use of a stabilisation clause, that of a perpetual freeze in policy is now unlikely to be upheld given the variety of human rights and environmental frameworks within international law, in addition to sovereignty over natural resource (Cameron, 2014; Sornarajah, 2017). However, a study by Shemberg (2008) demonstrated the prevalence of freezing clauses in investor-state contracts. Although some academic perspectives argue they would be unlikely to be upheld it does not undermine the deterrence value of its use against smaller, weaker states.

The clauses used fall under specific timeframes, offer compensation on equilibrium shifts and remain in use in investor-state contracts (Cameron, 2020). The viewpoint of time periods validating the clauses is now long held since the arbitration of Aminoil v. Kuwait (1982) accepted the stability clause, but only on the basis that it offered a specific and reasonable stability period. The difficulty remains in defining an appropriate amount of time (Faruque, 2006).

Cases have shown that stabilisation clauses are not always a significant protection from the broader view of indirect or creeping expropriation (Qurashi, 2005). In some instances the scope of expropriation is not wide enough such as Occidental Exploration Co v Republic of Ecuador (2004). In this case the refusal to refund VAT refunds did not constitute an expropriatiory action as described by the firm. Or the arbitration body deems the firm to not have conducted appropriate due diligence as seen in the ICSID case of MTD Equity v Republic of Chile (2005), which ruled in Chile's favour.

There are instances where the stabilisation clause is the key determinant of the arbitration award even if it has not actively stopped an expropriation. This was also seen in Agip v Congo (1982), where Congo sought to nationalise their oil and the case was ruled in Agip's favour on the basis of the stability clause. Congo still nationalised their oil, but Agip were awarded damages. A more recent example is Duke Energy International Investments No.1 Ltd v Peru

(ICSID, 2008) upheld the use of a stabilisation clause, as Frank (2014; 256) notes "*According to the tribunal, the inclusion of a stabilisation clause in the agreement also means that a stable interpretation or application of the law, which was in at the time the agreement was signed, will not be changed to the detriment of the investor. Further, the stabilised law may not be interpreted or applied in a patently unreasonable or arbitrary manner"*. At its core there are significant questions around the consistency, applicability and limits of stabilisation clauses (Sornorajah, 2017).

Fair and Equitable Standard and Stabilisation Clauses: Cases from the Energy Charter Treaty

Stabilisation clauses are intertwined with the legitimate expectations of an investor as an investor making a contractual agreement with a host state can feasibly expect the investment to remain unchanged by certain regulatory actions protected under the clause (Cameron, 2020). The fair and equitable treatment (FET) standard differs from stabilisation clauses but both are aspects that protect international investments (UNCTAD, 2012). FET is a guarantee that investors will be treated equitably in accordance with international law and the legitimate expectations of investors are part of this standard (Vandevelde, 2010). The FET standard is found in the vast majority of Bilateral Investment Treaties (BITs) and international investment agreements, including the Energy Charter Treaty (ECT). It is also frequently cited in investor-state disputes (Dolzer, 2005; Chriki, 2018; Dumberry, 2021).

The standard is a complex element within the context of regulatory stability, it does to an extent guarantee some regulatory stability, but not in perpetuity and it is not absolute. The stabilisation clause is the aspect that theoretically guarantees a static regulatory environment (Wong & Ali, 2022). The FET standard has been criticised for its vagueness (Ortino, 2018; Amin, 2020). Whether the standard constitutes customary international law remains a topic of discussion (Dolzer, 2005; Amin, 2020). Arguments supporting this view relates to the fact that it is found in the vast majority of Bilateral Investment Treaties and investment agreements, and it has also been applied as customary law in arbitral tribunals (Walde, 2004; Dumberry, 2021).

Regardless of how FET is situated within international law, it is related to stabilisation clauses. The cases of TECMED v. USA (2003), Occidental v. Ecuador (2004), Sempra v. Argentina (2007) determined "*that the notion of the stability of the legal regime under which the foreign investor should operate is a part of fair and equitable treatment of investment*" (Polkinghorne, 2015, p. 4). Legitimate expectations are part of FET which is connected to the contractual relationship between investor and state and any stabilisation clause that underpins

it (Maniruzzaman, 2008; Polkingholme, 2015). Consequently, the recognition of stabilisation clauses are connected to FET owing to the legitimate expectations of investors for regulatory stability on the basis of the contractual agreement's stabilisation clause. FET may guarantee some regulatory stability but it is a stabilisation clause that theoretically guarantees the immunity of an investment from regulatory change (Wong & Ali, 2022). This demarcation has been highlighted through many of the investor state disputes under the Energy Charter Treaty (ECT).

Disputes under the ECT have provided interesting legal examples of the potential strength of stabilisation clauses and the limitations of the FET standard in relation to regulatory stability. The treaty was ratified in 1998 and its roots lay in the early efforts of the EU to facilitate post-cold war investment from Western Europe to the resource rich and newly independent Eastern Europe (Konopylanik & Walde, 2006). The Treaty is multilateral and binding and its purpose was to establish "*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*" (ECT, 2016, p. 44). The treaty also stipulates that investments will hold "*the most constant protection and security*" (ECT, 2016, p. 54).

A key aspect of the ECT (2016) relates to its promotion and protection of investment in the energy sector for foreign investment. As time has progressed this has become problematic for two contrasting reasons. On one hand it granted protection to fossil fuel investments, leaving states open to potentially paying compensation claims to investors for pursuing policies conducive with the Paris Agreement obligations: an aspect that leads to regulatory chill in environmental policy (Tienhaara, 2018; Tienhaara & Cotula, 2020; Morgandi & Bartels, 2023). On the other hand, conversely, where states introduced generous incentives for renewable projects to encourage investment and then sought to roll them back, multiple disputes emerged (Tienhaara & Downie, 2018). Consequently, Russia withdrew in 2009, Italy exited the treaty in 2016, and Australia in 2021. Numerous European states signalled their intent to leave shortly after and the European Commission determined that a co-ordinated withdrawal was necessary (Morgandi & Bartels, 2023). The United Kingdom has also confirmed its withdrawal from the treaty in 2025 (ECT, 2024).

Under the ECT there have been a significant number of investment arbitration disputes. From 1257 investor state disputes as of 2023, the ECT has had 158 come from it (Daszko, 2023; UNCTAD, 2023). A key issue within these disputes relates to the breach of the FET standard on the basis of shifting regulatory landscapes by host states affecting foreign

investments. The principles of FET as discussed can lead to the argument that certain regulatory changes run counter to the legitimate expectations of the investor (Ortino, 2018).

Within ECT investor-state disputes it has been observable that the absence of stabilisation clauses has had an effect on the outcome of tribunals, and that tribunals have noted that reliance on FET is not a replacement for stabilisation clauses in the context of absolute regulatory stability (Cameron, 2020). For instance in the dispute AES v. Hungary (2010) the government was alleged to have failed to comply with elements of the sales agreement of the national energy firms. The claimants approach was to demonstrate that Hungary failed to give the investor fair and equitable treatment when it reintroduced administrative pricing two years after its abolition. The tribunal found that there could not be legitimate expectations that the regulatory landscape would remain static. It underscored that a state's duty to promote stability and protection for investment was not the same as a stabilisation clause. The tribunal argued that theoretically a stabilisation clause would have been able to challenge the reintroduction of administrative pricing (Gehne & Brillo, 2017; Cameron, 2020).

The structure of the ECT left states exposed to significant legal claims in relation to regulatory change. For instance when Spain sought to attract significant investment into the renewables market and then reneged on the incentives a few years later (Tienhaara & Downie, 2018). Legislation was passed that removed renewable energy incentives and placed a 7% tax in power generators, resulting in a significant number of claims. A non-exhaustive list includes; Charanne v. Spain (2012) and FREIF v. Spain (2016) which were ruled in favour of the state, while Eiser v. Spain (2017), and Sevilla Beheer v. Spain (2016) were ruled in favour of the investor. The claimants in these disputes focussed on the FET standard in the context of undue regulatory change. The legislation that removed the incentives, RD 661/2007, was argued to have held a stabilisation clause in Article 44(3) by some of the claimants.

The tribunal for Charanne v. Spain (2012) took the view that Article 44(3) of RD 661/2007 did not constitute a stabilisation clause. In FREIFF v Spain (2016), the tribunal reached the same conclusion. In Eiser v. Spain (2017) the claimant also aimed to argue that the legislation constituted a form of stabilisation clause. The view that the legislation constituted a long-term guarantee of regulatory stability was rejected once again. The tribunal for Eiser v. Spain (2017) cited Micula v. Romania (2013, p. 181) " *The fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability."* Once more, the stabilisation clause was posited as the feasible mechanism for maintaining the regulatory landscape not FET.

In Sevilla Beheer v. Spain (2016) the lack of an express stabilisation guarantee was also noted. Prof. Cameron (2022) in his partial dissenting position argued that the legislation observed in the case did hold guarantees consistent with stabilisation clauses. Furthermore, he opined on the view that the FET standard within the ECT did not guarantee regulatory stability, "*The fact that the wording implies a looser arrangement than the notion of 'stabilization' often found in investor-state contracts does not detract from this conclusion*" (Cameron, 2022, p. 4).

Many disputes were ruled in favour of the investor in Spain's renewables saga (Tienhaara & Downie, 2018). However, what is clear throughout is the absence of explicit stabilisation clauses remained a consistent theme. The argument that the legislation constituted a stabilisation clause or that the FET standard within the ECT meant investors had legitimate expectations of zero regulatory change was deemed unfeasible. Much of the tribunals stated that only a stabilisation clause in an investor-state agreement could guarantee regulatory stability.

The ECT cases demonstrate that stabilisation clauses are *perceived* to be the specific guarantee for regulatory stability. Which links well with what occurred in the Zambian cases, as the perception that the stabilisation clauses guaranteed stability constrained the government's actions, this aspect is elaborated in detail in Chapter 3.

The absence of stabilisation clauses in the ECT cases demonstrate the strength of the host state in attracting investment without the precautionary measure of a stabilisation clause, this runs counter to the examples found in Zambia where stabilisation clauses have been a pre-requisite for attracting FDI.

As stabilisation clauses are utilised primarily on the basis of protecting investment in a riskier state it is often considered to be one of the primary tools to attract FDI. Investors seek to mitigate risk through stabilisation clauses, which guarantee that the government will not change the fiscal or regulatory regimes (Qurashi, 2005). Studies have sought to repudiate the position that FDI is driven by clauses and perceived stability (Oshionebo, 2020). This is also further underscored by the consistent FDI to highly turbulent but mineral rich states such as the Democratic Republic of Congo (UNCTAD, 2023). Stabilisation clauses became widespread from the 1980s across developing resource dependent states owing to pressure from World Bank and IMF reforms (Frank, 2014). The imbalanced clauses are more prevalent between firms from the Global North with host states in the Global South and remain highly contentious owing to the perceived strength they give investors over host states in the Global South (Sornarajah, 2017).

Stabilisation Clauses and Mining

Stabilisation clauses are commonplace within investor-state mining contracts or development agreements in Africa. Alongside Zambia also Cameroon, Ghana, Guinea, Liberia, Malawi, Mali, Mauritania, Niger, Senegal, and Sierra Leone hold far reaching stabilisation clauses with extensive stability periods in their investor-state mining contracts (Bosch & Gupta, 2022).

The protective purpose of a stabilisation clause within mining is threefold. Firstly, for the large, up-front costs associated with mineral ventures. Mining has high sunk costs which means a large amount of capital needs to be used upfront, the clause allows the investor to utilise this initial capital without fear of reprisal. Secondly the considerable time needed for profit to be realised. This follows on from the high sunk costs as margins within mining tend to be thin during the early stages of exploitation. Especially if they must develop new shafts or if their refinement plants are not operational. Once these aspects are complete profit becomes significant (Oshionebo, 2010). Thirdly a safeguard against potential disruption from policy initiatives during this time period, mining affects multiple aspects of society and relies on a functional export system for profit. Any legislation that impedes the agreements made on labour, exporting, the environment and taxation would have a significant impact on project success (Oshionebo, 2010; 2018) . These clauses, however logical they may seem given the particularly long shelf life of mineral projects in comparison to the democratic cycle of governmental change, can be viewed from another perspective. Whereby, multinationals seek to straitjacket states via contract to safeguard investment (Oshionebo, 2010).

Stabilisation clauses in contracts demonstrate the asymmetry of power between states and firms, as they are able to not only limit legislation but disincentivise it. The disincentive is particularly apparent in resource dependent states whereby legislating against the key sector such as petroleum or minerals becomes futile owing to the majority of firms being protected by stabilisation clauses (Oshionebo, 2020). Either the firms are immune from the legislative change or a less developed state has to pay compensation to enact the legislation fully (Cameron, 2014).

In the Zambian context the state was disincentivised to legislate, as the intended targets of mining firms were immune to any legislative change owing to the stabilisation clauses. Stabilisation clauses held a significant hold over the state’s ability to legislate against mining firms for the duration of the stability periods between 2000 and 2020. Most notably the

Minerals and Mines Act (2008) which abolished existing development agreements with mining firms, however, the stabilisation clauses ironically protected the firms from the legislation (Mulenga, 2017). In addition to this, the clauses allowed firms to withstand specific domestic claims against them related to tax and the environment such as Nyasulu and Ors v. Konkola Copper Mines Plc (2011), Geoffrey Eliam Miti v. Mopani Copper Mines Plc (2014) and Mopani Copper Mines Plc v. Zambia, 2020. As a consequence of this dynamic, that of the state's most important sector's preference for bilateral negotiation and domestic courts little was done by the Zambian state in developing its international legal regime for FDI. This is best exemplified by the number of Zambian BITs drafted (33) against the amount actually ratified (10).

2.3) Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) are a legal relationship in which the terms and conditions for investment from one country into another jurisdiction are defined. They have played a significant role in the stability and consistency of the framework for international legal disputes related to investments (Gazzini, 2012; Dolzer & Stevens, 2015). In the simplest terms, BITs are treaties as they are bilateral state agreements that are governed by international law (Gazzini, 2012). BITs hold legal authority from multiple sources. The primary source is the text of the treaty itself. In addition to this customary international law, the practices of states in relation to the interpretation of BITS and the actual decisions of arbitration tribunals (Dolzer et al., 2022). In some BITs there is explicit reference to multilateral bodies such as ICSID, which would affect interpretations of the treaty itself (Gazzini, 2012). The purpose of the treaty is first and foremost that of investor protection with the goal of investment promotion. Consequently, the rules of the BIT are largely concerned with investor protection on the basis of compliance with domestic and international law (Vandevelde, 1988). The key incentive for BITs by the host state is one of incentivising FDI (Salacuse, 2007).

BITs are particularly relevant in instances where FDI enters a state in the Global South whereby the majority of investment is governed by the BIT (Elkins, Guzman & Simmons, 2006). The global prevalence of BITs grew considerably from the first signatories (Germany and Pakistan) in 1959. As it stands, there are now over 3000 in operation (UNCTAD, 2024). The central rationale for BITs with states in the Global South relates to poor institutional quality and weak legal regimes, the purpose of a BIT is in essence, to substitute the role of institutions or safeguard against a lack thereof. Vandevelde (1988) notes four core provisions within BITs.

Firstly, that of the treatment provision, whereby absolute standards for the investment must be guaranteed by the host state such as treatment that is fair and equitable, the investment's general security, and treatment that is consistent with the requisites of international law. Beyond absolute standards there are also relative standards, which require the host state to treat investments guaranteed by the BIT in line with domestic investments, and those from most favoured nations. The second provision relates to that of expropriation and its fair use, the third to transference of money out of the host state and the fourth to the method in which disputes are settled.

Foreign Direct Investment and Bilateral Investment Treaties

There has been a degree of consensus on the role of property rights and strong institutions in attracting FDI (Acemoglu & Robinson, 2001; Hallward-Driemeyer, 2003). A consensus somewhat split from the realities of natural resource exploitation; whereby reputable firms will gladly compete for business in hostile corners of the globe that lack institutional strength (Dougherty, 2015; Williams & Dupuy, 2016; Rauter, 2019). Many have been quick to posit that states in the Global South have to compete for FDI and compensate for their perceived riskiness as an investment environment through a race to the bottom, in relation to weakening domestic policy and generous tax incentives (Frank, 2015). With bilateral investment agreements between an external firm and a host state, they are reinforced by the instance of a ratified BIT between the jurisdiction of the firm and the host state. The BIT can be justified through the investor perspective, given that some projects have considerable sunk costs, which once realised places the leverage with the host state. Once sunk costs are realised the incentive to leave diminishes considerably (Hallward-Driemeyer, 2003).

They are often viewed as a salient international legal mechanism for the promotion and protection of FDI, in general they define the manner in which investment enters a state, how it is treated, the actions that correspond with expropriation and the manner in which compensation can be pursued in the event of dispute (Elkins et al., 2006). Empirical studies have emerged to further define the relationship between FDI and BITs, in addition to the principal motivators for states to sign up to them. Beyond these empirical questions are further substantive ones, related to the efficacy of BITs in the instance of arbitration and dispute settlement (Simmons, 2014).

Empirical studies remain at odds around many aspects of the dynamic of BITs and FDI. Chiefly that of whether it has a significant relationship with upticks in FDI inflows. There is a

largely dominant position that supports BITs as vehicles for FDI, through the protection of rights and the guarantees around fair and preferential treatment for external investors (Desbordes & Vicard, 2009; Busse et al., 2010). Within academia, studies have sought to determine a causal link through empirical study. To maintain this link, further refinements have been developed. For instance, one study determined that BITs increase FDI, however, the caveat of this study determined the role of geographical proximity in the likelihood of a positive relationship between BITs and FDI (Gomez-Mera & Varela, 2017). An irony of the position that supports proximity, is that greater geographical distance is a determinant for countries that have signed BITs according to a recent empirical study on the matter (Liu et al., 2021).

Hallward-Driemeyer's (2003) seminal research aimed to determine whether a BIT could act as a substitute for weak institutions and property rights regimes, it was argued that there was no statistically significant relationship between growth in FDI and the use of a BIT, rather it should be seen as a compliment to existing institutions, rather than an ample substitution. Further points from this show that the BIT itself grants extraordinary powers in comparison to domestic firms and leaves host states exposed to liability.

Relevant Case Studies of Bilateral Investment Treaties

A key issue with BITs in the Global South relates to the dispute resolution mechanism. Under a BIT a firm is able to file for arbitration in the instance the host state violates the agreement. The contracts determine that when a dispute arises, they are resolved through either a sole expert or an arbitration process. The latter refers to the rules of the ICC, ICSID, UNCITRAL in addition to regional investment bodies, such as the Cairo Regional Centre for International Commercial Arbitration or the Joint Court of Justice in Abidjan (Ogwezzy, 2013 Alamedin, 2021; Mohamadieh & Uribe, 2021). Question marks have arisen around dispute resolution, specifically in the context of African states and external multinationals. It has been argued that these rulings have been found to favour the investor over the host states (Sornarajah, 2017; Subedi, 2020; Qumba, 2021; Milej, 2021).

There is considerable discussion around the equity of this process, as it stands the BITs and bilateral agreements themselves between host state and firm often heavily benefit that of the firm, especially in instances where a firm is operating within the Global South (Sornarajah, 2017), beyond the conspicuous power dynamic lies an issue with the method in which the arbitration is exacted such as the appointment process for the panel, which largely remains opaque (Sornarajah, 1988).

Investor state dispute mechanisms have naturally courted controversy on the basis of the inequity of the treatment of host states in the Global South. A significant example relates to Chevron v. Ecuador (2011). The inhabitants of the affected Oriente region filed a class-action law suit in 1993. Subsequently, nearly two decades later the domestic courts of Ecuador awarded the state $8.6bn in compensation for decades of pollution and the cost of cleaning the environmental devastation. A few months later an international arbitration tribunal would award Chevron $96mn for violating the US-Ecuadorian BIT. What was clear from this case, is that multinationals have more in the way of time and resources to fight legal cases and it is a poignant example of how investor state dispute settlement is often geared in the favour of firms (Banai, 2017). This case should be contextualised in the time period, which as it was post-2008 was a period of increased Global Southern backlash against investment law regimes.

Brazil declared all investment treaties constitutionally invalid and South Africa has created legislation which will be the sole basis for investment protection (Sornarajah, 2017).
In 2012 South Africa effectively terminated all of their existing BITs, and in doing so challenged much of the orthodoxy around the practice. It should be noted that of the seven states that had a BIT terminated by South Africa, only three saw a decrease in FDI inflows (UK, Luxembourg, and Switzerland), whereas the other four saw an increase (Germany, France, Belgium, and the Netherlands) in the six years following termination. The Netherlands in particular increased substantially in 2015 (SARB, 2018). Mayer (2022) notes that the case of South Africa reinforces other studies that have sought to challenge the causality of BITs and FDI. For instance, Sachs and Sauvant (2009) focused on the role of institutions, and that states with stronger domestic institutions attract FDI inflows. Studies into external investors around South Africa have demonstrated that investor concerns have not related to the termination of the BIT but instead issues around labour laws, governmental plans of land expropriation and unreliable infrastructure. These same issues have consistently been raised by investors in the mining sector (Warwick, 2019; Mayer, 2022). Raising FDI inflows is complex, but in the instance of South Africa, BITs have not largely affected the investor landscape. Instead to increase FDI South Africa will continue to develop their domestic institutions, whilst simultaneously holding control over their national destiny.

Conclusion

Economic growth and institutional strength are necessary aspects for states that need further development. Africa, owing to its historical development, largely missed the period of

international convergence between states with liberalised economies. A historical aspect that has had profound effects on the continent's ability to operate in the modern age of highly internationalised capital flows.

The historic development of Zambia reflects many of the trends and periods of differentiation for international investment law. However, as discussed many of the perceptions around the salience of the existing international investment legal regime for states in the Global South seem reasonably unfounded. Ample empirical studies demonstrate that FDI is not driven by BITs themselves but a complex group of factors (Elkins et al., 2006; Liu et al., 2021). Furthermore, the asymmetric nature of bilateral arrangements such as development agreements have had negative effects in the development of domestic policy in the Global South and Zambia in particular (Oshionebo, 2020). The manner in which the mining sector developed in Zambia has disincentivised the establishment of a sincere investment law regime, as the lack thereof has not impeded FDI into its central sector of mining. Development agreements have played a significant role in the path dependence of the mineral sector. Conversely, BITs have played a limited role in Zambia. BIT limitations are a consequence of path dependence. That of political indifference owing to its limited effect on the FDI of its primary commodity or key sector, mining. BITs have in many ways shackled the Global South, with a limited return in the form of FDI. States in Africa may follow the South African approach owing to the seeming lack of financial repercussion, as such there are continental implications to this pioneering action.

The following chapter will utilise the legal elements discussed in this chapter in the context of the Zambian experience, specifically in relation to the privatisation period between 1991 and 2011, the period that followed (2011-2020) where the dynamic between state and firm worsened, and the state acquisitions of KCM and MCM between 2019-2020. It will outline the domestic legal issues and specific development agreements in place between firm and state, in addition to the disincentivising of BIT adoption.

Chapter 3

Domestic and International Law in Relation to the Path Dependence of the Zambian Mining Sector

The first part of this chapter outlines the legal cases and conditions in the build-up to the expropriation and compelled acquisition of Konkola (KCM) and Mopani Copper Mines (MCM) from Vedanta and Glencore respectively by the Zambian government. Between 2011 when the Patriotic Front was elected and the 2019-2020 state acquisitions, there were notable legal claims brought against KCM and MCM related to tax evasion and environmental damage. The chapter demonstrates that the structure of the development agreements in combination with the path dependence of the sector led to multiple violations being committed without legal remedy until the expiration of the agreements. Once the agreements expired or were close to expiration damages were awarded against KCM and MCM. The close of these specific cases culminated in their respective expropriation and compelled acquisition.

The second section of the chapter goes into the contractual detail of the development agreements. Demonstrating that the contractual specificities allowed for the obfuscation of violations which required legal and equitable remedies, and the particular instances it blocked legislative change. This process of obfuscation and outright blocking further cements the position of this research that development agreements, in particular the stabilisation clauses are a legal expression of path dependence that tangibly constrained governmental options between 2000 and 2020.

The third part of the chapter focusses on the limited international legal regime in Zambia that reinforced the usage of weaker domestic legal institutions throughout the acquisition saga. The path dependence of the mining sector has disincentivised the adoption of BITs both from a legal and economic basis for both firm and state. The firms are content with leaning on weaker institutions in the instances of legal violations. The state is focussed on the central sector of mining and as the ratification of BITs have had no tangible limitations on their ability to access FDI for the sector. The few treaties ratified related to specific mining related demands, and key investment states for mining such as Canada and the U.K still have draft BITs with Zambia that have no substantive application.

3.1) The Role of Development Agreements and the Legal Issues of Konkola Copper Mines and Mopani Copper Mines

This period draws focus on the stabilisation clauses and stability periods that underlined the development agreements signed with KCM and MCM between 2000-2004. These granted protection against any legislation that would be passed thereafter which could affect the profitability of mining operations. This research views that the structure of the agreements gave the mining firms the ability to act outside of the law until the periods drew to a close. This legal act can be seen as a codification of the path-dependent process of the mining sector in Zambia, as it explicitly isolated the firms from the reach of the state. These clauses were the result of a constrained decision during the hurried privatisation process of the 1990s. This constrained choice would go onto constrain the future government's ability to decisively act against the firms for its various legal violations.

Both KCM and MCM are some of the most advanced mining operations in Zambia, they were both majority-owned by external multinationals and also the acquisitions occurred within the same year. They have also been flashpoints for worsening public perception, owing to the counts of environmental damage, tax evasion, and labour rights violations levelled against them in the Zambian courts. Interestingly, the approach by the government in both instances of acquisition was to utilise the endpoint of the stability period and the expiration of the stabilisation clause to increase litigation against the firms and in turn start the long process of demonstrating reasons to not renew the operational licences of both firms. The financial and environmental crimes were drawn together alongside failures to honour aspects of the development agreements to demonstrate a legitimate reason to not renew their mineral licences once the stability periods had drawn to a close (Hume, 2020). Although both projects resulted in transfer of ownership, the outcome with MCM was collaborative and resulted from bilateral negotiation. It can be argued that the act was expropriatory as it compelled a sale via litigation, threat, and the illegal detention of MCM's CEO. However, the result was a sale at market value. Whereas the outcome with KCM was hostile, had multiple court cases in Lusaka and Johannesburg and resulted in a unilateral liquidation of the subsidiary by the government (Vedanta Resources Holding Limited v ZCCM Investment Holdings PLC and Konkola Copper Mines PLC, 2019).

By observing the events that led to the acquisitions of the two mines, elements of the historic state-firm dynamic can be elucidated. The actions of the firm reinforce the view of the

path dependence of the sector and that mining exists outside of and separate from the state. Both KCM and MCM were charged with evading tax through transfer mispricing and for causing severe environmental damage. MCM paid damages for both transgressions after their stability period drew to a close. KCM in the run-up to the expropriation was still protected via the deterrence of the stabilisation clause. Transfer mispricing and carving out dubious approaches to profiteering, occurred firstly with BSAC and then with RST and Anglo in the independence period (Ushewokonzwe, 1974). The environmental issues were not considered problematic under BSAC, but the legacy of environmental damage with Anglo at their Broken Hill Mine during the independence period was grievous. The villages by the mine were at one point the most polluted area in the world (Waters, 2019). The violations committed by KCM and MCM are path-dependent. They replicate the actions of previous firms from other time periods and reinforce the view that mines operate outside of the state and that their violations are a consequence of their separation from it.

The legal issues between the mines and the state further demonstrate the ability for the mines to utilise the stabilisation clauses of their development agreements to insulate them from legislative change. As updated legislation around the environment was not used in their environmental cases, instead the weaker legislation that pre-existed the contracts. The agreements stabilisation clauses The stabilisation clauses played a central role in the deterioration of the dynamic between firm and state. KCM had a period of 20 years to MCM's 15. The outcome with MCM was a compelled sale, the outcome with KCM was one of expropriation. Both, however, sought to utilise the domestic courts and their ability to hold up and appeal charges against them. And also lean on weaker institutions such as the Zambian Environmental Management Agency (ZEMA). The issue of ZEMA's weakness in oversight is explicit throughout.

The state acquisitions undertaken by the government were an unanticipated outcome, not only in the immediate context of Zambia's heavily indebted economy but in the wider context of the path dependence of the mining sector. However, given the immediate reversal seen by the UPND after their electoral victory in 2021 (shortly after the expropriations) the constraints on governmental options were clarified. The reversal shows the inviolability of the structure of the mining sector. Even if the government opts for the seemingly irrational choice, other processes will correct the path and reverse back to the point of optimal gains. Owing to path dependence the economically optimal choice always remains with a thriving private sector that is taxed for revenues, owing to the limited technical resources of the state and the legacy of

colonial debt which has continued to grow to the present day. This 'optimal' choice comes at the expense of the environmental and social well-being of the state.

Konkola Copper Mines Plc v. U&M Mining

The relationship between KCM's parent company Vedanta and the Zambian state was fraught. There were accusations of environmental damage and transfer mispricing and threats to curtail production. Additionally, there were clear instances of corruption and suppression of information. During the period between 2011 and 2019 of the cases against KCM, those that found them liable were heard in the UK. That of Konkola Copper Mines Plc v. U&M Mining (2014) and Vedanta v. Lungowe (2019).

In Konkola Copper Mines Plc v. U&M Mining (2014), KCM were sued by a firm it contracted for mining services. An Arbitration Tribunal in London awarded U&M Mining payments of firstly $15mn in 2013 and then a further $40mn in 2014 after KCM resisted payment. The issue from the case stemmed from KCM refusing to pay $40.2mn for services rendered by U&M Mining (2014). The outcome of the case has little bearing on the relationship between the Zambian state and Vedanta, however, what was used as evidence for the trial elucidates the relationship between KCM and the state at the time. The evidence used in the case exposed the lack of investment paid into KCM by Vedanta, their dire financial position and that they had engaged in transfer mispricing. The findings of the Government of Zambia's Technical Audit Committee's audit (2010) of KCM were used as evidence in the case. Up until that point the findings of the had not been utilised.

Within the findings it was established that KCM failed to invest the agreed amount into the mine. Vedanta had argued that by 2014 they had invested the required $2.8bn. The audit exposed that Vedanta had not injected capital as required and the mine was in dire financial straits. Of the sum presented by Vedanta, internally generated cash flows made up $2.07bn with the remainder wholly borrowed via Standard Bank. All of the loans from Standard Bank utilised KCM's entire asset base as collateral, additionally it had transpired that KCM had defaulted with Standard the year prior. To make matters worse Vedanta recalled a loan of $500mn from KCM in 2011, further taking funds out of the mines. The committee found that KCM had not been appropriately managed, its liabilities numbered $123mn over its assets value, and as such could not meet the loan repayments to Standard Bank. Another aspect that violated the agreement was that KCM used a Vedanta subsidiary, Fujairah Gold to buy undervalued copper from KCM. This was a clear violation of the arm's length principle and

can be construed as transfer mispricing (Grant Thornton, 2010; Konkola Copper Mines PLC v. U&M Mining, 2014). Furthermore, KCM were spending $1mn a year on management fees with Vedanta which were not explained in the hearing or the audit, in another mispricing violation (Grant Thornton, 2010).

The PF government of the time did not share the results of the audit in full, the only accessible information on it comes from a Ministerial Statement, by then Minister of Mines, Christopher Yaluma. In the statement Yaluma (2019) asserted that the audit was undertaken shortly after KCM threatened to retrench 1,529 employees. In the statement Yaluma touched on the investment issues related above and that a course of action was agreed upon. The course of action was comparatively light compared to what the audit found. The agreement as relayed by Yaluma formally stated they would increase production from 132,318 tonnes to 178,994 tonnes between 2013 and 2017. $280mn would be invested rather than the remaining balance of $700.7mn or the actual figure of $2.8bn. Contractors and suppliers with overdue invoices would be paid, and KCM would restart production. Additionally, Vedanta had to provide a guarantee of $400mn against KCM's $1.5bn liabilities. The requirements asked were wholly skewed in favour of the investor. KCM produced 200,000 tonnes in 2017, comfortably over the required amount. Additionally, the charge of transfer mispricing via Fujairah Gold was not engaged with nor the excessive management fees charged by Vedanta. From this we can assert either that pursuing a transfer mispricing claim against KCM prior to the close of the stability period was unfeasible. Or that KCM were able to utilise their considerable political weight to dilute the requirements placed upon them via the threat of retrenching labourers.

The political response was considered weak and the news of KCM's apparent financial difficulties were met with public anger owing to a video of Vedanta CEO Anil Agarwal circulated by local press the same year as the audit. In the video of Agarwal at a conference in Bangalore he stated that KCM was making profits of $500mn a year and that he only paid $25mn for the mine itself (Konkola Copper Mines Plc v. U&M mining, 2014).

Vedanta v Lungowe

A considerable environmental violation by KCM related to the poisoning of the Kafue River. In November 2006 a tailing pipeline split, discharging acidic effluence into two streams that provided the bulk of water supply for four nearby communities in Chingola. This had hospitalised residents through the contamination of drinking water who noted chest pains, diarrhoea, and skin diseases after drinking. The poisoned water was also used for all the

neighbouring agricultural and fishing activities, and as a consequence affected their livelihoods. It was noted that the water, stones, and bed of the river turned to a blue and green hue, once abundant aquaculture died, and the banks of the Kafue were studded with crystals of copper sulphate (Sambo, 2019).

Local farmer James Nyasulu, with 2000 other villagers undertook legal action via the Lusaka High Court the following year against KCM, the Environmental Council of Zambia and ZEMA. The latter agencies were included on the basis of failing to take measures to mitigate the damage. KCM argued that owing to their licence they had an exemption on the statutory limits of effluence spillage and that the leak was accidental. The High Court ruled in favour of Nyasulu and awarded damages of K5,000 (rebased) to each of the villagers. The award corresponded to $1,000 per villager. The total damages awarded were K10mn, which corresponds with approximately $2mn. The court took a dim view of the actions of KCM, who had employed a highly unqualified individual as the environmental coordinator for the mine. The court viewed that KCM had deprived the residents of Chingola of the right to life through its destruction of their water supplies and consequentially their livelihoods (Nyasulu and Ors v. Konkola Copper Mines Plc, 2011).

Within the case Justice Musonda commented on the political and financial influence wielded by KCM, and considered this facet part of how the environmental damage came to fruition, "*the first defendant [KCM] was reckless and had no regard for human, animal, and plant life. The only hypothesis for a powerful multinational to supposedly act with impunity is that they thought they were politically connected*" (Nyasulu and Ors v. Konkola Copper Mines PLC, 2011, p. 9). KCM appealed the following year and the Supreme Court upheld the ruling in favour of the villagers, stating that KCM had a duty of care and that the exemption was not relevant given the scale of the damage. However, the Supreme Court did not order the compensation on the grounds that only 12 of the 2000 villagers had medical reports, the Supreme Court took the view that the High Court erred when awarding damages to all 2000 villagers without detailed medical reports on each. The court also did not order a clean-up of the site, an aspect protected by the stabilisation clause in the development agreement (KCM, 2000; 2004). The Supreme Court decision although finding KCM to have had a duty of care, did not facilitate a method to solve the issues of the villagers or distribute effective compensation (Konkola Copper Mines Plc v. Nyasulu and Ors, 2012),.

After the verdict, the villagers took their claim to the UK to pursue KCM's parent company Vedanta. This was accepted, ostensibly on the basis that there was a likelihood that KCM as a subsidiary in poor financial condition lacked the funds to settle the claim (Van Ho,

2020). Additionally, and most saliently the view that access to justice was limited for the Lungowe residents in light of the limited damages awarded by the domestic courts (Sambo, 2019). Vedanta was sued by 2000 Zambian villagers and the case was heard on the basis that Vedanta which is domiciled in the UK were liable for the issues related to their subsidiary KCM's operations (Lungowe and Ors v. Vedanta Resources Plc & Anor, 2016). Vedanta sought to argue against the jurisdiction based on forum non conveniens, with the view that Zambia was the correct jurisdiction. Owusu v. Jackson (2005) was cited to utilise the UK courts and KCM's appeal against this tried to argue on the differences between Owusu and the issue with the villagers of Lungowe, this was rejected by Justice Coulson, who in turn ruled in favour of the Lungowe residents (Lungowe & Ors v. Vedanta Resources Plc & Anor, 2016).

The UK Supreme Court ruling on Vedanta v. Lungowe (2019) ruled in favour of the villagers. Vedanta argued against the use of the UK courts on grounds of forum non conveniens. This was overruled owing to Owusu v. Jackson (2005) based on Vedanta's domiciliate in the UK, and the lack of substantive justice available in Zambia (Sambo, 2019). Vedanta was deemed liable for a duty of care over those affected by its subsidiary, this followed the precedent of Chandler v. Cape Plc (2012) (Van Ho, 2020). In 2021 towards the end of the process of the liquidation of KCM. Vedanta agreed to settle with the Lungowe villagers, however, they did so without an admission of liability. 15 years later the residents have received the compensation. Shortly after the ruling in November (2020).

Justice Coulson spoke out on the elements of domestic corruption within the case, *"There is another aspect of KCM's likely stance which is material. I cannot discount the findings of Mr. Justice Musonda in the Nyasulu litigation that KCM 'was shielded from criminal prosecution by political connections and financial influence'. That is an alarming finding. If in the past KCM has been shielded by political connections and financial influence in Zambia, as the judge found that they were, then that must be another factor relevant to the concerns that I have about the claimants obtaining access to justice in Zambia*"(Lungowe & Ors v. Vedanta Resources Plc & Anor, 2016, p. 4.).

The rulings of both the Zambian and UK cases reiterated that KCM was able to exercise undue influence on the Zambian political sphere, which again cements why Vedanta was focused on keeping its matters away from foreign courts and international arbitration. This also gives insight into the dynamic between firm and state, whereby KCM given its domestic weight acts with impunity. The latter aspect is reinforced by the lack of legal follow-up on the governmental audit used in U&M Mining v Konkola Copper Mines (2014). Additionally, KCM committed another environmental disaster, owing to a sulphur dioxide leak from Nchanga mine

in 2019. This is the exact environmental disaster seen in Mopani Copper Mines v. Miti (2020). Although there were no fatalities, 200 children and 43 miners were admitted to hospital for immediate medical attention (ZNBC, 2019). This issue has yet to reach the courts and has received limited traction in domestic and international media.

The Expropriation of Konkola Copper Mines

The liquidation of KCM was the legal process utilised by ZCCM-IH, with the government's backing to directly expropriate the subsidiary of Vedanta and its mining assets in 2019. The immediate process was initiated through the introduction of a new taxation policy targeted at both KCM and MCM in relation to VAT refunds. This was followed by public announcements from President Lungu stating that if they took issue, they should leave Zambia. The liquidation itself was considered by many Zambian legal academics to be an illegal action, however, KCM after a brief foray into the Johannesburg courts to attempt arbitration undertook limited action to prevent it, instead choosing to wait. The UPND who shortly after the expropriation won the 2021 election immediately entered negotiations with Vedanta to reverse the liquidation.

In early May 2019 President Lungu announced a new taxation policy, affecting VAT refunds, he specifically targeted KCM and MCM during the announcement, stating that if they took issue they should leave Zambia (Mfula, 2019). On the 21st of May 2019 ZCCM-IH began winding up proceedings in the case ZCCM-IH v Konkola Copper Mines (2019). This was achieved via a petition to the Zambian High Court, based on the allegation of mismanagement which ran counter to the Shareholders Agreement between ZCCM-IH and Vedanta. Concurrently with the petition, ZCCM-IH managed to acquire an ex-parte appointment of Milingo Lungu as provisional liquidator of KCM, with this appointment came what was described as extraordinary powers, above and beyond that of asset preservation (Ndulo, 2020). Vedanta in turn applied for a stay of execution, on the basis that as a dispute had arisen it should be settled via UNCITRAL arbitration, as per the terms of both the Shareholders and development agreements. The High Court rejected this as it deemed the agreement as voided (ZCCM-IH v. Konkola Copper Mines PLC, 2019). There were further financial complaints levelled in the petition, KCM had run on losses of over $ 1.2bn through a period of seven years prior to the petition. KCM had also failed to maintain its operating costs between 2013 and 2019, and subsequently owed $ 24,064,722 to Copperbelt Energy and $ 468,036.92 to Ndola

Lime (Ng'ambi, 2022). Additionally, environmental damages such as the poisoning of Kafue River, seen in Nysalu and Ors v Konkola Copper Mines (2012) was cited also.

Ndulo (2020, p.55) noted multiple irregularities with the petition referring to it as "*legally unsound and indefensible*". Ndulo (2020) argued that instead of approaching the liquidation via a shareholder route, the state should have utilised the Minerals and Mines Act of 2011 which allows for government intervention in the instances of production curtailment and limiting investment. This perspective is questionable as the firm would be protected from the Minerals and Mines Act of 2011 as it was passed after the development agreement and within the stability period. Ng'ambi (2022) argued that owing to the stabilisation clauses within the development agreements the government was at fault and that contrary to Ndulo, the content of the 2011 update of the Mineral and Mines Act would hold no bearing on the outcome. Instead, he argued that an approach routed in the allegation of environmental damage would have fared better. Fine points aside, the legal consensus of the liquidation was that it was unsound.

After the case, Vedanta sought to apply for an interim court order through the courts in Johannesburg, whilst also obtaining an ex-parte order against the provisioning of the liquidator, Milingo Lungu (Singyangwe, 2021). This approach aimed to take advantage of the South African Arbitration Act of 2017. The interim court order was to deem ZCCM-IH as having breached the Shareholders Agreement through the pursual of winding up proceedings and that ZCCM-IH should be directed to withdraw. Additionally, they sought to challenge the legality of the creation of the role of liquidator for Milingo Lungu. The case Vedanta Resources Holding Limited v. ZCCM Investment Holdings PLC and Konkola Copper Mines PLC (2019), was heard at the South African High Court in July 2021. The court found that the grievances brought to Zambian High Court fell under the disputes element of the Shareholders Agreement, and consequently that arbitration was the correct method to settle the dispute. Habib & Jinudu (2019, p.2) note that even though this constituted a correct reading of the Shareholders Agreement, it didn't necessarily give justification as to how the South African High Court had the jurisdiction to rule on the case. They argue this was an "*approach from English case law of affirming the power of the national courts at the seat of arbitration to issue anti-suit injunctions restraining proceedings in a foreign court"*. This constitutes a reasonably weak argument for an appropriate setting, as both parties ZCCM-IH and KCM are registered to Zambia. At this point KCM decided to bide their time without further action as the liquidation went ahead.

Much of the events surrounding the liquidation are unusual at best, the Zambian High Court declaring the Shareholders Agreement voided, and the scope of and the partisan nature of the role granted to the liquidator (Ndulo, 2020). Additionally, the decision of the South African High Court can also be described as unusual given that neither party had any affiliation with South Africa. The only clarity that comes from the events is the lack of a strategic approach by both parties. As discussed, KCM had generally found a favourable setting in the Zambian courts for the cases against them, this point is underscored by the view of the Supreme Court in the UK, which reiterated the view that KCM was a politically connected entity. However, this ability to lean on institutions changed at the point the stability periods of the development agreements ended, this coupled with an upcoming election where resource nationalism played a significant role placed KCM for the first time in an unstable position in its dynamic with the Government. This dynamic shifted, fundamentally on the basis that ZCCM was now the largest actor within the mining sector. However, rather than challenge the liquidation decision further Vedanta opted to wait on the outcome of the election.

KCM's choice of waiting proved prudent, given that the election was lost by the PF and Lungu and instead won by Hakainde Hichilema and the UPND, a political party who have brokered an agreement to allow Vedanta to take back their majority share. Again, the decision of Vedanta to not litigate further but instead accept the ruling without going to international arbitration, firstly posits that KCM's crimes would be seen in a different light under the auspices of international arbitration but that they also hold a belief in their ability to influence the Zambian domestic sphere, given the outcome of the UPND's decision they were correct. Historically, arbitration decisions have largely favoured investors (Sornarajah, 2017). However, mining firm corruption in the Global South is highly documented (Kotsadam et al., 2015; Knutsen et al., 2017; Stapenhurst et al., 2018). The consistent vein of corruption lends credence to the motivation of mineral firms to focus their attentions on domestic institutions rather than the international sphere. Investment arbitration decisions have been met with criticism both procedurally and substantively, owing to their opaque nature and the general favourability towards investors (Waibel et al., 2010; Sornarajah, 2017). Even though these settings are favourable to the investor there are additional externalities such as enforcement of award (Huseynli, 2017). The reality is that KCM had relative success in the domestic courts and biding their time proved more prudent then taking the claim to the international courts.

The ability for KCM to bide their time highlights the power and control of the mining firms and the path dependency of the Zambian mining sector. The chaotic attempt to expropriate left two options, run the mines under a nationalised structure or renegotiate with Vedanta. The

option of seeking differing investors was unfeasible. KCM required considerable further investment for their deep mining shaft and the need for immediate capital combined with diminished investor confidence from an expropriation carried out for short term political gain nullified the possibly of a new investor. This factor in combination with KCM's salience within the Zambian economy left the incoming UPND once again, like many Zambian administrations before it constrained in their available choices. The path development of the sector has limited the ability for effective state intervention owing to the lack of technical resources and available capital for complex operations. All of which occurring against the backdrop of a heavily indebted state.

Mopani Copper Mines v. Zambia

The first significant legal issue for MCM related to transfer mispricing from Glencore. Transfer pricing relates to how transactions occur between legal entities that are related, for instance a parent company and a subsidiary (Mehafdi, 2000). This is a wholly legal process if the Arm's Length principle is adhered to, whereby the cost of the good is equivocal were the transaction to have occurred between unrelated entities. Transfer mispricing, however, is when the price is deliberately changed to give a tax advantage (Sikka & Wilmott, 2010). Glencore was accused of this after the Zambian Revenue Authority (ZRA) – Grant Thornton audit (2010) of MCM's taxes between 2006 and 2009. The audit found evidence of transfer mispricing on ore price and management fees for their parent company, and improper hedging patterns. A salient part of the debacle was that the audit was leaked by the ZRA, which further calls into question what the appropriate channels were for raising an issue against such a significant economic actor (Jastram, 2011). Initially, MCM appealed to the Zambian Tax Tribunal in 2010 who ruled in favour of the ZRA, subsequently MCM sought to appeal through the domestic courts. This case finally settled a decade later after the Supreme Court ruled against MCM in 2020 (Mopani Copper Mines PLC v. Zambia, 2020). The ZRA proved that the transfer of profits violated the Arm's Length principle, between MCM and its parent company Glencore.

How MCM committed transfer mispricing is complex and related to inflating labour costs, the usage of an expense on aspects that should have been capitalised in addition to how ore count was reported. The comparative analysis undertaken by Grant Thornton (2010) found that sales revenue deviated from London Metals Exchange pricing progressively over the time period measured, that this same revenue was also comparatively low compared to equivocal operations, and that the operating costs far exceeded that of equivocal operations. For instance,

the labour costs in the report showed that in 2005 it was $103.93mn and by 2007 this was $ 208.5, however, production had not increased significantly in that period nor had there been any significant structural changes. Grant Thornton estimated that the cost for 2007 should have been $118.15mn which indicates a $90.35mn hole in the labour costs. Residual costs went from $4.49mn to $210.27mn, when the estimation indicated it should be $5.1mn. In total there was an additional $381.21mn added to their operating costs over the period audited. Grant Thornton (2010, p. 11) explicitly stated in the report *"we believe that the Mopani cost structure cannot be trusted to represent the true nature of costs of the Mopani Mining Operation and that there is reason to follow up the uncovered inconsistencies in a more determined manner"*.

Ore value of copper by-products (such as cobalt) is difficult to monitor and the export and sale of the additional ores was at the time, easily concealed (Readhead, 2016). The Norwegian Government in 2007 conducted a study which held the view there were moderate cobalt reserves in MCM, which ran counter to reported figures by the mine (Manley, 2013). The ZRA audit with the aid of Grant Thornton had found by 2009 that MCM were reporting half the extraction rate and much lower production than equivocal operations, the audit held the view this was a deliberate attempt to match the figures with the declared number of ore exported and sold (Grant Thornton, 2010). Owing to limited monitoring capacity on the part of the government and the ease in concealing the amount of refinement that occurred on the cobalt, Glencore was able to both limit the overall number shown to be exported and simultaneously limit the amount of refinement, which would limit their tax bill (Readhead, 2016). The findings of the audit demonstrated that MCM had engaged in transfer mispricing by selling ores at a significantly reduced rate to its parent company Glencore to gain a tax advantage, that of 25% under London Metals Exchange pricing. Glencore were determining the prices not MCM. Additionally, the prices could be adjusted after six months, and the adjustments were inconsistent (Grant Thornton, 2010).

In 2020, over a decade after the audit's findings were leaked, the Supreme Court ordered MCM to pay $13mn in taxes avoided between 2006 and 2009 (Mopani Copper Mines Plc v. Zambia, 2020). The judgment came after the stability period of the development agreement ended, it is salient in underlining this as the agreements of both KCM and MCM did not state that intra-firm sales had to be done at Arm's Length. The also lends credence as to why the audit had to be leaked rather than utilised by the government of the time.

Mopani Copper Mines v. Miti

MCM also engaged in severe environmental damage, most notably in the case related to the atmospheric poisoning of the Mufulira area. In 2008 because of atmospheric pollution, local politician, and the District Commissioner of Mufulira, Beatrice Miti died. This was a result of sulphur dioxide fumes from MCM's operations, that were improperly released. This held similarities to Nyasulu and Ors v. Konkola Copper Mines Plc (2011) as it was related to how environmental aspects are managed, the limitations of statutory exemptions to pollution, and the strength of development agreements in protecting environmental damage by firms and delaying case outcomes.

The issue with sulphur dioxide leaks continued and a riot broke out in 2014. 70 local residents threw rocks and a further 20 broke in and tried to set fire to equipment (Davies, 2014). In the same year the widower of Beatrice Miti, Geoffrey Miti sought damages from MCM on the basis of negligence relating to his wife's death. The case was heard in 2016 in the Lower Courts. The court ordered a payment to the Miti family of K400,000. This was given on the basis that MCM acted negligently in its release of sulphur dioxide into the atmosphere, that exceeded the limits imposed by ZEMA. The ruling found that ZEMA had not carried out appropriate checks (Geoffrey Eliam Miti v. Mopani Copper Mines Plc, 2014). Importantly, the development agreements explicitly granted protection for emissions from the Mufulira site if ZEMA found the operation to be in compliance with their environmental obligations. (MCM, 2000).

MCM firstly appealed the ruling on the grounds of a flawed autopsy and contested evidence from their own selected pathologist. Secondly, that the Environmental Liabilities Agreement, part of the development agreement, granted Glencore indemnification from specific environmental issues (MCM, 2000). In 2020 the Supreme Court passed judgment and rejected MCM's appeals (Mopani Copper Mines Plc v. Miti, 2020). The judgment passed down required the payment of K1mn in favour of the Miti family. The Supreme Court found that MCM was negligent in its operational practices related to releasing sulphur dioxide into the local atmosphere. And that the development agreement clause was on the basis of the Environmental Plan being enacted, which required a management program for sulphur dioxide. Importantly it was noted that the stability period had ended. Additionally, the ruling found that ZEMA had allowed the issue to persist, which called into question the independence of the body from the firms operating within the mining sector. ZEMA's corruption and support for MCM maintained the stabilisation clause for the duration of the stability period. The timing of

the court decisions, also falls in line with the end of the stability period within the development agreement for MCM. The end of the stability period removed the specific legal protections around pollution (Mulenga, 2017). As the case was seen after the close of the development agreement's stability period, the Environmental Management Act of 2011 was able to be referred to rather than the previous act and amendments of the 1990s which was heard in Nyasulu and Ors v Konkola Copper Mines Plc (2011).

The Compelled Acquisition of Mopani Copper Mines

The legal events that preceded the acquisition of MCM by the Zambian government aided the dynamic of hostility between firm and state. The legal actions undertaken by the Zambian government and the relevant agencies were legitimate on the one hand, however, the events that led up to the acquisition were not. The immediate events leading up to the sale related to curtailment of production on the part of MCM. In April of 2020, MCM indicated it sought to place the mines into care and maintenance, owing to issues around copper prices (Oxford Analytica, 2020). This practice, often referred to as mothballing is a practice, whereby mines are closed for short intervals – and contractor jobs are lost- for the purpose of preserving the mines in the face of an economic downturn or weak ore pricing. The proposal to place the mines in care and maintenance had the power to affect as many as 11,000 jobs, subsequently the Mining Union urged MCM to "*surrender to the government*" (Nkomesha, 2019, p. 1) As a consequence of the action the Government threatened revocation of MCM's mining licence (Oxford Analytica, 2020), Prof. Oliver Saasa, a noted Zambian Academic in a public interview referred to the move as tantamount to expropriation (Nkomesha, 2019). After this the CEO of MCM, Nathan Bullock planned to leave the country to Australia and was illegally detained in the process. This action was highly unusual and as Nathan Bullock had not been charged of a crime or even accused, this ran contrary to Zambian domestic law, in addition to being a breach of Bullock's human rights. It was a deliberate attempt to intimidate MCM after they took the decision to place the mines in care and maintenance (Hume, 2020). Eventually Bullock was granted the right to exit Zambia. After this debacle, MCM went ahead with the shutdown but agreed to negotiate the purchase with ZCCM-IH.

The context of the agreement is still unclear. Arguably, this was an expropriation, which Glencore achieved a reasonably beneficial outcome. Threatening licence revocation and the detention of a CEO combined with only accepting care and maintenance on the basis of negotiation of a sale, would arguably fall under the definition of compelling a sale. At face

value, however, the amount agreed would constitute a fair market price. ZCCM-IH agreed to take on $1.5bn in debt. The debt was financed by another subsidiary of Glencore, the Carlisle Group (Musukwa, 2020). The debt component of the deal is complex. In a written statement by then Permanent Secretary at the Finance Ministry, Mukuli Chikuba stated that the debt of $1.5bn has not been guaranteed by the government, and consequentially was not an addition to governmental debt. (Musukwa, 2020). This would mean that the debt is written against the mine itself as collateral, which ironically would mean that if ZCCM-IH were to default on the profit payments MCM will revert to Glencore. The structure of the deal also poses questions surrounding whether the external investment brought in via the UPND would further limit the ability of ZCCM-IH to accrue the appropriate level of profits to repay the loan and simultaneously gain some of the benefits of this deal. This deal was agreed to in January 2021. The elections would be held later that year in August, and were won by the UPND, who's first actions were to initiate a reversal of the state acquisitions of KCM and MCM (Banya & Mfula. 2023).

The UPND Response to Konkola and Mopani Copper Mines

MCM and KCM were seen as the immediate issues for the UPND administration to chart a course for after their electoral victory. They had provided a significant public spectacle in the run-up to the election, and their acquisition was a central component of the re-election campaign of Lungu (Musonda & Larmer, 2023). The prolonged suspension of the two largest mines combined with the 3mn tonne target for annual copper production set by the UPND meant that it was clear new investors were incoming.

One of the earlier actions seen regarding MCM, was ZCCM-IH acquiring the services of Rothschild & Co. to undertake a strategic review of the state of the mine. This was done via an open tender, a further signal from the UPND of aiming to create a predictable regulatory environment (ZCCM-IH, 2022). By December 2023, ZCCM-IH had accepted UAE-based International Resource Holdings offer of $1.1bn in investment for a 51% share (Banya & Mfula, 2023). They had also managed to reduce the onerous costs associated with the PF deal with Glencore. "*The total proceeds received by Glencore (including the settlement of working capital facilities) were USD$411m in cash on closing plus deferred consideration of USD$135m which will be settled over c. 4.5 years with interest and a royalty of 10% of the copper price above $12k/t from 2027 until 2035"* (Glencore, 2024, p. 1).

From the outset of the UPND's electoral victory its view on the KCM debacle was clear, that this was an issue that needed to be reversed. The newly appointed Mines Minister Paul Kabuswe immediately denounced the liquidation but refused to indicate whether they sought external investment or a renegotiation with KCM (Kabuswe, 2022). The UPND also sought to bring into question the legality of the process of liquidation via a legal case against the liquidator Milingo Lungu . And in August 2022 he was charged with money laundering and two counts of theft. The liquidator was believed to have embezzled $2mn during the process of the liquidation (Konkola Copper Mines PLC and Anor v Lungu and Ors, 2022).
They also placed PF minister Davies Chama under investigation for taking bribes of $3mn from mining firms (Business and Human Rights Resource Centre, 2022).

The following year ZCCM-IH was able to secure $10mn working capital for KCM, in order to raise production as the mine had been under care and maintenance since the liquidation (ZCCM-IH, 2022b). This then signalled the process of reparations to the relationship between Vedanta and the Government. In response, Vedanta agreed to pay outstanding payments to its employees, that were lost during the liquidation and a deal was brokered in September 2023. The deal terms required Vedanta to commit to investing $1bn and to raise the wages of its employees by 20% in addition to a payment of K2,500 per employee (approximately $95) (Cotterill, 2023; Kabuswe, 2023). The terms remain unpublicised, there is no indication that the majority of workers who are contracted will receive this treatment, nor is their clarity on the payment terms for the sum of investment. Beyond this, the question of whether Zambia has re-entered a liability agreement for environmental damage or whether a development agreement has been redrawn remains yet to be seen.

Within this, we see that the UPND not only considered the risks of holding KCM too high but was also acutely aware of the legal liability left by the PF on the basis that this asset was expropriated. The high copper production targets are a key UPND goal and given the path dependence of the sector the options available are limited. Instead, a total reversal of the PF acquisitions has occurred on the basis that it is the scenario most likely to increase production and restore external investor confidence, and in turn aid in the servicing of Zambia's debt. The path dependence of the sector has left the state reliant on external firms to service their most complex mining needs and their debt. The question of whether the UPND would *choose* to carry out a process that aligns with the path dependence of the sector implies a level of free-will that Zambian administrations have historically not seen in relation to the unwieldy mining sector. Hichilema and the UPND may be supportive of a liberalised mining sector but this policy selection is the outcome of optimal choice based upon historically entrenched

constraints. Had the mining sector developed differently Hichilema may have been able to craft policy that encouraged capital raising for domestic firms to partner with larger external ones. This outcome is not possible owing to the development of the sector and its lack of input by Zambian citizens and the Zambian state and in turn the lack of development in the domestic arm of the mining sector. When discussing path dependence policy choice may seem like a *choice* but it is instead an outcome of constraints and limited options. Were the PF to have remained in power it would have likely chartered a similar course for reversal owing to the significant economic constraints that come with nationalisation. This lack of choice, firstly harkens back to the period of choiceless democracy discussed in the previous chapter, as the outcome of two radically different parties is the same. Secondly, it demonstrates the resilience of the institutional structure of mining in Zambia.

Findings

Both MCM and KCM had almost identical legal issues and the cases that were lost were only after the stability periods ceased. Both were accused of transfer mispricing and environmental damage. MCM lost both cases in the Zambian courts (Mopani Copper Mines Plc v. Zambia, 2020; Mopani Copper Mines Plc v Miti, 2020). KCM however, was not formally charged with transfer mispricing even after the audit came to light, and the damages of the environmental case (Vedanta v Lungowe, 2019) were awarded by the UK courts. What is clear from these high-profile cases is that the stabilisation clauses of the development agreements offered ample protection. The stabilisation clauses are a legal expression of path dependence and the constrained choices that characterise the interplay between state and firm in Zambia.

From the legal issues we see an inability for the state to act with immediacy against clear violations of domestic law, in addition to this we see the inability for updated legislation to be utilised in legal cases. The Minerals and Mines Act of 2011 offered more substantial environmental protection, however, owing to the stabilisation clauses the legislation could not be used against the firms. Instead, they relied on the act that preceded the agreement.

In both environmental cases damages were not awarded until the close of the stability periods. In Nyasulu and Ors v Konkola Copper Mines Plc (2011) the bolstered Environmental Management Act was not utilised, instead the previous 1990 act was. The evidence against KCM was overwhelming yet via the Supreme Court ruling in Zambia (2015) they were able to avoid paying damages and for the environmental clean-up. Even after the ruling of the Supreme Court in the UK (2020), they settled without admitting liability. MCM's environmental case

was initiated in 2008 and the case was not brought to court until 2016, as the stability period ended in 2015. Even though the period had ended, MCM still sought to utilise it during proceedings. However, a concrete award of damages was not given until the Supreme Court rejected the appeal four years later. The same can be seen in the cases regarding transfer mispricing firstly, MCM were not charged until after the stability period ceased (Mopani Copper Mines Plc v. Zambia, 2020). And in the instance of KCM they were never charged and the findings of the government audit with Grant Thornton (2010) were never utilised.

Additionally, questions of institutional porousness, or susceptibility to corruption arise from these cases. The end of the MCM stability period occurs at the point Edgar Lungu started threatening the mines for his election campaign, at which point it is arguable the courts felt emboldened to charge the mining firms. ZEMA's independence proved questionable given that MCM were able to spew sulphur dioxide above statutory limits for over a decade under their supervision. This claim is bolstered by the cases of environmental damage with KCM that lacked oversight. ZEMAs porousness gave legitimacy to the stabilisation clause of the agreement, as the institution was tasked with determining MCM's compliance on emission measures. If ZEMA did not explicitly state that MCM was uncompliant with the measures, the firm remained protected in the event of sulphur dioxide emissions.

The audit held evidence on KCM's transfer mispricing had to be leaked before the government commented on it. Again, the audit occurred the year before the election campaign platform of taking back the mines came to the fore. And lastly, the bribing of Minister Davies Chama raises further questions around institutional porousness.

The reversal under Hichilema, further demonstrates the path dependence of Zambia's mining sector. The random and reasonably destructive approach of the Lungu government in its acquisitions were still reversed, as the available options were constrained and renegotiating with Vedanta became optimal. The ability to take the mines back under state control, was unfeasible owing to the lack of available technical resources and capital. These constraints are a consequence of the path dependence of the sector.

BSAC created a climate solely conducive with attracting outside firms for mineral development, the debt left with Zambia and the lack of technical resources persisted and compounded to the present day. Nationalising two problematic firms could have been optimal but the weight of history constrained available decisions. Instead MCM has been passed to another firm and KCM is back with the same firm that underinvested for two decades and destroyed the Kafue River.

3.2) The Development Agreements of Konkola Copper Mines and Mopani Copper Mines

This section provides a detailed analysis of the development agreements and outlines their role as a formal, legal aspect of the path dependence of the mining sector. The purpose of this section is to outline the specific details of the agreements and how they constrained the options of the government between 2000 and 2020. The separate agreements entered into in 2000 and 2004 by Konkola Copper Mines (KCM) and Mopani Copper Mines (MCM), with state-owned ZCCM International Holdings (ZCCM-IH) and the Zambian government played a significant role in entrenching the path dependence of the mining sector. These agreements set out the parameters between firm and state for the operations of the mining assets.

Within the agreements were stabilisation clauses and stability periods. The stabilisation clauses protected the firms from legislative changes that could affect profits. The clauses remained intact for the duration of the stability periods (Ng'ambi, 2022). Both firms KCM and MCM were granted 20 and 15 year stability periods respectively (KCM, 2000; MCM, 2000). To put this amount of time into context, Zambia had five different Presidents from the beginning of the stability periods to their expiration.

These clauses and periods are an example of a phenomenon that is both symptomatic of path dependence and further entrenches it. The path dependence laid out in the previous chapters constrained the available choices that led to the hurried privatisation process, which ultimately meant the agreements were signed in haste with little compromise. The state was constrained in its options for attracting much needed capital for the mines and debt servicing and placed itself in a legal arrangement which *formally* constrained its ability to legislate against the worst excesses of the mines.

This section firstly defines the role of development agreements within the dynamic between firm and state. It situates them within the context of path dependency, as both a consequence of constrained choices for the state but also a legal instrument that further constrained the choices of the state.

Secondly, that stabilisation clauses protected firms during legal disputes around environmental and tax violations and insulated them from legislative change. Elements of the stabilisation clauses were presented in the cases against KCM and MCM, as discussed in the previous section (Konkola Copper Mines Plc v. Nyasulu and Ors, 2012; Mopani Copper Mines Plc v. Miti, 2020; Mopani Copper Mines Plc v. Zambia, 2020). The stabilisation clause was complimented by specifications around the tax regime, which aided the firms efforts in transfer mispricing. The stabilisation clause complimented the environmental liabilities agreement and

the lack of scheduled environmental management plan which in combination helped shield the firms from claims of environmental damage. Furthermore, legislation passed in relation to mining in this period was disincentivised generally and when enacted, limited in its effects on the firms. This facet lends credence to the view that path dependency separated control over mines from the state. This phenomenon was codified between 2000 and 2020 through development agreements. This maintained the separation from the period after the IMF had achieved its restructuring of the Zambian economy.

Lastly, another aspect of the agreements was their identical formulation across multiple clauses. This supports the view that the privatisation process was hurried and coercive. The similarities across both, indicates the limited bargaining that occurred on the part of the government of the time. And that these were in effect presented by the firm to be signed, rather than a consensus achieved through balanced negotiation.

Background

Konkola Copper Mines (KCM) has been subject to two different investment agreements during the privatisation period of Zambia. Firstly, with the initial investors, Anglo-American an agreement was concluded in 2000. Anglo sold their stake in 2004 to Vedanta. A new agreement was made and it carried over much from the first. Mopani Copper Mines (MCM), however, had been continuously owned by Glencore between 2000 and 2020. Clifford Chance led the contractual process of each agreement, and similarities between contracts are significant in the initial KCM agreement (2000) with Anglo, and the MCM agreement with Glencore (2000). Some differences emerge between MCM's initial agreement (2000) and the updated agreement of KCM (2004) with Vedanta.

The agreements were retrospectively abolished with the passing of the Minerals and Mines Act (2008), however they continued to be utilised by the firms until the end of the stability periods within the contracts (Mulenga, 2019). The most salient aspect of the development agreements was that they can be determined as a legal instrument that codified the path dependency of the mining sector in a modernised format consistent with privatisation.

Within investor-state contracts, they grant a specific set of rights to the multinational. For instance, generally a mining permit allows the multinational exclusive exploration and exploitation rights over the minerals in each area (Gupta & Bosch, 2022). These agreements are often furnished with stabilisation clauses, which grant immunity to the investment from undue legislative shifts that affect the profitability of the enterprise (Oshionebo, 2010). Stabilisation clauses, exercise a hold over the domestic development of legislation pertaining to environmental protection, labour rights and tax regimes (Oshionebo, 2018). This is why that even though the agreements were retrospectively abolished in 2008 continued to be in use throughout the length of the negotiated stability periods, as the firms were protected by the clause (MMA, 2008; Ng'ambi, 2022).

The holder of the mineral rights also holds the right of alienation, whereby the investor may transfer their rights to another actor on similar terms, this was seen when KCM was sold by Anglo to Vedanta in (KCM, 2004). The agreement's for MCM (2000) and the amended agreement for KCM set out the law applicable. In the KCM amended agreement (2004, p.54), Clause 24 states under Governing Law, that *"this Agreement shall be governed by and construed in accordance with the laws of Zambia which the Parties acknowledge and agree is supplemented, so far as they are relevant, by the rules of international law".* A key source of law for the agreement was the Minerals and Mines Act of 1995 and its amendments prior to the signing in 2000, however, any update to the Act (2008, 2011 and 2015) was nullified by the stabilisation clauses. For the duration of the stability periods, the supplementation via international law, would relate back to Zambia's ICSID status in the case of MCM, and UNCITRAL in the case of KCM, in addition to any ratified Bilateral Investment Treaty. The Law Applicable within the MCM (2000, p. 59) contract is almost identical in Clause 25, "*This Agreement shall be governed by and interpreted in accordance with the laws of Zambia as in force at the date of execution of the Agreement ,supplemented by the rules of international law where necessary to give effect to this Agreement.*"

In the case of Zambia, the Mines and Mineral Act in all its conceptions grants exclusive rights over the exploitation and trade of minerals through permits and licences which are subject to a set of criteria (MMA 1990; 1995; 2008; 2011). KCM and MCM were targeted for expropriation, largely through the basis of failing to honour the agreement in terms of tax, investment, and environmental and labour issues. In addition to failing to develop mineral sites

to full capacity (most notably in the case of KCM in the instances of Chilonga and Chililabombwe) (Ng'ambi, 2022). Ostensibly, the central charge for the expropriation of KCM was a failure to honour licence commitments. They were contracted to add investment which was never realised (Ndulo, 2020). Further issues which fell outside of the scope of the agreement related to labour and environmental standards that were not upheld (Ng'ambi, 2022). MCM was less clear, as an expropriation was not carried out directly, instead a sale or cooperative solution was compelled via litigation and general threat. MCM broke the terms of the agreement when threatening to mothball the mine as the outcome would have curtailed production. The environmental and tax charges were arguably outside the scope of the agreement but nonetheless were litigated against. This ultimately lends credence to the view that stabilisation clauses gave protection to MCM as the awards for both the tax and environmental violations were given by the Supreme Court after the cessation of the stability period.

This failure to honour the contract terms resulted in the government being able to withhold the renewal of their permits and licences, effectively halting production, and trade in one move. Within the initial KCM agreement (2000), the MCM agreement (2000) and the amended KCM agreement (2004), they seek to invalidate any immunity that could stem from sovereignty, this is seen in Clause 24 of both MCM and KCM (2000; 2004) and Clause 23 of KCM (2004, p. 53) whereby the same wording is used. *"GRZ irrevocably agrees that should any proceedings in relation to, arising out of or in connection with this Agreement be taken in any jurisdiction against it or its assets, no immunity (to the extent that it may at any time exist, whether on the grounds of sovereignty or otherwise) from those proceedings shall be claimed by it or on its behalf or with respect to its assets, and GRZ hereby irrevocably waives any such immunity which it or any of its assets now has or may acquire in the future in any jurisdiction".* Within this clause, we see a development that seeks to safeguard the investor Vedanta from sovereignty claims, this inhibits the ability of the government to set out parameters of consent on the extraction process beyond the contract (Cotula, 2018).

One key difference between the agreements was the existence of a ratified BIT in the instance of MCM. MCM at the time was a subsidiary majority-owned by Glencore which is based out of Switzerland. Only one of two signed BITs in Zambia is with Switzerland, as such this represented an additional source of law for the MCM agreement but not the KCM agreement. KCM's parent company Vedanta is U.K based.

Much of the domestic legal landscape in Zambia offers the limited protections against firms seen in other small, mineral-reliant states in Africa. Larger states such as South Africa

(for minerals) and Nigeria (for petroleum) have been able to shape their legal landscape to benefit exploitation from domestic firms. Other states in the continent are still beholden to granting foreign firms considerable rights for limited reward, for instance the Democratic Republic of Congo, Guinea, and Tanzania (Taylor, 2016). The link between states in Africa and their ability to benefit from their resources rests on their ability to implement their own domestic laws and protections and resist the excesses of stabilisation clauses (Oshionebo, 2010; Mostert et al., 2019). The impact of stabilisation clauses in Zambia is aptly demonstrated by the inability of the government to repeal existing development agreements. The Mines and Minerals Act of 2008, of which the 2015 iteration did not repeal, abolished development agreements. Section 160 of the Act (2008, p. 153) states that *"A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the Republic from the commencement of this Act".* Although a bold move, it proved to be toothless, as the stabilisation clauses protected the firms regardless of any legislative change from the Zambian government, including the repeal itself (Ng'ambi, 2022). Throughout this period the only legal aspects the firms were held to were those in place at the time of the signing of the development agreements.

The Stabilisation Clauses of the Agreements

Stabilisation clauses inserted into the development agreements represent the most salient aspect of the legal relationship between firm and state in relation to the path dependence of the mining sector in Zambia. The stabilisation clauses were furnished with stability periods that locked the contract in for a predetermined timespan. The periods in the instance of Zambia of 20 years for KCM and 15 years for MCM. The clauses protected against any legislation change for the duration of the stability periods notably in tax and the environment (KCM, 2000; 2004; MCM, 2000).

Historically, Zambia has proven to be a complex and high-risk environment for external mineral investment. When Zambia achieved independence in 1964 it immediately started the process of nationalising every asset, in addition to the beginning of the process of partially nationalising the mining sector (Noyoo, 2010; 2021). This historic aspect was a focal point during privatisation, as such every contract drawn regarding the privatisation of mines to outside investors had stabilisation clauses inserted (Ng'ambi & Mwiinga, 2016).

These clauses limited the incentive for the government to actively challenge the mines through legislative change as the target for any legislative change (the large mining firms) would remain immune. For instance, the key legislation that governs the environment in relation to mining, the Environmental Management Act (2011), and the Mines and Minerals Act (2011; 2015) did not affect KCM or MCM owing to the stabilisation clauses. The Environmental Management Act of 2011 which places controls on pollution, was not updated once, even in the instance of major cases related to pollution by the mines such as Nyasulu and Ors v Konkola Copper Mines Plc (2011) and Geoffrey Eliam Miti v Mopani Copper Mines (2014). The act received its first amendment in 2023, after the stability periods on most mines had lapsed (Environmental Management Act, 2023).

This is consistent, as owing to the stabilisation clauses the majority of mines would technically fall under the amendments passed on the Mines and Minerals Act of 1995. Legislators are disincentivised to update or amend when faced by stability periods, an issue seen in the formulation of the Mines and Minerals Acts in 2008 which had no effect on the majority of mining firms. By 2015 when it was updated major firms including MCM were held to it, but not KCM as their period still had a further five years. The disincentivising of legislation in this period, harkens back to the colonial era when the Colonial Secretary Cohen stated it was pointless introducing mining legislation to Northern Rhodesia whilst BSAC held the mineral rights (Colonial Office, 1946).

As discussed in the previous chapter there are many legal questions about the validity of stabilisation clauses. Regardless of this, they are still used frequently and often upheld owing to their connection to the legitimate expectations of an investor (Loving, 1994; Faruque, 2006). Sornarajah (2017) views that they offer little to investors other than some reassurance without specific legal rights. In essence, a impotent deterrent. However, if it is enough to reassure a multinational with a dedicated legal department and years of experience navigating complex and risky economies it raises the question of how a weaker, resource dependent host state perceives them. Even if we accept that stabilisation clauses have De Jure validity but little real world application, they are still accepted within the arbitration process (Cameron, 2014). Multinationals, especially in mining have more time to engage in lengthy legal disputes than a resource-dependent nation. The suffering imposed on a resource-dependent state when key mining assets have operations suspended (the most likely outcome during a dispute) would immediately affect their ability to garner tax revenues on their most valuable assets. In the case of Zambia this has the twin effect of limiting available funds for public service but also limiting the ability to pay off its deficit, thus widening their national debt. The stabilisation clauses

outlined in the KCM (2000; 2004) and MCM (2000) agreements were highly favourable to the investor, and the limited success of the legal cases that followed indicated they served as ample deterrence to the state in pursuing claims around tax and the environment.

The stabilisation clauses outlined for both KCM and MCM can be deemed as Economic Equilibrium Clauses, as both hold compensation elements and renegotiation clauses within them (Cameron, 2014). MCM's (2020, p. 45) contract states in Clause 16.4 "*GRZ covenants to reimburse the Company (or, at its option, make offsetting changes in any law, statute, regulation or enactment applicable to the Company) to ensure the Company is fully, fairly and timely compensated for any costs incurred by it by reason of a failure by GRZ to comply with the provisions of Clauses 14, 16.1 and Clause 16.3*". KCM's (2000, p. 48) carried over provisions read similarly "*GRZ covenants to make such payments (net of any Taxes, withholdings or deductions) to KCM (or, at its option, make such off-setting changes in any law, statute, regulation or enactment applicable to KCM) as would result in KCM being fully and fairly compensated for any loss or detriment suffered or expenses or costs incurred by KCM".*

The stabilisation clause used for KCM's amended agreement stems from the 2000 agreement with Anglo, and the initial period remained valid up until 2020 (Ngambi, 2022). The renegotiation of the stability period is vague at best, given that the amended contract references the original contract signed in 2000 which stipulated a 20 year period (KCM, 2000). The stability period was partially re-negotiated within the 2004 agreement to limit the clause's expiration to 2009 with an automatic extension to 2013 on the basis of maintaining the tenets of the agreement. However, the agreement also explicitly says that the period and clauses remain as long as the agreement is in force, *"The Stability Period shall terminate on 31 December 2009 notwithstanding that this Agreement may remain in force after such date, provided always that the Stability Period shall be extended"* (KCM, 2004, p. 18). The stabilisation clause and period was deemed to still be in effect at the time of expropriation in 2019 (Ngambi, 2022). Whether it was a result of the initial 20 year period agreed with Anglo or a perpetual one granted out of an error in the amendment the clause was in effect.

A key section of the stabilisation clause for KCM is outlined in Clause 13 (2004, p. 41), whereby the government will not change during the stability period *"legislation or regulations governing the regulation and management of companies, effect any changes thereto or to their application which would impose a requirement that the directors of KCM comprise a higher number of Zambian residents than that presently required by Section 208 of the Companies Act; 13.1.2 legislation or regulations governing the operation of mines or related activities*

but subject to Clause 12, effect any changes thereto or to their application which, individually or cumulatively, would have a Material Adverse Economic Effect; 13.1.3 regulations and procedures governing imports and exports within Zambia, effect any changes thereto or to their application which, individually or cumulatively, would have a Material Adverse Economic Effect; 13.1.4 legislation or regulations governing the terms and conditions of employment within Zambia, effect any changes thereto or to their application which would prevent KCM from: (a) operating on a seven (7) days a week, twenty-four (24) hours a day, three hundred and sixty five (365) days a year basis; or (b) negotiating with employees or relevant unions or engaging employees or terminating their contracts of employment in such a manner which would be likely to have a Material Adverse Economic Effect, individually or cumulatively".

The stabilisation clause reads similarly to many between large foreign firms and small resource-dependent states. It limits the government to develop policies and legislation that could result in material adverse economic effect, and hence why the abolition of development agreements bore no fruit. Additionally, it disallows any amendments to the existing import and export framework. This presents a significant constraint for the government as import and export activity, especially across a key sector of a mineral-dependent economy can; impact GDP, the rate of exchange, in addition to the rate of inflation (Gyimah-Brempong, 1991). Furthermore, for a resource dependent state maintaining strategic reserves is also important, and an inability to influence export flows affects this (Nager, 2013). The stabilisation clause outlined by KCM has focus on labour. For instance, the first clause limits the ability for the government to increase the requirement of resident directors. This is arguably in response to initiatives out of South Africa, which have sought to increase requirements by firms to have indigenous directors (Acemoglu et al., 2007). While further aspects of both MCM and KCM's agreements hold constraints over worker demonstrations, strikes and union activity (MCM, 2000; KCM, 2000; 2004; Kumwenda, 2016).

In the agreement for MCM and both the initial and amended version of KCM's agreement, we see an almost identical constraint of the stability clause over foreign exchange. The stability clause safeguards both firms from any future change to foreign exchange regulations. The stabilisation clause protects the investors from any legislative shifts in foreign exchange controls, and allows both firms to hold their own foreign exchange reserves and most importantly remit foreign currency out of Zambia (MCM, 2000; KCM, 2000; 2004). At the time of the agreement Zambia had removed foreign exchange controls, this runs in contrast to the evidence that points toward fixed, or partially rigid exchange rate regimes, which for states

in the primary stages of financial development can help stem inflation, without overriding growth objectives (Rogoff et al., 2003; Adam, 2009).

Foreign exchange controls remain a highly contentious topic in the Global South, especially with states that have unstable currencies, where in the event of devaluation foreign exchange reserves become crucial. These reserves effectively operate as an insurance against devaluation (Rodrik, 2006). The Zambian Kwacha has gone through purposeful devaluation in the past and is also highly susceptible to the fluctuations of the global copper market, something demonstrated when a sharp reduction in copper prices led to a 60% devaluation of the Kwacha over a six-month period (Bova, 2012).

Taxation and Transfer Mispricing During the Stability Period

Taxation was a sticking point of the development agreements and remains the only aspect that was renegotiated: or more precisely where legislation was passed and accepted by the firms despite the develop agreements. The agreements protected the firms tax arrangement through the stabilisation clause. This enshrined a corporate tax rate for the length of their respective stability periods, this included a reduction from 35% to 25% of the basic rate and mineral royalties devalued from 3% to 0.6% (MCM, 2000; KCM, 2004). Additionally further aspects were added. The firms were able to carry forward losses for 15-20 year periods, meaning from the first year, any year which resulted in losses from subsequent investment and the initial stake could be subtracted against different years where profit was higher (MCM, 2000; KCM, 2004; Lungu, 2008). Owing to the arrangement, KCM in one year paid $6mn tax on ores that generated over $1bn (Dymond et al., 2007; Silverstein, 2012). These contracts even though abolished, were able to survive through their stabilisation clauses, ultimately nullifying the initial repeal of the agreements in the 2008 Mines and Minerals Act but also the additional tax legislation of 2008 and 2009.

New tax legislation was operational in 2011. This occurred off the back of a boom in copper prices the mid 2000s. However, the firms were resistant. Although, the government sought to implement a new tax regime for 2008, it took three years to renegotiate with the mining firms, as such the firms did not pay the new taxes until 2010. The 2008 reforms included a windfall tax, the reduction of depreciation from 100% to 25%, hedging operations to be taxed separately from mining operations and royalty rates increased from 0.6% to the global standard of 3% (Manley, 2013). A windfall tax is used where sudden and unexpected gains occur. Given the significant fluctuations that occur with copper prices it would have been particularly useful

imposing a higher rate on unexpected gains. Copper prices between 2009 and 2011 rose from $1.37 to $4.41 (Comex, 2024). This would have been highly beneficial to the state given the sharp increase in copper prices in this period (Bova, 2012). The separation of hedging from operations would have aided in the regulation of tax evasion, as excessive hedging was cited as one of the methods Glencore evaded tax (Readhead, 2016; Mopani Copper Mines Plc v. Zambia, 2020).

Initially, the government sought to renegotiate all of the development agreements, however, this proved unfeasible hence the legislation-based approach. Subsequently, the mining firms refused to pay until the renegotiation occurred which redacted the bulk of the 2008 reforms (Griffiths et al. 2010). The renegotiation effectively removed the reforms, as such depreciation went back to 100%, hedging and operations income were merged back and the windfall tax was dropped (Manley, 2013). The firms could have taken the issue to international arbitration but instead were able to simply hold up the implementation of legislative change for three years, until the parameters suited them.

Taxing of the mining sector is the central component of public revenue in Zambia. As of 2021 the ZRA reported that mining and quarrying accounted for 36% of annual gross tax collection (ZRA, 2021). The extent of what was given to these firms within the contracts, the rigidness to which it was adhered to over the stability period, and the significant challenge of any renegotiation has led some to argue that the agreements were tantamount to reformation of domestic law (Lungu, 2008). This facet sheds light on why Zambia has attempted an increase in mining taxes ten times between 2002 and 2018 (EITI, 2020), yet there has been little increase in tax revenues (Oshionebo, 2010; Readhead, 2016; EITI, 2020).

This lies in the issue at the heart of stabilisation periods, that of state sovereignty. Contracts between investor and state do not revoke the state's rights to terminate an agreement or legislate for the benefit of the state, however, the result of the action can be deemed as a breach of contract or a form of expropriation. Taxation changes specifically target profitability and are a key area of contention around stabilisation clauses (Oshionebo, 2020). Regardless of legal validity, in the case of Zambia it proved an effective deterrent and also a key constraint of government options on taxation by the mining sector.

There are clear examples of constraints around taxation but simultaneously there are examples of the lack of contractual clarity aiding tax evasion. The stabilisation clauses demonstrated efficacy on the part of insulating both KCM and MCM from transfer mispricing charges. The stabilisation clause was cited in the case of the Mopani Copper Mines Plc v. Zambia, (2020) which conflated the actions used for transfer mispricing as an example of

hedging that was explicitly protected by the clause. Eventually the Supreme Court in 2020 ordered MCM to pay $13mn in taxes, this was after the stability period lapsed (Mopani Copper Mines Plc v. Zambia, 2020). The stabilisation clause didn't explicitly protect MCM from tax evasion but the hedging aspect of the agreement, that was protected via the stability period obfuscated proceedings. Although the audit from the ZRA had been completed in 2009 and demonstrated tax evasion, only after the stability period ended was it heard in the courts. In 2020 the Supreme Court who delivered a judgment in favour of the ZRA, whereby MCM were ordered to pay $13mn (Mopani Copper Mines Plc v. Zambia, 2020). Given the timing, it is a reasonable assertion that the stability period itself protected MCM from paying damages earlier.

The utility of the agreement is also demonstrated in the instance of KCM. In the case of UM Mining v. Vedanta (2014) which was heard in the UK courts, a Governmental Audit of KCM was used as evidence (Grant Thornton, 2010). This audit found that Vedanta had engaged in transfer mispricing via a subsidiary Fujairah Gold and through management fees to their parent company. This alongside the many other findings of the committee were not pursued against. Further reinforcing that the stabilisation clauses were effective in protecting the firms from legal repercussions.

Transfer mispricing was arguably protected against for KCM and MCM. According to Konkola Copper Mines v. U&M Mining (2014) and Mopani Copper Mines v. Zambia (2020), both firms engaged in transfer mispricing, via the cheap sale of ores through intermediaries for the purpose of tax evasion. Both KCM and MCM's agreements do not explicitly disallow transfer pricing that is not at Arm's Length, whereas the development agreements of 1997 and 1998 for the Chambishi and Chibuluma Mines, do explicitly regulate this practice. As such, it is feasible that this omission was there so the firms could engage in transfer mispricing without clear repercussions (Readhead, 2016).

Environmental Plans of KCM and MCM During the Stability Period

The environment was an overlooked factor in the agreements. Both agreements did not have a specific environmental plan in place, but purely an agreement to develop one over a period of time. The structure of the agreements with excessive stabilisation clauses and the length of the stability periods, aided the firm's ability to damage the environment without legal consequences from the state. Through the agreement firms were able to constrain the effect of existing legislation in specific instances of environmental damage. Specifically in relation to

clean-up liability in the case of KCM and its environmental damage of the Kafue River. In addition to MCM's pollution of Mufulira (Nyasulu and Ors v Konkola Copper Mines Plc, 2011; Geoffrey Eliam Miti v Mopani Copper Mines Plc, 2014).

At the time of the MCM agreement (2000), an environmental plan was scheduled, this meant no formal obligation had been made within the agreement, solely an obligation that one would be made in the immediate future. This highlights firstly the limited ability of the government to actively negotiate an environmental plan owing to a lack of data on the environmental impact of mining operations (Fraser & Lungu, 2007). It also demonstrates the alacrity of the privatisation period, whereby fundamental aspects such as the environment were given limited attention. This was mirrored in KCM's agreement during the Anglo acquisition (2000). Interestingly, the amendment of the agreement (KCM, 2004) also held a scheduled plan which implies that Anglo had failed to develop one in their 4 year period of ownership. Both contracts, mirror one another across a commitment to finalise an environmental plan, without actually having one in place. The environmental plans not only made the firms subject to only existing environmental legislation for the duration of the stability periods but also had clauses that limited the use of existing legislation in specific instances (MCM; 2000; KCM, 2000; 2004).

The development agreements are both particularly unclear around environmental protections. On one hand, they should follow every aspect protected by the stabilisation clause: that of domestic law in place at the time of the contract's commencement. Mulenga (2017) argues that the Environmental Management Plans further hamstrung the existing legislation given that the stabilisation clauses precluded the use of existing environmental legislation in the following instances, *"requiring the Company to clean up and or remove any stock of pollutants and or remedy any other condition which was pre-existing as at the date of this Agreement (other than in respect of areas of land or bodies of water identified by the Company pursuant to Clause 12.19[...]imposing fines or penalties in respect of the Company's breach of Environmental Laws in the case of penalty charges in respect of the emission of sulphur dioxide arising from the ongoing operation of the Mufulira smelter provided that the Company remains in compliance with the measures, and in material compliance with the timetables for implanting those measures set out in the environmental plan" (MCM, 2000, p. 35).* The clause related to clean-up liability was also replicated in the KCM (2000) agreement and carried forward to the amended version (KCM, 2004).

The agreement with MCM (2000, p. 36) also held within Clause 12.6 that the firm had the right to renegotiate the scope of the scheduled environmental plan under certain conditions.*(d)" if, at any time following the expiry of a period of three years following the date of this*

Agreement, the continued operation of the smelter at Nkana by Konkola Copper Mines PLC (or any successor in title there to) renders the operation of the Mufulira smelter and refinery in accordance with the then applicable Environmental Plan uneconomic and amendment(s) there to is (are) required to enable its continued economic operation". This is unusual as it shields MCM's smelting operations from that of its competitor KCM. Ultimately, this disincentivises environmental development on the part of MCM's smelting operation to operate at a higher environmental standard.

The environmental component of the Anglo's initial KCM agreement (2000) is imbalanced. The contract demands negotiations cease within two years for the plan to be adopted and secondly the clause also gives power to KCM in negotiations ,"*KCM shall not be required to agree the KCM Final Environmental Plan with GRZ until such time as GRZ procures that ZCCM negotiates and agrees with GRZ and KCM (in a form reasonably satisfactory to KCM) the detailed terms and conditions and timetable of the ZCCM Final Environmental Plan*" (KCM, 2000, p. 34). This explains why no plan was in place by the time the contract was amended with Vedanta in 2004.

The power ceded to KCM in the negotiations is further demonstrated by Clause 12.2 (KCM, 2000, p. 34) whereby as part of the stability period the government must retract statutory instruments and other environmental laws that could harm the value of the KCM investment, "*such actions shall include amending or replacing the Enabling Statutory Instruments and/or any relevant Environmental Laws and or applicable permits to disapply the standards previously applied to the Assets under Environmental Laws and to replace these in any Environmental Laws which are applicable to KCM with those requirements specified in the KCM Final Environmental Plan for the conduct of Normal Operations at each of the relevant Assets for the period after KCM has fully implemented the other requirements of the KCM Final Environmental Plan*". This clause displays the robustness of the environmental clauses inserted into the agreement, whilst plainly revealing how these agreements can harm sustainable development. Furthermore, the KCM agreement (2000, p. 37) gives a safeguard with the caveat in Clause 12.7, "*Provided that this Clause 12.7 shall only apply to the extent that any such non- compliance, partial compliance or delay is not attributable to either any refusal or failure on KCM's part to spend funds which it has committed to spend under the KCM Environmental Plan or the Approved Programme or the negligence of KCM or its contractors or agents or KCM'S refusal to comply with such plan*". An important point relates to the timeline it takes to implement an environmental plan. At the time that Anglo pulled out of KCM in 2004, it had displaced 140 households to create the Lubengele Tailings Dam (a

component of the mining operation). As they exited before the implementation of an Environmental Management Plan, it created confusion around who was liable for resettling the 140 households (Etter-Phoya & Banda, 2022).

Much of the environmental component of MCM's (2000) and Anglo's agreement (KCM, 2000) are similar. The latter agreement carried over to the amended agreement with Vedanta in 2004 (KCM, 2004). The agreements included an Environmental Liabilities Agreement whereby responsibility for and the implementation of an environmental plan lay with ZCCM-IH and that the Government would need to provide indemnities to firms in the event of specific issues under environmental law and mine safety. This facet is crucial in understanding why during the appeal in Konkola Copper Mines Plc v. Nyasulu and Ors (2012), the judge removed the clean-up requirement that was imposed in the previous case of Nyasulu and Ors v. Konkola Copper Mines Plc (2011). The environmental liabilities element was also used as the method of defence by Glencore in Geoffrey Eliam Miti v. Mopani Copper Mines Plc (2014).

The stabilisation clause over environmental legislation and the lack of concrete plans behind the environmental components of the development agreements aided KCM. Aptly demonstrated when it was found liable for the pollution of the Kafue River in the Lungowe case (Nyasulu and Ors v. Konkola Copper Mines Plc, 2011). The pollution affected surrounding streams and the both the natural and piped water supply of localised inhabitants, this has steadily worsened over the years with a high mercury level and other heavy metals pollution (Environmental Council of Zambia, 2006; Moussa et al., 2022). Although, KCM was determined to have had a duty of care and were negligent as early as 2007, compensation was not actually released until after the stability period ended in 2021. The Mines Minister at the time of Nyasulu's first complaint in 2006, blamed the event on KCM not implementing the agreed environmental plan (Yaluma, 2014). But it is unclear as to whether the agreement meant that the Anglo plan had to be carried over until the Vedanta plan had been agreed. Also the claim did not clarify whether Anglo had actually implemented a plan initially. The lack of a clear framework for the environmental plan allowed the investor to have wider scope in the instance of environmental damage. On balance Vedanta has caused some of the most significant environmental damage in Zambia (Mulenga, 2017).

Environmental plans were ignored in the hurry to privatise, and simultaneously the contract goes to considerable length to stifle it prior to its creation: in addition to constricting the use of any existing environmental laws on the part of Zambia and constraining the use of future amendments. It is obvious, that an environmental plan agreed between a government of

a highly indebted resource dependent nation and a large mining conglomerate is likely to benefit mining over the environmental well-being of the state.

KCM wanted the case presented by Nyasulu and the Lungowe villagers to remain in Zambia rather than the U.K or the international courts. The judgement on Konkola Copper Mines Plc v. Nyasulu and Ors (2012) may have found KCM to be environmentally negligent under the Environmental Management Act (1990), but the stabilisation clause still insulated KCM from the bolstered Environmental Management Act (2011). Beyond this although the High Court sought to award damages, the Supreme Court removed the compensation aspect but instead only found them liable for a duty of care. This meant that KCM remained shielded from serious financial ramifications and there was no court-ordered clean-up of the pollution Konkola Copper Mines Plc v. Nyasulu and Ors (2012). In effect the agreement gave KCM space to defend itself from much of Zambia's bolstered environmental law of 2011. Owing to the stabilisation clause in place the state would have to bear the costs of any award settled relating to the environment unless the company had violated the negotiated environmental management plan within the development agreement (Siachitema, 2018). This last point is salient when questioning why the Supreme Court decision deviated significantly from the judgement of the High Court, as the government would have likely had to bear the costs.

MCM's stabilisation clause over environmental legislation provided significant protection in the wake of the death of local politician Beatrice Miti. Miti had died owing to pollution from the Mufulira operations of MCM. Mufulira's emissions is specifically cited in the stabilisation clause. Clause 12.4 states that the government will not enforce environmental law with the aim of *"imposing fines or penalties in respect of the Company's breach of Environmental Laws in the case of penalty charges in respect of the emission of sulphur dioxide arising from the ongoing operation of the Mufulira smelter provided that the Company remains in compliance with the measures, and in material compliance with the timetables for implanting those measures set out in the environmental plan"* (MCM, 2000, p. 35). ZEMA, which as discussed before was cited in the case as failing to expose the levels of pollution from Mufulira, was in charge of determining appropriate levels. As long as their oversight failed or was improper MCM remained protected. Mulenga (2017) notes that the stabilisation clauses gave MCM licence to pollute at the Mufulira site with impunity up until 2015.

The case occurred in 2014 (Geoffrey Elliam Miti v Mopani Copper Mines Plc, 2014) prior to the cessation of the stability period. After the lapse of the period Mopani Copper Mines Plc v Geoffrey Elliam Miti and Attorney General (2016) followed. In which the judge ruled in the favour of Miti's family. However, a further indicator that even after the end of the stability

period the power dynamic remained in MCM's favour (until the government signalled its intention to take back the mines) was the firms refusal to pay out the compensation after the ruling. MCM sought to appeal the case in 2020, having not paid out compensation yet and to limit the ammunition available to the Zambian government in its attempts of expropriation. Being able to prove that they were not culpable for environmental damage would have hindered the ability of the government to reject their mineral licence renewal. However, the Zambian courts ruled against MCM once again, at which point MCM accepted liability and paid compensation (Mopani Copper Mines Plc v Miti, 2020). This case study demonstrates firstly the hold of stabilisation clauses over domestic law, but also secondly that the weakness of institutions in Zambia meant that the courts could not actually make MCM pay compensation or take culpability for the death of Miti until it had the full backing of governmental objectives. The case provides a stark reminder of the ability of foreign mining firms to lean on weaker institutions in the Global South for their benefit.

It is critical for host states to protect themselves from the deleterious effects of stability periods and long-term contractual obligations within mining to effectively mitigate environmental damage. The case for Zambia is stark when assessing water pollution in Kitwe, lead poisoning in Kabwe by Anglo and atmospheric toxicity in Mufulira resultant of MCM's operations. Mining irreparably damages the localised environment; however, the economic benefits tend to veil this issue. Empirical studies have demonstrated the effects of mining not only on the quantity of local freshwater supplies but also its impact in deteriorating its quality (Meissner, 2021). Brauch et al. (2022) note many issues within investor- state contracts in the mining sector across the globe that in turn impact the environment, the cases of KCM and MCM reflect much of these global challenges . They identify from their study some key aspects which could alleviate the issue. Chiefly, that domestic laws must fill the regulatory space that investor-state contracts often form a stop gap for, precisely identifying and in turn regulating against issues protected under the contract. Domestic courts should also be the forum for arbitration, rather than maintaining arbitration clauses that remove the host state from its responsibility to regulate their external investor issues.

Beyond the legal arrangements surrounding future development agreements, if the abolition is reversed under the new UPND administration, there are also recommendations that resonate with the contracts drawn in the cases of KCM and MCM. Chiefly the removal or significant limitation of the scope of stabilisation clauses. Or at the very least, a balanced method to renegotiate them as time progresses.

Renegotiation and Dispute Resolution

As the purpose of stabilisation clauses are to effectively straight-jacket smaller nations, there has been considerable discussion on the necessity of wide renegotiation clauses in investor-state contracts (Sauvant & Wells, 2021). Renegotiation or as stated variation, was also part of the agreements, however, it required both parties agree to the renegotiation of the clause whilst also maintaining the validity of the remaining aspects of the contract. Clause 27 of the MCM agreement (2000) stipulates the terms and right related to renegotiation or contract variation, which remains similar to that of the initial KCM agreement (2000). The amended agreement of 2004, maintained the same rights for the government to variation but had substantial changes to the methods of renegotiation, which benefit the investor. In this, KCM (2004, p. 14) has the right to modifications of the "*Approved Programme of Mining and Metal Treatment Operations*", whereby a sole expert has the power to ascertain whether something constitutes a major or minor change. The latter can be done without approval of the government.

In the event of a major change that the government disagrees with, the sole expert can overrule the governmental objection under Clause 26.17 (KCM, 2004). This aspect aids understanding of why the government and Vedanta did not engage in bilateral negotiation prior to expropriation. The structure of the contract favoured KCM in the event of renegotiation, thus disincentivising the government to utilise this strategy for the duration of the stability period. This in turn set the parameters for the bilateral relationship between firm and state and limits the feasibility of negotiation. This aspect is highlighted by the differing outcomes of the acquisitions. By this point in time MCM's stability period had ceased and were not protected in the event of renegotiation in a similar way, as such this may have incentivised both parties to negotiate bilaterally.

Use of the sole expert is frequent throughout investor state contracts, and this is widely understood to be an unbiased method of dispute resolution (Salih & Yamulki, 2020). Both parties must agree on the sole expert prior to selection. However, regardless of the seeming lack of bias within this approach it is worth questioning whether the favourability of the contract to the investor, or the favourability of international law to investors make the use of a sole expert fraught with complication. The sources that would be used by a sole expert, ultimately weigh against the host state's favour (Okafor, 2006; Maklanron, 2016; Banai, 2017). Even an unbiased mediator in this instance would have to use the contract, domestic law, or

international law, all of which ultimately weigh the balance in the favour of the investor (Shalakany, 2000; Sornarajah, 2017). It is notable that at no point during the stability period was a sole expert called, in any of the disputes, which indicates that both parties felt a sole expert could work against their aims.

This is demonstrated by the tax renegotiation of 2010. In effect, the majority of mining firms ultimately refused to pay until the agreement had been diluted and the windfall tax (the key component) had been removed (Manley, 2013). Neither side sought to bring in an independent expert and channel the renegotiation through the development agreements. Instead the Zambian government sought to unilaterally raise taxes because of the abolition of the development agreements, however, were not inclined to raise a case against the firms given the stabilisation clauses in place (Ng'ambi, 2010). The firms did not seek to utilise the agreements and, instead they united, and simply refused to pay until key components had been removed.

Outcomes: Expropriation and Acquisition

In the MCM (2000) agreement, the firm could terminate any point after the 15th year via 12 months written notice. Whereas the government prior to the end of the stability period could only terminate through Clause 19 on the grounds of licence expiration or if it was deemed that the firm had not honoured the obligations of Clause 8, in relation to Suspension or Curtailment of Production, and in turn the land of the mine had been reasonably considered to be abandoned. This explains the strategy of the government in the run-up to the settlement, whereby they focused on methods to not renew the mineral licence after the stability period ended on the basis of production curtailment. This was seen when Zambia detained MCM's CEO Nathan Bullock. The governmental letter sent prior was widely reported in the news, which held the explicit threat to not renew MCM's licence. Ultimately, both sides failed to honour the agreement, this was seen not only in the detention of the CEO, which contravenes domestic law, but also the failure to pay VAT refunds and the increase of tax in contravention of the stability clause. MCM however, also failed to honour the agreement as it engaged in tax evasion and curtailment of production during the stability period. MCM were ruled against in relation to that of transfer mispricing in Mopani Copper Mines v. Zambia (2020).

However, both sides seem to have seen the futility of engaging in lengthy arbitration outside of the domestic system and under ICSID, where an automatic execution of award presented a risk to both parties. As such, MCM was concluded through paying a fair market price, as outlined in the agreement (2000). Glencore the parent company of MCM, facilitated

a $1.5bn loan through their subsidiary the Carlisle Group. Since then, Glencore has offered further loans to the ailing plant. As of 2022 MCM requires a further $300mn for expansion, of which Glencore has offered to supplement as much as $200mn. "*Glencore notes the completion of the Mopani transaction today. The total proceeds received by Glencore (including the settlement of working capital facilities) were USD$411m in cash on closing plus deferred consideration of USD$135m which will be settled over c. 4.5 years with interest and a royalty of 10% of the copper price above $12k/t from 2027 until 2035*" (Glencore, 2024, p. 1). MCM can be characterised as an indirect expropriation, whereby the government compelled a sale. However, Glencore played this to their advantage by creating an outcome that benefitted them.

The outcome of KCM was far more contentious, as the settlement was not amicable, constituting a direct expropriation, whereby the government liquidated KCM. The expropriation strategy of the government remained the same, whereby they did not renew KCM's mineral licence. The petition to wind-up KCM set before the High Court determined that Vedanta was liable for mismanagement to the detriment of the governmental shareholder ZCCM-IH (ZCCM-Investment Holdings Plc v Konkola Copper Mines Plc, 2019). The issues cited included the failure to pay a dividend to ZCCM-IH dating back to 2013. Operating at a cumulative loss and failing to meet operational expenses between 2013 and 2019, in addition to failing to pay debts to Copperbelt Energy and Ndola Lime (Ng'ambi, 2022). Beyond this, the issue of the pollution of the Kafue River was also highlighted, not as a breach of a contract but proof that KCM was unfit to run the mine.

A clear aspect where KCM violated the development agreement was a stipulation related to investment into the firm by Vedanta. Vedanta had argued that by 2014 they had invested $2.8bn. The investigation led by the Government of Zambia's Technical Audit Committee (2010) exposed that Vedanta had actually invested very little and the mine was in dire financial states. Additionally, that they had committed transfer mispricing (Konkola Copper Mines PLC v U&M Mining, 2014). The most bizarre point of this, is that although this was utilised in the liquidation process to build the case to not renew the licence this was initially supressed by the government in 2014. As discussed previously the findings of the audit committee were suppressed at the time and only a redacted version of it was discussed in parliament (Yaluma, 2014).

There are legitimate questions around the legality of the liquidation and there are arguments that international environmental law may have been a more useful method to facilitate the liquidation. Instead, Zambia through its abrogation of the contract and its impingements on the terms of the stabilisation clause became liable for extensive compensation

to Vedanta. As Ng'ambi (2022, p. 14) notes *"This would mean not only paying the investor for sunk costs (damnum emergens) but also for lost future profits (lucrum cessans)".* Vedanta never sought compensation through the international courts, which lends credibility to the argument that neither party has a strong case that the other party was the one who breached the terms of the agreement. Instead, they chose to bide their time, an option which allowed them to enter renegotiations with the UPND in July 2023 and receive the mine back by December of the same year (Kabuswe, 2023).

How Development Agreements Constrain Decisions and Reinforce Path Dependency

The development agreements signed by the Zambian Government embody the period of privatisation that then Finance Minister Edith Nawakwi referred to as akin to negotiating with "*a gun to your head*" (BBC World Service, 2007, as cited in Lungu, 2008, p. 2). This statement is demonstrative of the pressures faced by the MMD government after they took office in 1991 and throughout their two decades in office. As discussed previously the privatisation of the mines was the central component of the period of privatisation and the most glaring question related to how to increase the productivity of the mines. The incoming government, under the direction of the IMF sought to make mining as attractive as possible, whilst also giving due consideration as to how the Zambian state, could be perceived as an investor friendly climate (Lungu, 2008; Fraser & Larmer, 2010). A difficult task given the nationalising tendencies of the previous UNIP administration. The key component of this was to create the one-sided Development Agreements with prospective mining firms.

These agreements are a central event in the path dependence of the Zambian mining sector. They represent both an outcome that occurs from the historical development of the separation of mining from the legislative functions of the state but also a legal method that further constrains the decision-making capacity of the state away from the path. They are both symptomatic of path dependency and reinforcers of it. This element is underscored clearly by the failure to abolish development agreements through the Minerals and Mines Act of 2008, the legalisation of transfer mispricing through the agreements and the inability for the updated environmental legislation to be utilised during the proceedings against both firms for environmental damage. This demonstrates that the government engaged in the option to legislate against the firms but the agreement itself constrained the available outcome to one that favoured the mines.

The positive feedback of privatisation within the path relates to the twin troubles of vast national debt, coupled with an underperforming mining sector. This was the quickest way to raise capital to advance the mines and service the debt. The positive feedback of this course is also the result of the constrained choices of the government due to the path.

The choice of state acquisition was never an applicable choice, hence its immediate reversal under the UPND. The agreements underpinned this as it left the heavily indebted country with two further constraining factors consequently. An unproductive mining sector needing capital and dire effects on investor confidence, which feeds into the ability to raise capital externally. The path that sprang from the separation of mines and state by BSAC and the British Empire has created this parallel existence, whereby the mines remain outside of the state. The state acquisitions of KCM and MCM if seen in a vacuum were a rational choice. The logic being that Zambia is reliant on mining but also mindful of its ability to legislate all sectors, engage in taxation and protect environmental goods. Additionally, the state would rightly seek to avoid external interference from larger external forces. The logical conclusion of that sequence is a nationalised mining structure.

In the path whereby the mines have developed outside of the state, debt has continued to grow, and the technical capacity of the state is still unable to run significant mining assets without external help: the available choices are constrained. This is further reinforced by the need to present the state as investor friendly, so that mines can continue to raise capital for development and debt servicing. Subsequently, the act of acquisition becomes highly irrational. The action is highly irrational in the context of the path. Therefore, the path constrains the choices to equilibrium, through rational choice. However, the equilibrium of this path-dependent sector, as we have seen from the development agreements, the privatisation period, the colonial legacy firms, the IMF, and the actions of the BSAC, is wholly tied to limiting the self-determination of Zambia. This limitation, feeds into issues on appropriate taxation, the development of fair working conditions and the protection of the environment.

Findings

A salient finding is that regardless of the "abolition" of development agreements in 2008, the utilisation of stabilisation clauses prolonged their existence a further decade, something demonstrated by the lack of legal action taken against MCM until 2015 and KCM until 2019. Furthermore, the Environmental Management Act (2011) remained without a substantial update until 2023, after the cessation of the stability periods. Which lends credence to the view

that stabilisation clauses do not just protect firms, they disincentivise policy (Oshionebo, 2010). Only one aspect of the development agreements was renegotiated over a 20 year period, that of tax, and it took three years to get the firms to agree to the renegotiation. In the meanwhile they refused until the agreement became palatable. By which point the original aims had been considerably diluted and the tax increase had become marginal (Griffiths et al., 2010). Beyond the difficulties with taxation lay the agreement's ability to ease transfer mispricing. A combination of unclear hedging practices and no explicit definition left the state exposed (Readhead, 2016). The stabilisation clause also gave the firms protection when engaging in environmental violations that in the instance of MCM caused loss of life (Mopani Copper Mines Plc v Geoffrey Elliam Miti and Attorney General (2016) and the instance of KCM displaced communities (Nyasulu and Ors v Konkola Copper Mines Plc, 2011). Within this is a simple point, that of the efficacy of stabilisation clauses for firms in the cases of KCM and MCM.

Environmental controls within both agreements presented a concerning situation. Not only were the firms protected from multiple improvements to environmental legislation, the structure of the contract itself prevented the use of existing environmental legislation in specific instances. In both cases KCM (2004) and MCM (2000) were protected from liability for environmental clean ups, an aspect that had significant consequences for the Kafue River and nearby communities. But also in the instance of MCM it was granted licence for excessive sulphur dioxide emissions as long as it was regulated by ZEMA. As ZEMA proved to be a weak institution that did not offer legitimate oversight to the operations of MCM the structure of the contract itself contributed to indiscriminate toxic emissions that resulted in the death of Beatrice Miti (MCM, 2000).

Regardless of the validity of the clauses, they had a far-reaching impact on the state's ability to legislate and hold firms to account. The events preceding the acquisitions demonstrate its utility for the firm as a deterrent against state intervention. This deterrent to the state needs to be contextualised on the basis of an indebted mineral dependent state such as Zambia. This relates to the perceived ability of a stabilisation clause to garner significant compensation for an act of expropriation. This possibility of having to release compensation can serve as a deterrent against smaller and economically weaker states (Waelde & Ndi, 1996).

In the context of the agreements both the firms and the state breached them, this may aid in the explanation as to why the international route for dispute resolution was not instigated by either party.

The agreements developed out of the path dependence of the sector and also contributed to it. Path dependence of the sector led the government to the point that they had to include development agreements to attract foreign capital, however, not only did they constrain decisions in the form of explicit policymaking around tax, the environment, and the abolition of the agreements. They also constrained the available options related to litigation and negotiation. The agreements provide us with concrete macro and micro-examples of the constraints that occur in a path-dependent scenario.

Zambia's experience with stabilisation clauses has been seen across Africa, and to some extent represents part of the generic issues with ceding sovereignty in international law. Where it differs relates to the asymmetric power within negotiations of the initial contract, an aspect that is amplified by the path dependence of the mining sector. The limited bargaining power of the state at the time of negotiations resulted in an uneven contract that was biased to the investors but also ones that carried particularly long stability periods (Lungu, 2008). Additionally, the significant similarities across the contracts, the similarities across cases and the speed at which the government had to negotiate, lends credence to the view that the privatisation of the mines was a hurried and disorganised process (Fraser & Larmer, 2010).

3.3) The Role of Bilateral Investment Treaties in Zambia

This section continues the legal element related to the path dependency of the Zambian mining sector, specifically on Bilateral Investment Treaties (BITs). Although often positioned as a necessary legal instrument for high-risk climates to attract investment, BITs have arguably not been beneficial for the Global South (Elkins et al., 2006; Sornarajah, 2017). The following section builds on this perspective, challenging the view that the instruments increased foreign direct investment (FDI) in the Zambian context. Zambia had a wave of BITs drafted in the privatisation period, largely as a method to signal their intent as an investor-friendly state, however, only 10 out of 33 have been ratified in the past three decades. There have been two significant periods for BITs in Zambia. The first in the privatisation period under the MMD party between 1994 and 2005 which saw the drafting of 29 BITs, the signing of 13 and only one ratification. The second period of increased BIT activity is the ratification of 6 agreements under the PF between 2014 and 2016.

This section posits firstly that BITs have a negligible effect on FDI in Zambia, and instead should be viewed as method used by the Zambian government to increase a favourable perception to external investors. In the privatisation period BITs were used by the state to acquiesce to IMF conditionalities. External states in this period sought to build ties with a state that sought to privatise 280 state-owned assets (Kabala et al., 2020). Secondly, that the path dependence of the mining sector disincentivised the use of political capital on ratifying the majority of the draft agreements. Ratified agreements predominantly occurred after the highest recorded year for FDI inflows. However, this year (2014) was the start of the heightened tension between the PF and the mining firms MCM and KCM. Ratification in this period was a combination of signalling for investor confidence in a state with growing calls for resource nationalism, and also used with states that held firms with the potential to buy KCM and MCM.

The last element of the section focusses on the limited role of BITs in the expropriation of KCM and the compelled acquisition of MCM. These state acquisitions demonstrated that firms preferred to utilise the domestic courts rather than international law. The wide scope of their development agreements provided a more secure position than the international courts would offer. This aspect lends credence to the position that mining firms seek to operate in states with weak institutions.

The IMF never explicitly demanded the adoption of BITs but the policy conditionalities around raising capital lead to a necessity to adopt them (Elkins et al., 2006). In this sense, the IMF direction over Zambian economic policy during the privatisation period (1991-2011) led to a rapid adoption of the instrument. However, the way that mining firms have operated within Zambia, rely on their ability to lean on weaker institutions within the domestic space. As such, there is limited incentive by either state or firm to ratify them and or promote their ratification. This explains why 33 BITs have been drafted, fewer have been signed and only ten have been ratified by Zambia. From the perspective of the host state there is even less incentive for their adoption when one considers their limited effects on foreign direct investment and also the few instances in which they have benefitted resource dependent states in the Global South (Sornarajah, 2017).

During Zambia's privatisation period, the IMF who played a significant role in restructuring the Zambian economy in return for financial assistance did not explicitly demand the introduction of BITs as part of policy conditionalities. However, empirical studies on BIT adoption found a relationship with IMF credits in relation to the point at which they are offered. Elkins et al. (2006), found that within the BITs signed between 1960 and 2000 there is a link between the point of signing and whether the state has drawn on the IMF within that year. This is a subtle mechanism, whereby they are not explicitly told to do so but instead coerced during the pressures of balance of payment stresses. "*The strong positive effect of IMF borrowing and alliance relationships on the propensity to sign a BIT also reminds us that a certain degree of coercion may be at play in some cases" (*Elkins et al., 2006, p. 842).

Regardless of to how they emerged, the efficacy of international law in relation to Zambian mining disputes is limited. Neither KCM and MCM's cases reached the international legal sphere, in spite of the ICSID and UNCITRAL dispute provisions.

There are in total 33 BITs that were drafted by Zambia and within this only 10 are ratified (UNCTAD, 2024). The lack of ratification points towards a lack of incentive or political will to ratify them, as they are required to pass through parliament (Simumba, 2017). Firms mining in Zambia do not necessarily require it and as a consequence the state will not use political capital on ratification if it is unnecessary. In the rare instance a state wants it they will receive it, such as China and the UAE. In both instances the BIT did not attract the FDI, instead the BIT was a consequence of the FDI into mining.

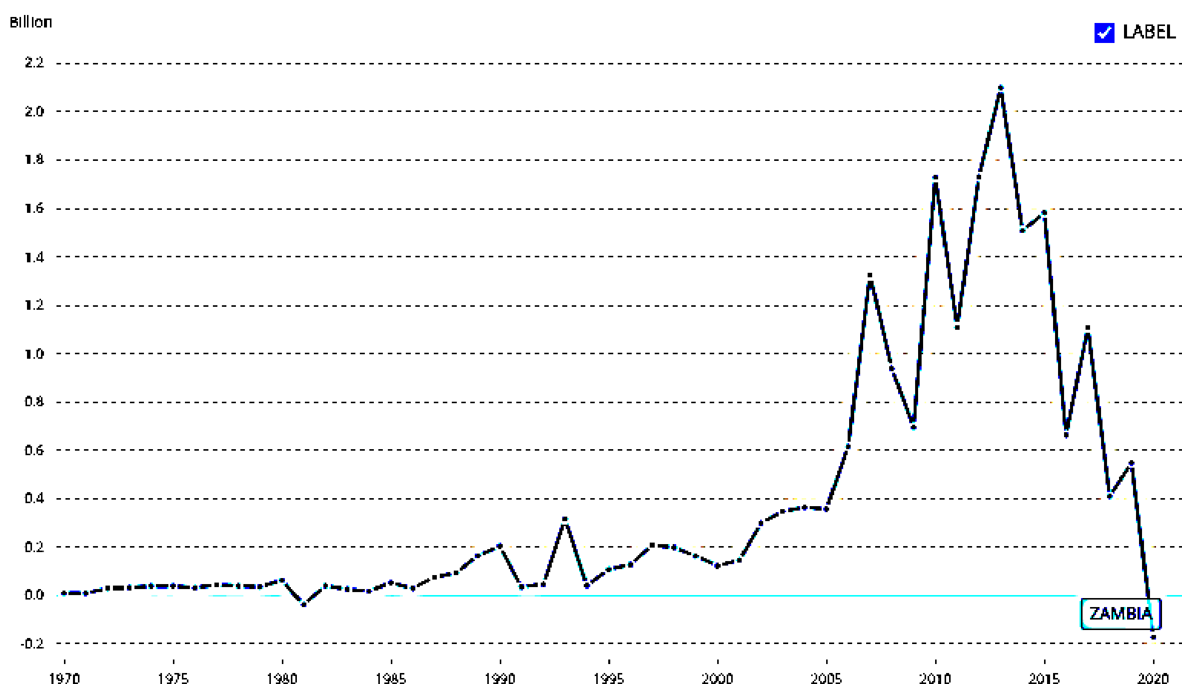
Table 8. Stages of Bilateral Investment Treaties in Zambia (Simumba, 2017; UNCTAD, 2024).

Country	Date Signed	Date Ratified	Status
Germany	1966	1972	Ratified
Switzerland	1994	1995	Ratified
China	1996	2014	Ratified
France	2002	2014	Ratified
Italy	2003	2014	Ratified
Netherlands	2003	2014	Ratified
Finland	2005	2014	Ratified
Mauritius	2015	2016	Ratified
Turkey	2018	2020	Ratified
United Arab Emirates	2020	2021	Ratified
Belgium-Luxemburg	2001		Signed
Croatia	2000		Signed
Cuba	2000		Signed
Egypt	2000		Signed
Ghana	2001		Signed
United Kingdom	2009		Signed
Morocco	2017		Signed
Algeria			Draft
Angola			Draft
Botswana			Draft
Canada			Draft
Denmark			Draft
India			Draft
Kuwait			Draft
Malaysia			Draft
Mozambique			Draft
Namibia			Draft
Nigeria			Draft
North Korea			Draft
South Africa			Draft
Tanzania			Draft
Ukraine			Draft
Zimbabwe			Draft

As discussed previously, there is significant contention as to the role of FDI increases via BIT ratification (Hallward-Driemeyer, 2003). Zambia's increases in FDI came from privatising mining and further increases of investments into developing the mines sold, not BIT adoption. In total 65% of FDI liabilities are in mining assets, and 86% of all FDI inflows have gone towards mining (Bank of Zambia, 2022; Ndlovu & Haabazoka, 2024). The states from which FDI inflows for mining came were primarily Australia, Canada, China, Switzerland, the U.K and the UAE (EITI, 2020; Bank of Zambia, 2022). Half of these states hold BITs whereas the other half do not. The timings of the inflows occurred in most instances prior to BIT's drafting and ratification rather than after.

Owing to the reliance of the state on the sector (a consequence of the path dependence of the sector) there has been limited incentive to engage in the international investment legal regime unless it explicitly aids a mining firm, as seen with the BIT between Zambia and the UAE that followed International Resource Holdings' purchase of Mopani Copper Mines. Furthermore, activity around BITs whether drafting or ratifying has occurred during peaks of FDI. This lends credence to the view that BITs in Zambia are a consequence of FDI rather than the converse.

Figure 4. FDI Inflows to Zambia between 1970-2020 (World Bank, 2020, p. 1)



When we look at upticks in FDI in Zambia in Figure 4, it does not relate to the ratification of BITs. Germany in 1972 and Switzerland in 1995 had little impact on increasing FDI. In fact 2014 which saw 50% of the ratification of total BITs occurred the year after the highest recorded FDI inflow in Zambian history of $2.3bn. The year that followed the BITs saw a continual downward trend in FDI inflows finally reaching negative levels in 2020 after the state acquisitions of Mopani and Konkola Copper Mines.

There does seem to be correlation between drafting BITS and the increase in FDI. However, these acts do not tangibly affect the investor landscape via a ratified legal mechanism, but instead purely signal a renewed confidence to investors, subsequently it cannot be determined that BITs have themselves increased FDI. The UK had significant investment outflows from Anglo-American's acquisition of KCM in 2000 and Vedanta's acquisition of the same mining subsidiary in 2004, neither of which related to the unratified 2009 BIT. If anything the development of KCM may have signalled a possibility for a BIT but not the other way round. Furthermore, of those ratified China, Germany, Finland, France, Mauritius, Netherlands, Switzerland, Turkey, and the UAE: only China and the UAE (formerly Switzerland) could be considered significant investors in Zambia (UNCTAD, 2024).

China's investment has grown steadily in Zambia from $50mn to $3.8bn between 1990 and 2022 and has held investment in Zambia since the TAZARA railway was built in 1967 (Xiaohui, 2022). In 1998 China's invested purchased Chambisha copper mine: which has seen continuous steady investment since (Olsson, 2023). China's FDI outflows to Zambia dropped from $424.9mn to $96.6mn in the year that followed the ratification of the China-Zambia BIT (Textor, 2023). China's investment in Zambia has little to do with the adoption of international legal regimes, instead it is part of a wider strategy for shoring up relations with resource rich states in Africa, (Qumba, 2021; Brautigam, 2022; Olsson, 2023). China has a history of close cooperation and continued FDI with Angola, Benin, Chad, Guinea, Kenya, Namibia, Niger, and Uganda: yet does not have a ratified BIT with any of these states (UNCTADb, 2024). The China-Zambia BIT remained in draft form for almost two decades and is largely a by-product of an economic relationship and a wider diplomatic program, rather than a specific mechanism that has determined their increases in FDI outflows.

Mauritius's BIT, which was ratified in 2016 was again driven by the desires of the mining sector. Mauritius as a tax haven became a helpful place for mining firms to start subsidiaries to engage in questionable tax arrangements. During the hostilities with KCM and MCM, Zambia broke off their tax agreement with Mauritius (Fitzgibbon, 2020). Turkey's BIT likely

relates to the tendering process for KCM that occurred briefly after the liquidation of Vedanta's asset. An undisclosed Turkish firm assumed to be representatives of Calik Holdings engaged in advanced discussions with the state about purchasing KCM and the ratification occurred prior to KCM's return to Vedanta (Reuters, 2019).

With the UAE, the BIT's signature and ratification occurred during the tendering process for MCM, which was eventually acquired by UAE-based International Resource Holdings. What can be surmised is that the UAE sought broader investor protection prior to purchasing MCM, which is reasonable when considering the expropriation and state acquisition of KCM and MCM between 2019-2020. MCM was tendered for by ten firms including South Africa based Sibanye Stillwater, China's Zijin Mining, and the undisclosed Turkish firm (Njini, 2023). International Resource Holdings won the tender but it wasn't the BIT itself that sold the mine. The BIT may have aided in the negotiation with one firm amongst many potential suitors. This uncommon instance of a rapid ratification of a Zambian BIT is an example of the mining sector leading the international investment environment in Zambia: not an example of international legal regimes enticing FDI. With China, Mauritius, Turkey, and the UAE we see that the mining sector led to the ratification of BITs rather than the ratification of BITs attracting FDI into the mining sector itself. A key example supporting the negligible impact of BITs on Zambian FDI is that Canadian firms represent one of the largest investors in Zambia and yet the BIT has remained in draft since 1996. Canada's First Quantum Minerals invested $30mn in 1998 and since then between First Quantum Minerals and Barrick Gold, Canadian FDI has reached a total of $3.7bn (Bank of Zambia, 2022). This significant FDI has occurred without a BIT in place.

A reasonable position would be to see the signing of the BITs as opportunism on the part of the state to create a favourable perception for future investment, rather than a specific mechanism for increasing FDI. With external states seeking to build ties in periods where Zambian FDI is conspicuously increasing. Zambia dramatically increased its FDI through its privatisation of state mining assets which included the sale of 280 nationalised assets (Kabala et al., 2020). The BITs effectively were drafted and signed as part of the privatisation process in the 1990s. The state was incentivised to signal to the IMF and external countries that it was sincere in its economic liberalisation and external states saw the opportunity of forging ties with a newly liberalised economy. Privatisation itself rather than the BITs provided the increase in FDI inflows, the BITs in this context provided little more than window dressing. It is notable that in line with Zambia's privatisation period, the expansion of BITs occurred in tandem with the reforms prescribed by the IMF and World Bank (Sornarajah, 2017).

Ratification, the aspect of the BIT which formalises its role as a legal mechanism for firms operating in host countries are not necessarily crucial within the context of Zambia's resource dependent economy. As capital inflows increased on the basis of what was a fire-sale of 280 state owned firms in 1995 there was little incentive to ratify the mechanisms, the ratifications would effectively leave the state exposed to legal claims. The process of starting BITs signalled to external investors, the IMF, and World Bank that the privatisation process was expansive, however, the utility of ratification in the context of Zambia's economic needs were not immediately apparent hence why so few were ratified prior to 2014. The view that BIT activity is incentivised during strong periods of FDI inflows is demonstrated by the majority of ratifications occurring in the highest recorded year for Zambian FDI inflows, 2014. The highest drop in Zambian FDI inflows from $1.5bn to negative figures occurred in the period immediately after the ratification of half of Zambia's in force BITs. This dramatic decline furthers the view that BITs have no pivotal impact on Zambian FDI inflows. A further point that emphasises the lack of political will to ratify BITs is the length of time spent in draft and as signed. Of those ratified in 2014 they had been signed between 1996 and 2005.

Inflows of FDI do confirm the role of mining in Zambia's economy and the link between the openness for mining investment and increased FDI. For instance the privatisation period saw a steady upward trajectory for FDI. Inflows of FDI also clustered around increases in global copper prices. Market sentiment to copper is the most crucial indicator for Zambian FDI increases (Mulenga, 2019; Kabala et al. 2020; Ndlovu & Haabazoka, 2024). The FDI balance starts to decline from the point that the PF start to openly threaten the mining firms regardless of the ratification of BITs between 2014-2016. A key message of the PF under Lungu was to increase domestic revenues from mining, and a flurry of legal activity against the mines occurred from this period onwards. Lungu's electoral victory in 2015 placed a heavy emphasis on taking back control of the mines (Caramento, 2021). Further legal activity continued against the large mining firms, these firms then threatened to stop production and in the instance of Glencore mothball MCM. At this point other firms developed concerns, Barrick threatened to sell its Lumwana mine and First Quantum Minerals threatened to remove investment (Friedman, 2018; Denina & Brumpton, 2019). Prior to the 2020 elections Lungu carried out the simultaneous acquisitions of KCM and MCM, an action of which plunged Zambia into negative FDI, which shows that the total value of disinvestment exceeded that of the incoming FDI flows. In essence, we see that Zambia's economy is not solely tied to copper prices itself but also to the actions of the state in regard to expropriation within the mining sector. In Zambia, BITs do not have a clear role in increasing FDI or decreasing it. One of the major

disinvestments, MCM was guaranteed by the Swiss BIT. While one of the largest investors the United Kingdom had no BIT. The role of the BIT in Zambia seems to fall in line with much of the literature that argues they do not increase FDI (Hallward - Driemeyer, 2003).

The Role of Bilateral Investment Treaties in Zambia in the Cases of Konkola and Mopani Copper Mines

The United Kingdom-Zambia BIT is not ratified, however, if it were it may have provided Vedanta (a U.K listed company) protection against expropriation. Vedanta successfully pursued an expropriation claim against the Indian government utilising the United Kingdom-India BIT (Shetty & Weeramantry, 2016). Glencore could have theoretically pursued international arbitration as a Swiss based firm prior to the sale as one of the two enforced BITs in Zambia is the one with Switzerland. The BIT gave Glencore protection in this instance as the parent company was incorporated in Switzerland it received protection under Article Three that of fair and equitable treatment. Additionally, Glencore held a further explicit protection against expropriation. Article 5 states, *"neither of the Contracting Parties shall take either directly or indirectly measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party. unless the measures are taken in the public interest. on a non discriminatory basis, and under due process of law and provided that provisions be made for effective and adequate compensation*" (Zambia-Switzerland BIT, p. 6).

Beyond the question of whether Glencore constituted a clear expropriation, Zambia did abrogate Article 4 of the BIT when they blocked VAT refunds and the movement of payments. Article 4 states that the "*Contracting Party shall grant those investors the free transfer of the payments relating to these investments particularly of: (a) interest, dividends, benefits and other current returns:[...] (e) additional contributions of capital necessary for the maintenance or development of the investment*" (Zambia-Switzerland BIT, p. 5).

VAT refunds were covered by the development agreement, which also offered international arbitration as the mechanism for dispute resolution in the event they were blocked. However, as discussed, this never reached international arbitration. The firms instead preferred a domestic approach, where they have utilised their ability to influence the domestic courts via the threat of development agreements. Mining firms at no point sought to press for BIT ratification in the instance of Vedanta with the United Kingdom or BIT use in the instance of Glencore. Nor has the absence of a BIT hindered external investment in the mines generally.

BITs in Zambia have had little impact on their economic relationships and have not been cited in high-profile investor-state disputes. The strategy by KCM and MCM can be summarised as utilising elements of the domestic legal space and weaker governmental institutions, in addition to bilateral discussion directly with the government. This approach is exemplified by the private resolution of KCM's mothballing dispute in 2014 and the suppression of the findings of the governmental audit of the mine's activity. As discussed previously, KCM and MCM were both able to lean on the Zambian Environmental Management Agency (ZEMA) in instances of long-term environmental damage without repercussion (Mulenga, 2017; 2019). Additionally, the domestic legal space however much it tried to punish the mines activities, were hampered by the firm's ability to contest proceedings and the strength of their development agreements' stabilisation clauses.

Much discussion around economic growth is related to institutional strength (North, 1990; Acemoglu & Robinson, 2001; Collier, 2006). The better a state's institutions the more likely they receive external investment, a matter which has been empirically developed when discussing developing countries (Sabir et al., 2019). This has often accounted for why smaller non-resource rich states in Africa and South East Asia have often outperformed larger resource rich states with weak institutions (Sachs & Warner, 1997). Weak institutions provide a risky environment for large scale investment owing to rent seeking elites and reputational threats (Mehlum et al., 2006).

Mining, however, given its propensity to engage in transfer mispricing, environmental damage and labour violations, in some of the least developed and most hostile corners of the world arguably finds itself at ease in enclaving away from the spectre of international law and instead utilising weak institutions such as ZEMA to their advantage (Dougherty, 2015; Williams & Dupuy, 2016; Rauter, 2019). In economic theory this tandems well with the Pollution Haven Hypothesis whereby developing states that adopt robust environmental legislation often lose out on FDI (Grossman & Krueger, 1995). Polluting or environmentally damaging industries such as mining seek regulatory environments conducive with enacting environmental damage: this hypothesis reflects the Zambian experience well (Olsson, 2023).

In the instance of MCM, Glencore fought their legal cases in the domestic courts, specifically those related to the environmental damage of Mufulira (Mopani Copper Mines Plc v. Miti, 2020) and those related to violating the Arm's Length Principle in profit transfer between MCM and Glencore (Mopani Copper Mines Plc v. Zambia, 2020). Glencore managed to keep both of these cases from reaching the Supreme Court for over a decade, even though the lower courts had found them guilty. Beyond the legal cases, the Supreme Court cited the

clear failings of the ZEMA, which indicates Glencore had some ability in keeping them from regulating their operations. KCM managed to avoid the courts on specific matters related to transfer mispricing (Grant Thornton, 2010) and when they utilised the courts, received a favourable ruling in Konkola Copper Mines Plc v. Nyasulu and Ors (2012). The latter also relates back to ZEMA not regulating their environmental activities appropriately.

By keeping litigation at bay for over a decade both had been able to utilise their relationship with senior politicians and agencies to be able to maintain their approach to extraction, regardless of whether the environmental damage and tax evasion negated their investor-state contract.

In both instances we see the lack of utility for BITs, firstly from the basis that were it to be in place they would have not been able to challenge Vedanta effectively, this reinforces the argument that BITs shackle the Global South (Hallward-Driemeyer, 2003), secondly, even when it was in place in the instance of Glencore, the weak domestic institutions in place determined that the better strategy for the investor was to lean on the environmental agency ZEMA and domestic court system, rather than utilise the international legal regime.

The structure of the Zambian economy that is a consequence of the path dependence of the mining sector has had an impact in the relation to BIT ratification. The resource dependent nature of the economy has limited the incentives to diversify away from mining. Instead, the state, in particular during the privatisation period has sought to capitalise on capital inflows for mineral assets. Within the path-dependent phenomenon, that of the parallel dynamic of a mining sector that operates externally and over that of the state we see little incentive for mining firms to demand this external legal protection. In Zambia, mining firms will often operate outside of the law and use weak institutions to defend themselves. This is demonstrated by the case studies of KCM and MCM, whereby the firms have been able to avoid punishment through the use of weak state institutions.

Findings

This evaluation presents the following findings. Firstly, BITs in Zambia are not linked to increasing FDI. The lack of a BIT with Canada has not impeded its continuous investment and the timings of drafting and ratifications do not coincide with increases in FDI inflows. The highest number of BIT drafts occurred during the privatisation process. The process of privatisation had a clear impact on FDI inflows not the BITs, additionally mines that were purchased in this period were not from states with a BIT or even a draft, with the exception of

Glencore and the Swiss BIT. Whereas, the highest number of BIT ratifications in Zambia occurred in the state's best performing year for FDI, 2014: the year that followed commenced the largest continuous decline in FDI in Zambian history. The ratifications of the BIT did not lead to further FDI inflows.

BIT drafting and ratification in Zambia is related to signalling investor confidence to other states, and specific mining demands. The initial drafting of 29 of the BITs is linked primarily with the privatisation period of the 1990s. It was the result of a combination of IMF pressure to liberalise and a signal of intent to external investors. The ratifications of 2014 were also largely used as a method to signal confidence to external investment at a time of heightened tension with the mining firms. The three BITs drafted, signed, and ratified between 2016 and 2020 related to specific mining demands. Mauritius's deepened ties with Zambia were a result of their position as a tax haven that benefitted mining firms operating in Zambia, while the UAE and Turkey's BIT occurred at the point of the sale of KCM and MCM (Reuters, 2019; Njini, 2023).

Thirdly, BITs are unlikely to favour Zambian autonomy. Firms generally have more time and resources to fight legal issues rather than resource dependent states that need the taxation of production to service debt and provide public services. This is reinforced by the general view that the Global South receives limited justice in the international legal setting (Sornarajah, 2017; Qumba, 2021). A BIT in the instance of KCM could have hindered the process of expropriation and given the length of time that international legal proceedings would take, the PF would have lost its opportunity to expropriate prior to the election. Vedanta have offered further investment and a bolstering of the agreement related to environmental and labour protection, in response to the expropriation and this combined with the lack of success for small states in the international courts, the UPND accepted their offer. A BIT in this instance would have given Vedanta time to wait, and also would have likely seen a ruling in their favour.

Lastly, whilst Zambian institutions are weak with limited separation of the executive and judiciary there is no prior example to suggest that an investor in Zambia would pursue international arbitration over utilising the weaker domestic institutions. From the case studies we have, KCM and MCM demonstrated a clear preference to lean on the weaker institutions, and bide time in the domestic courts rather than utilise international law for the disputes.
The firms were able to lean on institutions and within the wide boundaries of their development agreements, the stabilisation clauses offer better protection for withstanding domestic legal complaints. This combination of protection from legislation and weak institutions is an easier environment for mining firms to operate in.

Chapter 4
Regional Cooperation and Zambia

This chapter focuses on the continental and regional cooperation of Zambia in relation to its mining sector, specifically with the African Union (AU), the Southern African Development Community (SADC) and Common Market for Southern and Eastern Africa (COMESA). Continental cooperation in Africa through the AU is comparably different to other continental bodies such as the European Union (EU). The AU is comparatively less integrated with a less pronounced legal framework (Obeng-Odoom, 2020). A further difference relates to the regional trade and political bodies such as the SADC and COMESA that are situated above the state but below the AU in regional groupings.

Path dependency of the mining sector has disincentivised continental and regional cooperation for Zambia. The mining sector relies on foreign firms to extract and foreign states to export to, as a consequence of the path dependence of the mining sector the state has not developed regional and continental strategies to enhance mining. As a resource- dependent state what benefits the mining sector will remain at the forefront due to a lack of diversification (Muhamad et al., 2021). Resultantly, the choice of utilising resources to deepen integration and regional cooperation becomes an irrational one. Furthermore, the mining firms themselves would be exposed to broader environmental claims if continental cooperation across mining sectors advanced.

The potential options in a continental cooperation scenario could be regional and bilateral state agreements around mining, joint beneficiation of ores through pooled resources and establishing regional downstream linkages. From a social perspective they could create cross-state unity around labour, taxation, and environmental concerns. As demonstrated in the previous chapters, mining firms in Zambia have significant institutional weight and as a consequence of this path-dependent phenomenon would not encourage development of mining to occur outside of the bilateral dynamic of foreign firm and state. The existing dynamic benefits the firms and allows them to avoid tax, damage the environment and act with relative impunity. The path dependence of the sector constrains the ability to open up the avenues listed previously and instead maintains a firm-state dyad rather than an environment that encourages multiple state's cooperation on mining.

This facet is not solely related to Zambia and occurs across other resource-dependent African states. At the continental level there is limited tangible cooperation or policy across differing national mining sectors in Africa, as the overarching economic strategy of the African

Union has been focused on diversification and tariff standardisation through the African Continental Free Trade Agreement (AfCFTA) (Pasara, 2020).

The lack of integration in the African Union has been the subject of considerable. discussion, largely around the nexus of sovereignty (Geldenhuys, 2012; Chambiwa et al., 2022) A complex factor related to the formation of postcolonial states offers an interesting perspective on why some states seek to limit or are wary of integration. Many states in Africa won their independence, much of which resulted in political leadership composed of the very men and women who fought for self-determination and sovereignty. This historic reality limits the desire or increases the reluctance of those actors to cede sovereignty, even if it is to similar partners (Welz, 2012). There exist legitimate questions around the efficacy of continent-wide structures. Beyond structural historic elements exists the vast disparity between member states' economies (Bayraktar, 2022), in addition to this is the view that the AU would not act impartially between differing members in the instance of conflict and disputes (Okumu, 2009).

Historically, diversification of the economy has not been particularly successful in some African states which has persisted into modern times (Loxley, 1990; Bayraktar, 2022). As such many are resource-dependent, and reliant on extracontinental partners for trade, an aspect that does not incentivise the deepening of regional or continental economic integration. Beyond this issue are the wider difficulties faced by integration across the spectrum of differing economies, even larger ones that could benefit such as Nigeria have been reluctant: largely owing to the threat continental-wide cooperation has over their regional dominance. Within the Zambian conception, the limitations on wider cooperation relate largely to the lack of incentive to engage given the path dependence of the mining sector and the state reliance on it. Much as path dependence constrains domestic decisions it can also disincentivise international ones (Caporaso, 1998).

The African Union and the African Continental Free Trade Agreement – Continental Cooperation

The African Union (AU) holds similarities to the European Union. It formed on the basis of the Abuja Treaty of 1991 which held economic integration as the starting point (Chambiwa et al., 2022). The AU also holds a Pan-African Parliament and brings together the heads of state of member states to consolidate joint decisions and continent-wide policy. There are, however, some key distinctions. Namely the creation of the AU is based on the Pan-Africanist ideal, whereas the EU was formed effectively as a peacekeeping measure (Lipgens, 1979; Welz,

2012). The AU also takes a gradualist approach to integration. The EU governs at the state level, with each member state entitled to vote. The AU, however, sits above the regional economic groupings of which there are eight, that divide Africa across regional economic and political lines (Paterson, 2013). Regional groupings are crucial in understanding how intracontinental politics have manifested across the continent (Obeng-Odoom, 2020).

In the context of the mining sector the AU sought to rebalance the issues of African member states in relation to deteriorating relationships with foreign mining firms. The African Mining Vision sought to create a set of objectives and best practices at the continental level, which could be adjusted accordingly for each member state with a Country Mining Vision (Busia & Akong, 2017). The idea was well received, and many heads of state were supportive of the AU's stance on increasing royalties and taxes, additionally the Union had shown its ability to assist in the renegotiation of development agreements in the past (Leon, 2011). Hilson (2020) has noted that the purpose of the Vision was to rectify the elements of enclavisation that has scourged the growth and internal development of the mining sector, by creating linkages both upstream and downstream to diversify the economics of mining in Africa (Ferguson, 2005). However, according to Hilson (2020), the failure of the Vision, which is much less discussed now, relates to a confluence of factors. The most salient of which relate to the difficulty of implementing linkages in mining, when most firms already have long-standing relationships with suppliers and partners, in addition to how this aspect further entrenches enclaves (Ackah-Baidoo, 2020). Enclavisation relates to the remoteness of mines and how the economic benefits are often tied to areas removed from the population of the host state (Emerson, 1982) The issue of enclavisation is path-dependent, and in effect self-perpetuating. This leads to a multiplication of issues, of which only extreme actions can alter the path. To actively replace the structures in place would require considerable domestic advancement, in human resources and technology but also a focus on raising capital for domestically led projects. Beyond this a focus on localised cooperation and pooling the capital and technological requirements could aid the change.

The African Continental Free Trade Agreement (AfCFTA) was envisioned as a method to deepen integration across the continent through intracontinental trade, an effort that would accelerate an effort that had in the years prior seemed to slow down within the AU (Obeng-Odoom, 2020; Pasara, 2020). AfCFTA holds multiple purposes. On one end it is to create a single market that can consistently increase growth and aid in the development of the economies of its members (Obeng-Odoom, 2020). Beyond that, it is to an extent a formalisation of the expression of Pan-Africanism, this is demonstrated by its push for open borders and a

more inter-connected continent that is specifically less reliant on the Global North (Boschemeier et al., 2022). The relationship between AfCFTA and Zambia has been uneasy, although Zambia ratified the agreement under the Patriotic Front, the UPND stated that they would seek to delay implementation of the agreement shortly after their electoral victory in 2021 (Vandome, 2023). Given that the existing framework of AfCFTA benefits more complex value-adding economies with services and manufacturing, such as Kenya, Nigeria, or South Africa (Bayraktar, 2022), it is explicable as to why the UPND have sought to reverse the PF's approach to the agreement. For Zambia and other resource-dependent states the benefits of intra-continental trade are less conspicuous. Beyond this, Zambia amongst eight other countries; Botswana, Burundi, Eritrea, Guinea-Bissau, Lesotho, Namibia, Sierra Leone, and Tanzania were the initial states opposed to ratification. Additionally, Nigeria -who were most likely to benefit as a complex economy- were also highly resistant to some aspects that would have affected their regional trade dominance (Odije, 2019; Obuaku Igwe, 2022).

AfCFTA has continued to slowly advance with ratifications of major components by the majority of African states, this will ultimately complement the existing regional trade structures but simultaneously implement new aspects (Maliszewska & Ruta, 2020). The position of Zambia, in its reluctance to fully commit to AfCFTA relates firstly to its reliance on mineral revenues, specifically from foreign firms. For one aspect -that of coordinating taxation across the continent- represents a significant challenge for a resource-dependent state. Flexibility in its taxation and tariffs are an aspect that is likely to attract external investment towards riskier ventures such as mining (Bayraktar, 2022). Beyond this the economic modelling of AfCFTA so far has shown that resource dependent nations, reliant on exporting goods out of the continent (as is the case with primary goods producers) are likely to suffer consequences. A study utilising a Computer-Generated Equilibrium approach demonstrated that the boost of inter-continental trade would likely decrease exports by approximately $10bn, and that import tariff reductions would lead to decreases in tariff revenues, trade, and real income (Mevel & Karingi, 2012; Draper et al., 2022). This would also negatively impact wages; whereby primary goods workers would potentially see decreases in the fallout (Mevel & Karingi, 2012).

All of the issues rest against the backdrop of Zambia's reliance on copper. Zambia has much to benefit from the agreement on non-mining related aspects, for instance it is one of Africa's highest manufacturers of apparel as it is a large cotton producer, this is an industry that is likely to benefit from the lowering of inter-continental tariffs (Phiri et al., 2021). Furthermore, the lowering of these tariffs would benefit Zambia given that 64% of its imports come from the continent, a key challenge currently for intra-continental trade flows relates

back to the issue of high tariffs among African states (Marinov & Zlatinov, 2022). Natural resources represent 30-50% of the capital wealth of states under AfCFTA (Mahuni, 2021), however, a key position of AfCFTA is to move states away from resource and mineral reliance for the purpose enhancing their export markets through strategic diversification (African Union, 2020).

Southern African Development Community – Regional Cooperation

Zambia is part of the South African Development Community (SADC) and the Common Market for Southern and Eastern Africa (COMESA). In terms of continental structure these regional groupings can be seen as efforts to harmonise and deepen regional trade and ties that remain under the auspices of the AU (Mbengue & Schacherer, 2018; Pasara, 2020). Harmonisation is a consistent issue owing to overlapping membership of regional groupings this occurs at both the regional and continental level, in addition to the considerable differences in each state's economies (Mlambo, 2020).

Theoretically, localised cooperation provides a more tangible starting point for change, as it requires fewer actor's demands and involvement. Zambia's regional trade relates back to the development of COMESA and the SADC. The latter of which has facilitated trade between neighbouring states through cooperation and a series of agreements. The bloc is comprised of 16 member states, namely, Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia, and Zimbabwe. The SADC has developed since the time of independence, but it had not formalised free trade until 2008 with the commencement of 2000 SADC protocol on free trade committed to (Schoeman, 2002; Sandrey, 2013). As it stands, there are 27 protocols, relating to trade, security, and migration amongst other facets (Chibwana, 2020). In essence, there is a high degree of cooperation amongst the nations within this region, however, some states cooperate considerably more than others, which has resulted in a tiered system within the bloc (Mlambo, 2020).

COMESA is specifically a regional economic community, in contrast to the inter-governmental SADC (Mwale, 2017). COMESA and the SADC membership can be overlapping, Zambia alongside, Zimbabwe, Malawi, Madagascar, Comoros, and the Seychelles hold dual membership. The remaining 15 members belong to other intergovernmental blocs such as the East African Community. The trade benefits of COMESA have historically related to the Free Trade Agreement that underpins it, a much-cited figure

from an early COMESA study (Mevel & Karingi, 2012) relates back to the increase of exports from members. The study recorded an increase from $1.7bn to $9.96bn between 2000 and 2013, representing an 83% uplift. Taken over time this represents annual growth of 16.7%. This, however, is arguably misleading if the entire responsibility for the increase is credited to the COMESA FTA. Given that intra-regional trade between the SADC and COMESA (dual-members and single members), and COMESA and the European Union grew by 16.2% and 23.2% respectively over the same period (Gondwe, 2021).

Africa as a whole during the late 1990s and 2000s benefitted from the general diversification of economies, increases in tourism, cessation of civil wars amongst Lusophone states, the devaluation of the Central African Franc, the sharp increase in human resources and the end of Apartheid to name but a few substantial changes that occurred (Collier, 2007; Fosu, 2012). Gondwe's study into the utility of the FTA of COMESA, would indicate that the agreement had little to do with the boosting of exports and imports, and additionally did nothing to boost intra-member imports and exports. The actual total as a whole of exports amongst COMESA members between 2007 and 2015 was a mere 7.8%, in contrast with 44.1% between member states and the European Union (2021). Trade between COMESA and the SADC was higher at 9.4% (Hollingsworth, 2021), which arguably presents the view that COMESA-SADC member states have lower transaction costs with non-COMESA SADC members through their free trade protocol. A further argument that demonstrates the practicalities of trade in the region, relates to economic geography. Amongst member states, the limited nature of intra-continental trade is exacerbated by high transaction costs due to poor transportation infrastructure, delays during cross-border trade and limited clarity within mechanisms of cross-border certification (Vijil, 2012; Willie & Chibwaki, 2018; Otung, 2020). The agreements mean very little, without the requisite infrastructure in place. Furthermore, historically, there has been tension surrounding the overlapping elements of SADC and COMESA membership, with the latter attempting to subsume the former in the early 1990s (Pasara, 2020).

Beyond all of these key issues, when related to mining, intra-continental trade is not feasible until refinement, beneficiation or value-adding to upstream value chains occurs on the continent, rather than at export destinations outside of Africa.

The specific role that the SADC plays in mining relates to the promotion of external investment, and regional strategies to increase inter-regional value linkages. Out of the member states the DRC, Zimbabwe, South Africa, Madagascar, Tanzania, and Namibia all have significant mineral reserves. The SADC Protocol on Mining (2000) encompasses a broad set of aspirations for developing the region's mining sector. The protocol demonstrates focus on

the knowledge and technology gap, that has so far held back the region's ability to effectively exploit their mineral resources, and adequately refine them. It also addresses the inequity afforded to the majority of those who have laboured in the mines, and it requires a certain environmental standard to be upheld (SADC, 2022). However, it also seeks a harmonisation of policies and legislation across states, it also demands a commitment to fostering an environment conducive with attracting FDI into the sector, *"Member States have agreed to adopt policies that encourage the exploration for and commercial exploration of mineral resources by the private sector"* (SADC, 2000, p. 1). Essentially, the SADC, seeks to entrench much of the strategies that have left mineral reliant states dependent on the whims of private sector firms until now. The aspirations for improvements to environmental and labour concerns, alongside the goal of further domestic revenues does not side well with an approach that effectively seeks to re-entrench much of the issues from colonial and neo-colonial mining practices. As demonstrated by the cases of KCM and MCM, external mining investors will seek to benefit themselves through imbalanced development agreements and weak institutions at the expense of the environment, labour conditions and the domestic purse (Dougherty, 2015; Williams & Dupuy, 2016; Rauter, 2019). Given the high risk, and significant upfront costs, combined with an industry that has consistently been accused of an approach that risks the environment, the lives of labourers and avoids tax, external firms cannot be expected to hold up the standards and aspirations laid out by the SADC, as such the goals and the method of achieving them are not consistent with one another.

Beyond this inconsistency, lies the question of how successful the SADC has been towards mining, and the results are mixed. It also is determined by asking whether member states achieved success individually or owing to SADC cooperation. For instance, there is much discussion on batteries, given that the region produces the bulk of raw materials for the batteries used in the Electric Vehicle market. However, an environment conducive with processing the raw materials has yet to be achieved (Cloete, 2020). The key member states for this include, chiefly, South Africa, Zambia, the DRC, and Madagascar, owing to significant reserves in copper, cobalt, nickel, and lithium. All of which are utilised in the production of batteries for electric vehicles. However, there currently is a lack of infrastructure that would support any regional efforts to refine the materials and produce the batteries themselves (Foli, 2021).

Beneficiation is a feasible step in which some promotion within the SADC has been directed, in addition to further promotion from the African Union. However, a lack of clear policy has meant that some SADC members have thrived while others have yet to do so.

Botswana is an example whereby the enhancement of polishing operations has led to the export of polished diamonds over raw diamonds, this simple usage of beneficiation added value. For instance, in 2008 Botswana exported $100mn, by 2015 this number (largely polished) was near to $1bn (Jagdeesh, 2015; Baissac et al., 2015; Isheloke & Blomwitz, 2020). The central issues of the Global South not processing their minerals, relates firstly to lack of capital for large scale projects and secondly, the training and technical knowledge gaps related to the specifics of processing minerals. Hence why the majority of resource-dependent states import labour to fill the gaps (Siakwah, 2017). There are examples of the SADC approaching this issue through its emphasis on increasing technical education. This is seen in the SADC Qualifications Framework, the SADC University of Transformation, and the Regional Skills Audit (SADC, 2022). At the domestic level, knowledge gaps have been an area of focus under the South African Quality Council for Trade and Occupation (QCTO), within this initiative is a renewed focus training South African Citizens in the skills necessary for large-scale mining, this would stem the issue of importing skills and limiting the labour pool for the local population. Zambia has sought to increase education through domestic policies, the expansion of universities to include mining related subjects (Besa & Banda, 2021). However, much of the investment in mining-centric education has been left to the mines as part of their Corporate Social Responsibility (CSR), a dynamic which is unlikely to loosen the grip of foreign firms over the direction of the mining sector.

The Zambia 2030 Vision set out by the MMD in 2006, was a formal expression of the role that the private sector would have in the future of mining in Zambia. Within it set out some of the CSR in relation to education. Kansanshi Mine and Lumwana Mine are two large mines in Solwezi operated by foreign firms, the impact of their educational programs has been subject to studies. One from van Alstine & Afionis (2013) concluded that the majority in the local community of Kansanshi were supportive of the educational offerings of the mine, however, it had not translated into more domestic jobs within the mines for Zambians (Mayondi, 2014). It is commonly viewed that the limitations of graduate programs are a reasoning behind the lack of labour expansion, specifically in relation to specific subjects such as mineral governance. The mines still rely on imported labour for some specific skillsets (Besa & Banda, 2021). Beyond the limits for higher skilled technical jobs remaining domestic, there are also question marks around the use of contracted or casual labour by foreign mining firms, in the instance of KCM casual labourers were brought in from India (Ng'ambi, 2022). Furthermore the development agreements in place gave limited labour rights at the expense of domestic legislation (KCM, 2000;2004; MCM, 2000).

Given that domestic approaches have had the fastest success out of the available options for developing minerals, and that the SADC and COMESA have not aided cooperation between states on mining significantly, a positive development has been the joint approach of the DRC and Zambia to foster development of the cobalt market. Cobalt represents an interesting method for which copper and nickel producing nations can further benefit from raw minerals. Cobalt, a key material for the production of batteries, is rarely found alone, instead it is a by-product that occurs during the smelting of nickel, and copper (Horn et al., 2021). Cobalt demand has consistently grown owing to its role in the production of lithium-ion batteries, and in turn its uses for Electric Vehicles, the market for cobalt is projected to increase by 9.3% between 2022 and 2030 (Straits, 2022).

Bilateral Mineral Agreements – Intra-regional Cooperation

Zambia and the Democratic Republic of Congo signed a bilateral agreement in relation to cobalt production in 2022. This approach is a development which could have a positive impact on Zambia's control over its mining sector. The DRC represents 50% of global reserves for cobalt and the stability of DRC has a significant impact on the overall cobalt market (Zeuner, 2018). The bilateral agreement between Presidents Hichilema and Tshishikedi form a base from which the production and refinement of cobalt can occur, with limited external intervention. This agreement creates a significant amount of leverage for both the DRC and Zambia. The limited nature of cobalt and the poor reserves existing has meant that large electric vehicle producers have been sourcing cobalt, copper, and nickel from the source rather than relying on middlemen and external battery producers (Bulman, 2015). The scarcity of cobalt, and the salience of it along with nickel and copper to the production of batteries places the DRC and Zambia in a position of power for negotiating directly with electric vehicle producers rather than selling the mineral rights to the highest bidder, a practice Glencore has developed in the field of specialised minerals (Zhongming et al., 2020). This agreement -if properly developed and implemented- could place Zambia and the DRC in a position to demand the production of batteries domestically, giving them the chance to cement themselves into the global economy in a manner akin to Taiwan through semi-conductors, a phenomenon that emerged through significant government planning and intervention (Liu, 1993). Batteries themselves are estimated to represent up to 35% value share of the Cobalt market between 2022 and 2030, while the total market is estimated to reach $19.5bn (Straits, 2022). This approach could also offer both the DRC and Zambia a route out of enclavisation in the

Copperbelt, as rather than their being two, static but developed enclaves with nothing in between, it would be connected by infrastructure, in addition to upstream and downstream linkages which would consequently emerge as a result of the interconnected development. Existent firms in the DRC and Zambia gain little benefit from the states taking firstly a portion of the available business through linkages but also through developing a bulwark that specifically strengthens the host state in the face of multinationals.

Findings

Path dependency in the Zambian mining sector has hampered the incentive to increase and embed intraregional and intracontinental institutions and policy frameworks. The export model, reliant on western firms and western buyers has made Zambia and many other resource dependent nations unable to gain the full benefits of a continental trade deal that promotes diversification above all else. The manner in which the mining sector developed was embedded as the primary economic driver, consequently, means that policy actions must enhance the sector's profitability. As discussed, AfCFTA and the AU's Mining Vision seek to promote diversification, tariff, and tax consistency, and attached linkages to mining. Flexibility in tariffs and taxation is fundamental to attracting external capital from mining firms, alongside this these firms have long established partnerships with separate firms that operate on the linkages (Bayraktar, 2022). Consequently, they would be resistant to new domestic firms to supplement the linkages.

Continental and regional cooperation has done little to mitigate the issues surrounding Zambia's mining sector. The SADC and COMESA have proven to not be a fertile ground for adding domestic value chains to the sector, the limited advancement of battery manufacture remains a glaring example (Foli, 2021). The SADC has also not engaged in tangible educational advancements (Besa & Banda, 2021). Beyond edicts and proclamations, very little advancement has occurred at the top level, to the extent that it indicates that development of the industry should be approached at the local level with bordering states. Out of the many agreements and initiatives, the bilateral agreement with the DRC offers an immediate and feasible project. Given that the focus is on minerals for the burgeoning EV market, raising capital would be more feasible. The top-down approach involving the AU and AfCFTA, and even the SADC provides a limited framework for the very individual needs of each state in Africa to rectify the economies that have suffered enclavisation and the other side-effects of

colonialism. By cooperating with local actors and neighbouring states the process of developing a domestic-led mining sector becomes a more feasible eventuality.

The path dependence of the sector has left Zambia unable to take advantage of wider continental integration. Beyond this, the options regarding integration are limited. Arguably the bilateral cooperation between Zambia and the DRC represents a new aspect to the mining sector. One that would not necessarily be encouraged by firms operating locally.

Chapter 5
Institutional Evolution in Zambia's Mining Sector

The relationship in Zambia between the mining sector and the government can be described as in equilibrium when foreign firms hold control over the mineral assets and supply. This institutional characteristic is path-dependent and diachronic from the point of the critical juncture in 1924 whereby the administrative and mining sectors of the state were split. After independence in 1964 the private firms from the colonial era continued to exercise control in 1982, at which point the IMF held control over domestic economic policy and paved the road for privatisation in 1991. IMF influence over the privatisation process led to political and legal institutions which further entrenched path dependency and maintained the equilibrium. However, this entrenchment fuelled tensions between firms and state resulting in expropriation and state acquisition of KCM and MCM from 2019-2020. The reversal by the following UPND government in 2021 was a consequence of path dependence and the equilibrium of foreign firm control over mineral assets. The listed chronological events represent synchronically analysed stochastic moments occurring in a diachronic process. The diachronic process is that firms have and will continue to control Zambia's mineral assets, the synchronic events relate to institutional upheaval or shock during specific temporal moments that result in shifts in institutional actors available choices. This shift in the availability of choices does not alter the diachronic path but instead determines new options and avenues within the equilibrium. This chapter seeks to conclude in the first part, via game theoretic perspectives on institutions that; (1) the equilibrium for the mining sector in Zambia relies on foreign firm control and that historic synchronic events that have led to institutional upheaval and resets do not alter the diachronic path. (2) That game theoretic institutional perspectives on self-sustained belief equilibria explicates the efficacy of the institution of development agreement's stabilisation clauses.

The second part seeks to outline how this equilibrium builds tension between agents within the organisational set of mining in Zambia and leads to institutional shock around key timeline events. Namely, independence in 1964, privatisation in 1991 and the expropriation of Konkola Copper Mines and reacquisition of Mopani Copper Mines between 2019-2020. Each temporal event, owing to institutional shock leads to a resetting of actors within the institutional framework of Zambia's mining sector and the establishment or entrenchment of new or

enhanced formal institutions. These specific institutions push forward into each new time period shifting, and enhancing through repeated interactions between the firm and the state, creating self-sustained beliefs that perpetuate and constrain outcomes. The most crucial aspect of this is that the equilibrium regardless of institutional shock does not change as it is diachronic, and consequently the sector remains path-dependent.

This chapter places particular focus on the destabilising of institutions in the lead up to and during the expropriation of KCM and reacquisition of MCM. With a detailed analysis of the resetting of institutional actors that led to new avenues in this period. These new avenues can be built on within the confines of the equilibrium but would have wider benefits for marginalised actors within the organisational set, that of Zambia's citizens. The emergent avenues outlined exist *because* of the tensions built up between the firm and state in the lead up to the nationalisation attempt. They exist as a result of a re-shifting of institutional actors and their options and incentives. The specific avenues that could be built upon are that of (1) strategic litigation for communities affected by mining activities, (2) the formalisation of small-scale mining (SSM), (3) increasing technical capacity via educational initiatives and (4) bilateral cooperation with the Democratic Republic of Congo to limit the effects of over-reliance on foreign firms.

5.1) Firm-State Dynamic, Organisational Sets and Working Definitions of Institutions

The present-day mining sector in Zambia is characterised by the ability of private firms to exercise influence over varying agents within the state apparatus to maximise profits and limit legal remedy for wrongdoing. This is a consequence of the path dependence of a mining sector that was designed to be above the state in its colonial conception and to be as attractive as possible to external mining firms. Over time this has developed into a mining sector that defines the state, a sector that is entirely reliant on foreign capital and expertise. The secondary administrative state is reliant on the funds garnered from the mining firms to service ever-increasing national debt and public services. Consequently, *the equilibrium is foreign firms managing mineral assets*. This equilibrium creates tensions around key time periods which alter institutional actors, such as the establishment of the protectorate in 1924, independence in 1964, privatisation in 1991 and the expropriation and reacquisition of KCM and MCM between 2019- 2020. This alteration of institutional actors can be perceived as vast and overarching change but the end result is the same, that of the equilibrium of foreign ownership over mineral assets.

Within the organisational set there are multiple agents attached to the government with operates as the primary actor to engage with the firms. They interact within one-another across multiple domains, creating institutionalised linkages that explicate synchronic events. As discussed in previous chapters the environmental and tax agencies attached to the state have proven porous, and susceptible to firm influence. As a consequence firms have been able to commit environmental and tax violations. These legal infringements are an example of a continuation of the actions of colonial era firms who also engaged in tax evasion from the Crown and environmental degradation. The reactions of the state to nationalise can be analysed synchronically but simultaneously contextualised in the diachronic institutional path. In po./plain terms, each period has an organisational set for mining, the comprised agents change or reset in the event of institutional shock through complex events. This resetting creates new avenues, agents and options but do not provide the ability to deviate from the path.

Institutions can be seen as informal constraints and formal rules, devised for the purpose of confining a wide array of behaviours across multiple fields (North, 1991). Path dependency plays a central role in demonstrating why change becomes difficult for actors within an organisational set (Pierson, 2000). The technological aspect of path dependency (Arthur, 1994), is particularly relevant when focussing on how mineral extraction has developed in the context of postcolonial states with foreign multinationals. This relates to the position that firms have over the state in the Global South in terms of their advantage in extractive technology, human resources, and access to raising capital. All of which are crucial for the successful exploitation of minerals through complex and large mining projects (Runge, 2012). However, informal constraints and formal rules that comprise institutions are not necessarily technological but instead humanly devised and shaped and develop at the point of human interaction (North, 1991).

Institutional theorists within game theory seek to divide the exogenous rules from the endogenous. The exogenous rules shape the game between agents. Aoki (2001) offers a broader interpretation which encompasses the bounded rationality of agents and the view that seemingly exogenous rules can be endogenously created and sustained via shared beliefs though repeated games, whereby the institution is an equilibrium. This does not delineate all exogenous factors but incorporates some seemingly exogenous as endogenous self-sustained beliefs perpetuated through the available actions across domains. This explains in the Zambian dynamic why outcomes such as expropriation and nationalisation which when situated into a one-shot game with perfect recall are irrational and not an equilibrium. To elucidate the inexplicable, that of mineral nationalisation which lacks a rational economic argument in the

firm-state dynamic in Zambia a deeper explanation of institutional evolution is necessary. This is achieved by analysing key events synchronically and the shifts in options for actors across domains at varying points in time. This deeper explanation allows us to understand how the institutions developed chronologically. It highlights that the development agreements, although not necessarily a sound and robust legal instrument perpetuated path dependence so successfully because the agents *shared* belief in its inviolability. It also sheds light on the failure to nationalise under Kaunda and Lungu in two separate historic moments. It elucidates why new institutional patterns emerged at the point of expropriation under Lungu in 2019, specifically in relation to strategic litigation. Additionally, it explains why the Zambian state has lacked incentive to move to deeper cooperation in the regional and continental settings.

Diachronic and Synchronic Institutional Analysis of Equilibria and Game Theoretic Approaches in Zambia's Mining Sector

In the Zambian dynamic, institutions hold what Aoki (2001, p. 10) referred to as a "*self-sustaining system of shared beliefs".* Rules in the repeated games that occur are endogenously created rather than exogenously given as a consequent of strategic interactions. These shared beliefs come from subjective views, which are referred to as "*compressed information"* that emerge and entrench within repeated games. In the case of Zambia, we can see that the belief of both firm and state that the state cannot successfully manage the mining assets on their own. This is not solely a result of the exogenous factors of state debt, lack of human resources owing to colonialism and the other structural path-dependent factors within the institution of firm-state mining in Zambia. Instead this is the result of a sustained and shared belief in them by both agents (firm and government). The equilibrium is one whereby the firms manage the assets, which although not beneficial to the state or its inhabitants remains an equilibrium of belief. This belief is compounded by the increasing state debt and reliance on mining tax revenues, but this belief supersedes clear realities on the ground, that of environmental degradation, labour violations and illegal activities around tax. This is an equilibrium based on self-sustained belief via repeated interactions between the firm and state because it removes the marginalised actors from the equilibrium. As such inconsistencies emerge, such as a perceived benefit in higher taxable revenues from foreign firms, although they evade tax via illegal practices. A further inconsistency is the self-sustained belief that the technical capacity of foreign firms is required, as their knowledge may have helped exploit ores but they also simultaneously reeked vast environmental damage. From these inconsistent preferences, we

can see that the governmental agent's order of preference starts with profit in the economic exchange domain rather than the wellbeing of inhabitants.

The development of the Zambian mining sector is highly complex and can be seen as the result of a multiple strategic games between firm and state across political, social, and economic domains. Exogenous factors have shaped the outcomes of the interactions within the dynamic between firm and state and endogenous institutions have emerged within it. The institutions emerged within are self-sustained and shared beliefs. The purpose of each interaction is to maximise the pay-off. For the state it's to maximise their revenues utilising policies or tax. For the firm maximisation occurs via ignoring policies that affect profit, specifically related to the environment and tax.

This deeper perspective on institutions sheds light onto the complex and multi-faceted development of the Zambian mining sector. The organisational set includes multiple actors interacting across varying domains and institutions have developed via path dependence (DiMaggio & Powell, 1983). The institutional structure over time can demonstrate why path breaks and nationalisation have failed but also, this deeper approach allows us to elucidate why they occurred even though the path is rigid.

The critical juncture that split the mines from the state and set a course for parallel development in 1924, led to the creation of mining's own formal rules outside of the colonial state and the independent state that followed it. Aoki's (2001) perspective lends well to the Zambian mineral policy domains that were inherited.

The agents across each time period effectively shared the belief that only the firms could manage the assets rather than the state, this institution bound actors into continuing a colonial dynamic. The legal aspects that followed are endogenously made within the domain, as the body of law passed from colonial to independence was not an exact transplantation. Many of the favourable rules such as taxing via value rather than profit were omitted to benefit the private firms operating in the new environment (Ndulo, 1986). In essence the institutions emerged endogenously from the strategic interactions between firm and state in the independence period rather than reformulated as part of a radical upheaval. When colonialism ended, the private actors still retained a minority share and day to day control over the mineral assets this continued reliance on the colonial era firms and helped sustain the belief that full nationalisation was not possible. By the time that the firms had been removed in 1982, this belief still remained and the IMF were directing economic and in turn mining policy.

The critical juncture, that of the separation of mining and state by BSAC and the British Protectorate in 1924 combined with debt and an increased reliance on mining for rapid

development and debt servicing led to a path whereby the state was reliant on external firms to exploit their mineral resources. Under Kaunda, debt combined with legacy firms and IMF led policy constrained the options and reinforced the path of separation. This gap was further widened by the IMF led privatisation period and the reintroduction of foreign firms. In the period under the PF, the path was reinforced by development agreements, which provided a concrete legal example of the asymmetry of power, in addition to an aspect both symptomatic of the path but also a constraint of it. These agreements have stabilisation clauses that make investment immune to new legislation that affects profit, often through direct compensation (Cameron & Kellas, 2008; Oyewunmi, 2011).

The terminology of diachronic and synchronic is useful for explaining flash points in the path dependence and institutional structure of the mining sector that reset or change actors. Fundamentally the path dependence of institutions centre on an equilibrium of the mining assets controlled by external firms. As shown in figure 5 below, this is a diachronic process, as it is past, present, and future regardless of the stochastic impact of the synchronic flashpoints (Aoki, 2001). The synchronic flashpoints that reset institutional actors bring about new institutional arrangements, these are what Aoki (2001) referred to as political cataclysms with stochastic institutional impact. These events include the initial critical juncture, this split set the path but retained the colonial firm control over mining that preceded the split. Independence occurred but the colonial firms remained, and the state went onto be heavily guided by the IMF. This then led to the privatisation period which cemented private control through various legal methods and then the period of Lungu, whereby expropriation occurred and was then reversed. The key point, is that the synchronic flashpoints are the only point at which institutional change is possible. So far that change has further cemented the path and at each major political event in the timeline we see significant institutional change that does not alter the diachronic path. This is demonstrated in the figure below. The base of figure 5 is from Gutierrez and Stone (2000), Synchronic and Diachronic Dimensions of Social Practice.

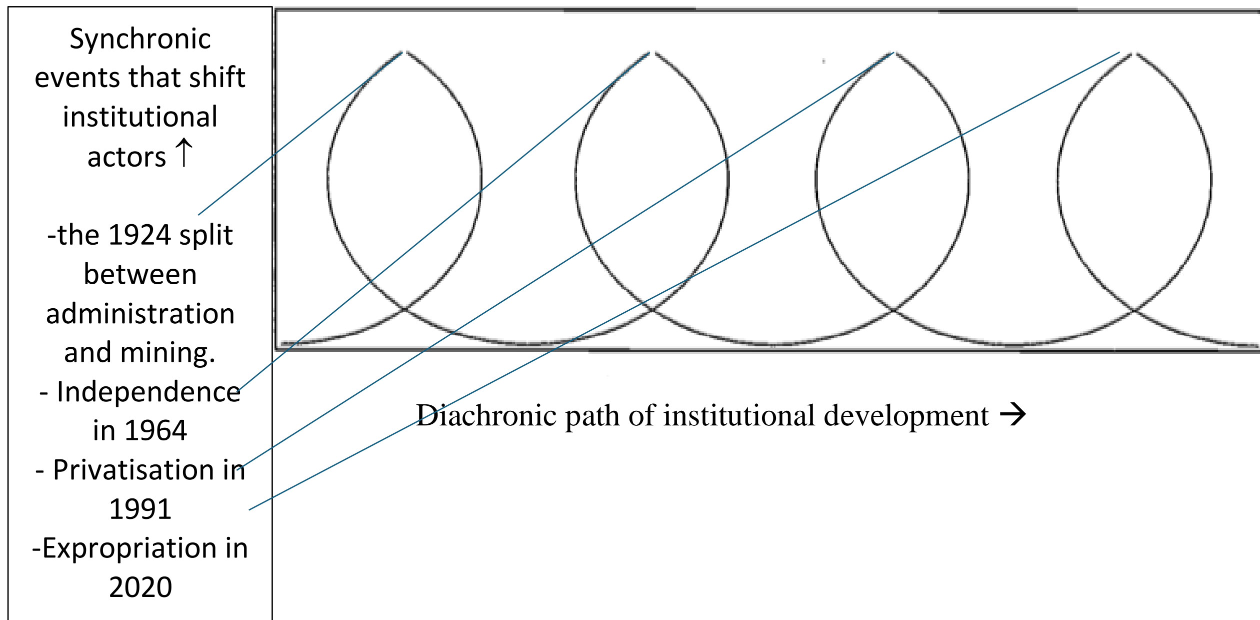


Figure 5 Diachronic and Synchronic Effects in Zambia's Mining Sector

Domains and Institutional Linkages for Synchronic Events

The traditional domains can be described as the "*economic exchange domain*" and the "*organisational exchange domain and organisational field*" (Aoki, 2007, p. 12) . The first at its simplest relates to the opportunity for repetition of transactions between two agents, in essence this forms a quasi-contractual relationship between the two (Hicks, 1969). The issue therein relates to the promise of exchange and how can what is promissory be truly guaranteed. This issue is in effect that of the enforcement of contracts, which relates back to trust, whereby defection will result in future penalties within games. This problem expands in the context of numerous unknown agents exchanging, whereby mediation by both state and non-state third parties can help issues that arise from the necessity of enforcement and the issue of information asymmetry and the active propagation of relevant information (Milgrom et al.,1990; Olson, 1993; Aoki, 2004; 2007). This leads to the necessity of enforceability within the institution, whether formal or through self-sustained belief (Aoki, 2001). Within the second domain there is contention, specifically as to whether an organisation can constitute a player in a game or is an institution itself. This issue arises because organisations themselves are the aspects that bind a series of individuals via information, objectives, presumptions amongst other aspects that affect individual decision-making (North, 1991).

These domains are the prototypes for economic analysis, these domains within the sphere of economics interact and relate to the social and the political. As such the two prototypes in this context are firstly the "*political exchange domain*" and secondly the "*social exchange domain*" (Aoki, 2007, p. 13). The first of these domains relates to the interaction between firm and state. The state in this is powerful and able to exchange rights, rule of law and investment security in return for taxes and increasing foreign exchange receipts. The government however, can abrogate these rights granted to private agents (Weingast, 1997). Theoretically this gives government the upper hand. The subsequent responses available to agents include harmonising decisions with other agents or acting alone when facing a governmental decision. Within this decision they can choose to acquiesce or deviate, each of which has differing outcomes, especially in light of the available coalitions between government, agents, and other agents. The social exchange domain is the most abstract, relating to the semiotics of socialisation (Coleman, 1990; Aoki, 2001; 2007). Although, esoteric the social exchange domain plays a considerable role in the synchronic events specifically in relation to nationalisation, as the perception of mineral firms worsen, putative measures against them open up a payoff in relation to elections whereby votes can be gained. Within Aoki's (2001) framework the domains hold agents, in this instance specific organisations or groups capable of influencing across the political exchange domain, giving the government a payoff at the point of an election through votes in exchange for putative measures such as expropriation.

Amongst what Di Maggio and Powell (1983) perceive as the organisational set we see a variety of actors shifting and changing through the institutional evolution of Zambia's mining sector. In 1924 the set is limited to the British South African Company (BSAC) and the Crown. In 1964 this is limited to BSAC, the new firms introduced by BSAC and the independence government: by the 1982 this set has removed the firms but the IMF has emerged as a key player. In 1991 the agents are the IMF and the government, in addition to the incoming private firms. In the state acquisitions of 2019 and 2020 there is the government, comprised of the ministries related to mining such as minerals, finance, environment and labour and the state owned mining investor ZCCM-IH and the private firms themselves. Beyond the bilateral dynamic that was seen throughout this period is the additional agent within the social exchange domain, that of the voters. Additionally, there are the miners themselves, and the informal mining sector who hold a degree of social power and are themselves a significant voting bloc. This set may have numerous agents, but those that do not directly impact that of the bilateral state-firm dynamic have limited impact on the policy direction of the sector (Ng'ambi and Mwiimbu, 2018).

The political exchange domain in this context, differs greatly from the traditional conception of the domain. Aoki (2001) states that the legislative power of the government gives considerable advantage over the firm, this perspective discounts the power imbalance owing to the stabilisation clauses within contracts. The key advantage is neutralised in the dynamic via the clause, the government has limited options to extract a larger share of resource revenues as they cannot threaten with legislation (Oshionebo, 2010). As such expropriation over time develops as a feasible strategy as opposed to costly and unsuccessful litigation.

The social exchange domain in this context is the most complex. Prior to the expropriation the state held few methods to challenge firms, additionally as minority shareholders they also lacked incentive. The perspective that the Zambian government could only be a minority shareholder and were unable to take control of the mines can be perceived as a norm that developed within the social exchange. As discussed, the period of privatisation was done in haste and the government were explicitly told that they were unable to run the mines without external actors from the Global North. The act of expropriation was a marked change from this position (Fraser & Lungu, 2007; Ng'ambi, 2020). As such, it represented a novel strategy for the government to use in future conflicts with other firms. In essence this norm developed within the institutions after repeated games, which supports the notion of endogenous institutions.

An equilibrium in one domain is reliant upon the others (Aoki, 2007). Prior to expropriation the equilibrium was reliant on (1) the inability of the government to create legislation against the firm owing to stabilisation clauses. (2) The norm that developed that Zambia must rely on external firms to invest and extract, so in turn the state can garner tax for domestic spending, and that most importantly they are unable to undertake the process of mining themselves. This perspective self-regulated the relationship between firm and state, as the state feared the potential scenario of losing an investor and being unable to attract another. These two aspects combined with legal institutions that lacked the ability to enforce punishment allowed firms to act with relative impunity in relation to environment, tax, and labour. The act of expropriation in 2019, therefore, signifies a shift in two of the domains. The political exchange domain shifted to the traditional view, whereby governments are powerful and the stabilisation clause is negated by the strategy of unilateral expropriation of the asset, instead of unsuccessful litigation. Additionally, the social exchange domain has seen a shift as the government of the day felt it feasible to run the mines from a nationalised position, which went against the wisdom of the IMF and the three previous governments. This aspect developed endogenously within the social exchange domain. This outcome was not an equilibrium, hence

its immediate reversal under the UPND the following year. Aoki (2001) notes that non-pareto outcomes can occur across domains.

5.2) Institutions and the Critical Juncture of 1924

Within the organisational set for mining in Northern Rhodesia the agents initially comprised of the British South African Company (BSAC) and the British Empire, directly negotiating for the role of mineral assets. Between the initial start of mining activities by BSAC in 1899 and the creation of the Protectorate in 1924 is the introduction of the first formal institutions for what would become the Zambian mining sector. BSAC acquired all the mineral rights of the territory of Rhodesia through a series of concessions, an act codified by the charter issued by the Crown. Then BSAC introduced the Hut Tax which gave the firm the right to raise taxes from the indigenous inhabitants (Slinn, 1971). The Mining Ordnance Act (1912) was also introduced by BSAC, which gave BSAC the right to franchise off large tracts of land to foreign mining firms, chiefly Anglo and the RST (Slinn, 1979). BSAC introduced taxation of firms whereby they collected a percentage of value of the ores mined rather than a percentage of the profits of the enterprise (Ndulo, 1977). The critical juncture that started the path dependence was the establishment of the protectorate in 1924, a formal act that separated the administrative duties of the state and its mineral rights. The latter remained with BSAC who continued franchise out land to firms to mine aggressively (Yorke, 2015).

A technical issue emerged from the formal institutions of BSAC. The structure of the franchising agreements meant that the incoming firms had little incentive to invest in exploiting ores in harder to reach environments. As such an over-exploitation of the easiest ores to access occurred (Yorke, 2015). Consequently by the point of independence the ores which were easily accessible were depleted and to access deeper ores or ores located in underdeveloped locales required raising capital and technical human resources capacity (Ndulo, 1986).

The charter and rights given to BSAC meant that the following independent state had to buy back its own mineral rights at a cost of $4mn, which left the nascent state with a sizeable debt. This debt continued to grow as the state had to invest in public services for what was a considerably underdeveloped colony (Ndulo, 1977). BSAC had also accrued $135mn from the early franchising with Anglo and RST, this represented further funds that were lost. The firms in this instance were granted perpetual licences that would continue past independence (Ushewokonze, 1974).

BSAC and the Crown did little in their tenure to invest in education (Burawoy, 2014). As a consequence of this the mining sector inherited by the independent Zambian state in 1964 lacked human resources to operate it. This twin issue of large debt and little human resources meant state control was never viable, this twin issue was compounded by the over-exploitation of easy-to-reach ores which further deepened the reliance on foreign firms that had easier access to capital and better human resources. These issues were further compounded by the reliance the territory had on mining, a further legacy of being an extractive colonial state.

The twin-issue and technical issue form not only the antecedent conditions for path dependence in the mining sector and its diachronic development. But it also comprises the foundations for the multiple exogenous institutions and factors that shape the outcomes from repeated interactions between firm and state. These antecedent conditions placed the state in a position where it would always be reliant on external support for its mining sector and in over reliance of it. As such, institutions have evolved within the conditions of the exogenous factors from repeated interactions further entrenching themselves over time.

Institutions and Independence 1964-1991

The act of Independence in 1964 was a vast political event in Zambian history that reset institutional agents within the mining sector. In theory the act of independence would represent a move away from colonial institutions to newly created ones with new institutional actors. Although this event resets the agents within the organisational set, much of the colonial or BSAC era institutions permeated into this period.

The organisational set after independence initially is formed by the Kaunda UNIP government, BSAC and the firms operating Anglo and RST. The set evolved over time to comprise the various public agencies created to manage mining such as ZIMCO and ZCCM in addition to the IMF after the copper crash of 1975. After the removal of Anglo and RST in 1982 the organisational set effectively became a bilateral dynamic between the IMF and the government. After 1987 and the implementation of Kaunda's isolationist plan the IMF turned their attentions to the newly emerging Movement for Multiparty Democracy (MMD) party influencing their policy agenda of economic liberalisation which would come into place after the 1991 election (van de Walle, 1999).

At the point of independence the newly formed Zambian state transplanted much of the formal institutions that affected mining, specifically that of the legal structure used in the colonial state that preceded it (Ndulo, 1977) and the colonial firms who would continue to

operate the mines as minority partners until 1982 (Adams & Simpasa, 2010). The formal institutions evolved at this point through interactions between the nascent government, BSAC and the firms Anglo and RST.

IMF led policy in this period resulted in the devaluation of the Kwacha, aggressive attempts at diversification and other policies that contributed to the increasing debt cycle which remained as an exogenous institution in repeated interactions between agents in the organisational set (Colclough, 1988).

Mining firms from the colonial era were finally removed in 1982, but the negotiating partner for foreign capital in mining was simply switched to the IMF. This period between 1982 and 1991 was an example of extreme economic crisis, whereby food shortages and protests became a consequence (Limpitlaw, 2011). In 1987 Kaunda rejected an additional proposal of IMF adjustments and this period can be seen as the first genuine path break, as both foreign firms and the IMF had been removed from their official capacity in dictating mineral and economic policy.

Regardless of this, the IMF continued to exert influence on the development of the legal institutions of the state up until 1991 through protracted negotiations with the newly formed political party the Movement for Multiparty Democracy. The likelihood that Kaunda and UNIP would win the 1991 elections were slim given the economic chaos unfolding, as such the IMF engaged in bilateral discussions with the opposition movement in anticipation of their electoral victory (van de Walle, 1999) . By 1991 as discussed in previous chapters the IMF effectively directed the legislation developed to privatise the state's mineral assets and ushered in a new wave of foreign firms over the decade that followed. In essence, it took Kaunda and UNIP 23 years to achieve a genuine path break, one which was reversed almost immediately. The government could not weather the period of sole economic management between 1987 and 1991, largely owing to the equilibrium of foreign firm control over mineral assets. Significant institutional shock followed in the privatisation period, and new actors and institutions emerged which reinforced the path dependence of the sector and the equilibrium.

Institutions and Privatisation 1991-2011

The IMF and the MMD government comprised the initial organisational set, alongside the parastatal agencies and the newly democratised Zambian electorate. This is the first point at which the electorate becomes an agent which can influence the social and polity domains.

The IMF led privatisation process resulted in multiple formal institutions that would go on define the rules of repeated games within the economic exchange domain of the Zambian mining sector. Chiefly that of development agreements with stabilisation clauses and stability periods. Stabilisation clauses are the definitive exogenous institution that maintained path dependence and constrained the outcomes of the repeated interactions between the firms and government from 2000 to 2020.

Stabilisation clauses are controversial for their subjective legitimacy in international courts. Some cases have upheld their use, whilst others have not (Cameron, 2011). Some theorists go even further stating they lack legal validity (Sornarajah, 2017). The view of the stabilisation clauses as an institution is complex, as without legal validity they straddle between formal and informal, or endogenous and exogenous. Why stabilisation clauses were so successful in insulating the firms and maintaining path dependency can be analysed through compressed information and self-sustained belief in institutions. In an institution compressed information within the domain needs to be known, shared, and believed by all the applicable agents. Interpretation of the compressed information can differ between agents, but the outcome of the institutions remains the same (Aoki, 2001) .

Aoki (2001) notes institutional enforceability in the compressed information of the employment contract. Whereby an employment contract bounds agents within a domain to act accordingly, if the worker does not fulfil the obligations of the contract they lose the job, this is compounded by the sustained belief that finding work after would be difficult. These are beliefs that sustain the institution, one that is shared by other agents in the domain. This elucidates the use of development agreements: as shared beliefs sustained the institution in their *belief* of the validity of the agreements. The stabilisation clauses, as discussed in previous chapters, are not necessarily valid and their application in international investment tribunals vary. However, given the timing of the legal cases against issues covered by the agreements it can be concluded that both agents, the government and firms held a sustained belief in their validity. As such the agreements had institutional enforceability that were separate from the legal validity. The development agreements effectiveness are best explained via a game theoretic approach to institutional evolution rather than their legal validity. Even if the agreements were abolished by the state in 2008 (MMA, 2008) and stabilisation clauses are contentious within international legal settings, the agents within the organisational set *believed* them to be enforceable. Consequently the formal rule, becomes an endogenously formed institution across domains. Rather than solely a formal constraint from outside of it. As such,

the stabilisation clauses become part of the compressed information understood by institutional actors.

Expropriation and Reacquisition of the Mines in 2019-2020: Reversals and Equilibrium

If put into a one-shot game, with perfect recall the act of expropriation by the Lungu government in 2019 was irrational. The state was in no position to actively exploit the complex mines, owing to an inability to raise capital to further invest in the mines and due to the limited human resources for operating the sites. The exogenous factors of the economic exchange domain and the polity domain would have constrained the choice back to the equilibrium at the point of negotiation. The social exchange domain or organisational domain was influenced by the short-term payoff of votes, given that voters play a role in influencing the organisational set. The short-term payoff of electoral victory reduced the benefits of the equilibrium for the PF at that specific point in time.

As such, expropriation needs to be contextualised synchronically, and as an action that disrupts or shifts the positions of institutional actors and emphasises new avenues. It is a political event with stochastic impact on institutions and institutional actors. It is not an event that alters the diachronic path. The diachronic path being the equilibrium of foreign firm ownership of mines. The act although seemingly irrational occurs across multiple domains, and factor the component of short-term electoral gain. The reversal that followed shortly after proves the existence of the equilibrium once the electoral component is removed. The UPND had a fresh term to start, as a consequence negotiations occurred specifically across the basis of economic maximisation for both parties. In essence, capitalising on voter sentiment against mining firms was the only way to find a brief incentive away from the existing equilibrium within this time period.

Expropriation is a drastic route out of the path, as it is costly, diminishes investor confidence, and removes technology and knowledge (Opp, 2012). However, remuneration from foreign firms is minimal, and the inability to protect collective goods impacts communities (Mulenga, 2019). Expropriation in this context destabilises institutional equilibria when analysed across multiple domains. Destabilisation provides new paths born out of collective decision-making that are new, attractive equilibria (Boyd & Richerson, 2008). An example is the nascent collective belief that mining firms can be challenged through litigation as seen in the cases against KCM and MCM. Mining up until 2020, represented an example of extreme institutionalism, whereby actors could not conceive the plausibility of change owing

to likely rebuffal by elites (Lukes, 1974; Di Maggio, 1988; Dorado, 2005). Social research theorists stipulate the redressing of power imbalances as a central part of sustainable societal change (Gamson, 1975; Gaventa, 1980; Tarrow, 1998; Alvord et al., 2004), and expropriation or general institutional upheaval provides a path break at which these relations can be rectified.

Within organisational theorising exists a contradiction, that of the possibility of institutional change when actors' decision-making is constrained by the institution it seeks to change (Holm, 1995; Seo & Creed, 2002). Dorado (2005) notes that institutional change comes from varying profiles and is defined by agency, resources, and opportunity (Di Maggio, 1988; Dorado, 2005). Agency within this is habitual, sense-making, or strategic. Temporal orientation determines agency; habitual relates to the past, sensemaking to the present, and strategic to the future. Resource mobilisation is defined by three processes: leverage, accumulation, and convening. Opportunity is an objective condition that renders the field opaque, transparent, or hazy owing to multiplicity and the extent of institutionalisation, saliently the perception of opportunity is affected by the actor's temporal orientation and networks (Zucker, 1977; Sewell, 1992; Whittingdon, 1992; Emirbayer & Mirsche, 1998; Dorado, 2005).

Within the organisational field of the mining sector are multiple institutions, the formal is represented by contracts and legislation, whereas the informal relates to the dynamics of relationships firms and state, and less powerful actors and their separate relationships with firms and state. The informal constraint here is effectively fear of reprisal. Communities fear challenging the status quo, whilst government feared the loss of foreign investment (Voigt, 2018). The shift to resource nationalism is endogenously determined by the agent-government on the basis of garnering votes in elections, this payoff at the point of election was greater than economic security. This shift to resource nationalism as a payoff from the electorate is a result of the repeated interactions, between the firm and both the government and labourers and communities. The repeated violations of tax and environmental degradation created a setting in which payoff for defection by the government increased, via an election.

Conversely, the lack of anticipation by the firms relates to the self-sustained beliefs around the institution – that the state will not be able to manage mining. The equilibrium is disrupted by the expropriation which represents a crisis or as Aoki (2001) would refer a political cataclysm with stochastic impact on institutional selection .

The processes leading up to governmental and public support of putative measures against the firms can be seen through evolutionary institutional change. In this perspective, change has "*a quality of punctuated equilibria*", in this the change is associated with a crisis or shock, but

in reality, it is the product of evolutionary steps away from a pattern that no longer holds the same payoff (Greif & Laitin, 2004, p. 639). The shock was expropriation, however, the processes leading to it were actor's evolutionary steps away from the existent equilibrium. This disruption lends volatility in the field. Subsequently, the perception of opportunity for change within the organisational field shifts, although, the perception of opportunity varies between actors (Aldrich, 1999).

This disruption revealed the process in which actors in the organisational set cooperate in the face of a path-break such as expropriation. Expropriation creates an opportunity for institutional actors to perceive change. This case demonstrates a confluence of institutions galvanising the expropriation. Both mining firms were able to hold their positions in the domestic courts with little ramification for over a decade. The fact that the government set a course for expropriation in the run-up to the 2021 election, gave the domestic legal system the teeth it needed to rule against the firms in the cases of Vedanta Resources Holding Limited v ZCCM Investment Holdings PLC (2019) and Konkola Copper Mines PLC (2019) and (Mopani Copper Mines Plc v. Zambia, 2020). Further actors involved in the expropriations include the mining unions who as a powerful voting bloc called for expropriation (Nkomesha, 2019). The key turning point is that the government set the course of action which allowed other institutions to act. Porous elements such as ZEMA were exposed in the legal proceedings for allowing firms to cause environmental damage (Mopani Copper Mines Plc v. Zambia, 2020): a key indicator of the firms' power over other actors in the set. By the point the UPND took power, the minister Davies Chama was placed under investigation for receiving corrupt payments from mining firms (Business & Human Rights Resource Centre, 2022). The shift that occurred from the disruption allowed other to act accordingly. Even though the acquisitions were reversed, the momentary rupture allowed actors to perceive change, of which knock on effects occurred within the organisational set.

5.3) Community Responses and Avenues in the Equilibrium

Under the backdrop of calls for resource nationalism, Vedanta was successfully sued for compensation by 1,826 Zambian villagers, in a campaign spearheaded by James Nyasulu, a noted campaigner and poultry farmer from Chingola who coordinated Zambian and British NGOs and lawyers (Gayle, 2019). Vedanta's pollution from Nkana affected air quality, fishing stocks, and drinking water. This made residents near the mine fall ill (Nyasulu and Ors v Konkola Copper Mines Plc, 2011). The legal campaign started in 2011, however, until Vedanta v Lungowe (2019), litigation through the Zambian courts had remained largely unsuccessful, until the innovation of trying the parent companies of mines in the courts of states where the parent company was utilised: these states tend to have stronger legal institutions (Collier, 2006).

For many communities nestled in the shadows of imposing mines, the suffering through polluted collective goods developed into a cultural norm. Many communities affected by mining's negative externalities such as Kabwe or Chingola carried on farming and living in increasingly polluted areas, unable to hold firms to account. Beyond this the response of the government has been to individualise blame in areas affected by mining, whereby the onus has been placed on individuals to find clean water rather than punish firms that have poisoned water sources (Waters, 2019). There exist examples of striking miners in Zambia (Uzar, 2017), but the emergence of nearby communities demanding compensation is a nascent phenomenon. Litigation on behalf of marginalised groups against corporations demonstrates agency with a temporal orientation towards the future, and a change in collective expectations from passivity to demand (Alvord et al., 2004; Dorado, 2005). This conceptualisation of agency links well to Vedanta v Lungowe (2019) which showed the effectiveness of collective litigation against firms, whilst simultaneously demonstrating a collective decision made by a marginalised group to break from a failing equilibria, that of suffering, to a different path characterised by compensation and deterrence against future environmental damage (Boyd & Richerson, 2008). These outcomes delineate this as strategic litigation (Barber, 2012), which also paved the way for Kabwe v Anglo American, an ongoing class action lawsuit to respond to the legacy of lead poisoning from Broken Hill Mine (Waters, 2019). This success is the result of coordination between Zambian NGOs, marginalised communities, trade unions and lawyers both domestically and abroad. Within Dorado's (2005) conception of change, we see the profile of leveraging in a highly institutionalised field. Politically skilled actors, in this instance lawyers,

Nyasulu and NGOs, held a strategic form of agency, with an understanding that certain actions could lead to compensation. Burt (1992) notes the importance of brokers, like Nyasulu who connected UK lawyers and NGOs such as Foil Vedanta, with his community. The community was defined by sensemaking who once the collaboration was brokered provided testimonies crucial to the case (Dorado, 2005).

Deterring firms from damaging collective goods and marginalising communities is important, however, restructuring power has to provide a new direction for marginalised actors in the sector. Regarding institutional change, within the organisation of the mining sector, a key challenge is the enhancement of sustainable SSM, a practice which employs more and damages the environment less than traditional large-scale projects. Zambia has sought to incorporate informal mining institutions into the domestic legal sphere, to combat extra-legal economic activity. Legislative efforts have been made with regards to licencing and buying targets, actions which stem from De Soto's (2000) legalistic approach. The formalisation of SSM in Zambia is widely considered successful, however, there exists a gap between formalisation and practice due to educational and technological deficits (Siwale & Siwale, 2017). Technological and educational support to complement the current efforts to formalise SSM, could help soften the reliance on foreign firms (Hilson, 2007). Conventional economic wisdom is against formalising SSM, instead focussing on the efficient extraction of resources, which necessitates large-scale projects with access to investment and technology (Veiga & Marshall, 2019). SSM is inefficient in strict profit-making terms, but it has wider socio-economic and environmental benefits, as it creates more employment as a low-tech, labour-intensive practice. Employment is important, given that the private sector has managed to increase the amount of extraction without increasing employment, owing to technological advancements (Runge, 2012). Estimates in Sub-Saharan Africa number 15-20mn direct jobs, and further tens of millions of jobs in upstream and downstream activity in SSM. Additionally, the sector helps sustain subsistence agriculture communities, through additional informal work directly and through the supply chain (Hilson, 2020). There are legitimate concerns regarding unregulated SSM, specifically relating to health and safety, child labour and criminal groups controlling underground mineral markets, these issues could be remediated through formalisation of the sector (Hilson & Maconachie, 2017).

An example of social entrepreneurialism affecting change in SSM was seen at the International Conference on Artisanal and Small-Scale Mining and Quarrying. This was coordinated by the Federation of Small-Scale Miners Associations of Zambia (FSMAZ) and the Association of Zambian Women in Mining (AZWIM), convening international and national

groups with an interest in SSM. The conference involved knowledge sharing, policy strategies, discussions on institutional barriers and the socio-economic benefits of SSM (IISD, 2018). The organisers represent an example of social entrepreneurs who facilitated change. Since the conference and once the expropriation actions commenced, policies have emerged for formalisation, such as SSM licencing and the buying of ore from small scale miners by ZCCM-IH, who in the following year raised a target of 40,000tn per annum from SSM (Siwale, 2019).

The change within the mining sector in relation to SSM as a whole can be understood as one of partaking. This is when institutional change is the consequence of differing actions that gradually converge, with no individual or organisation credited for the outcome (Dorado, 2005). This describes what has been seen until this point, as numerous separate actions led to convergence; (1) the economic inefficiency of subsistence farming which led to the necessity of SSM. (2) The scale and importance of mining in the state leads to the association of mining with economic benefits for individuals. (3) The emergence of a black market required a policy response of formalising SSM. (4) The return to resource nationalism by a government that came to power in 2011, culminating in expropriation of foreign mining assets and a new direction for the sector. (5) Associations coordinating a growing SSM sector to protect individual and collective rights. In this, we see accumulative resource mobilisation and we see the association as social brokers with strategic agency, utilising the sensemaking agency of SSM workers and connecting their concerns and aspirations with policymakers (Dorado, 2005). Though the associations hold a role of note in the advancement of the cause, the sheer scale of outcomes converging prior to this shift demonstrates partaking.

Under the UPND, the future of scaling the provisions around SSM are unclear. An opening Ministerial Statement on Zambian mining under the UPND by the Minister of Mines and Mineral Development stated that, "*the confusion associated with gold where illegal mining was the order of the day will not be tolerated under the 'New Dawn' Government. In addition, the wanton illegal mining and destruction of the environment in other base metals, industrial and energy minerals will be a thing of the past under the UPND Government. The illegalities in manganese mining, the smuggling of emeralds, and the destruction of the environment by illegal miners is unacceptable*" (Kabuswe, 2022, p. 1). The statement has not been followed by a clear policy directive as of 2024. However, this could be interpreted as clamping down on the aspects around gangs and child labour and not as wholesale withdrawal of the legalised aspects and the associations that have developed around the practice. This form of mining should be important, and seen as a legitimate outlet and supplementary income for marginalised

actors. The practice itself can be done separately to large-scale mining in designated areas delineated by the state (Hilson et al., 2022).

Scaling Up and Social Entrepreneurial Gaps

The use of strategic litigation for communities and the formalisation of SSM has seen success, however, there exists a gap for social entrepreneurialism to build on these processes of change. The concept of scaling up within social entrepreneurialism focusses on three aspects; that of servicing more people with the initial provision, augmenting the initiative so primary stakeholders receive wider benefits beyond the specific function, and efforts that lead to shifts in behaviours of actors capable of adding to change (Uvin , 2000; Alvord et al., 2004).

There are still many challenges related to SSM, such as environmental degradation. Degradation relates to inefficiency, as only 50% of ore can be extracted, leading to further unnecessary digging. This is solved through low-cost methods such as portable sluices, ball mills, and water removing pumps, which increases the efficiency of extraction (Hilson, 2020). Efforts regarding education must complement any technological additions, to limit safety issues and environmental damage (Buxton, 2013; Siwale, 2019). The SSM conference organisers formed a point from which to scale up. Capacity building, package dissemination and movement building are all concepts that apply to transitioning towards SSM. Capacity building is integral for educational advancements for the efficiency of mining and the limitation of environmental degradation. Package dissemination could follow Grameen Bank and use microcredit for individuals to buy efficient technology or for groups and small businesses to buy earth-moving equipment, mirroring the maize technology used in Plan Puebla (Alvord et al., 2004). Whereas movement-building, through coordinating with existent mining unions, local NGOs and international bodies would help advance the cause of SSM as a legitimate movement of communities rather than a flawed economic opportunity (Hilson, 2007). A movement as well would likely attract political support as it would create a new voting bloc.

These concepts are equally useful in filling the social entrepreneurial gap for marginalised communities affected by mining pollution. So far, the residents of Lungowe and Kabwe have relied on a disparate network of community leaders, lawyers, NGOs, academics, and international organisations, which has limited efficacy. Capacity building has the ability to change cultural norms and enhance education surrounding the effects of mining toxicity. A notable norm in question is the individualisation of the blame for lead toxicity in Kabwe, a persistent issue whereby individuals are blamed for drinking toxic water as opposed to firms

blamed for poisoning water supplies (Waters, 2019). Further education could help pre-existent household-level strategies for avoiding toxicity but also educate on root causes of toxicity and the legitimacy of compensation to other affected communities. Microcredit could also be of use to give communities the ability to raise funds for lawsuits. It could also mirror the use of providing microcredit in agriculture for technology to identify toxicity in water and soil (Alvord et al., 2004). Movement building could link together multiple communities affected by mining, all of whom incorporate the strategy of trying parent companies in their home states. In doing so lawyers and NGOs who led the class actions, could engage in knowledge-sharing with multiple, marginalised communities.

Improving the Mining Educational Sector

Zambian educational institutions, currently would not aid domestically sourced large scale mining projects, although further investment has gone into this process there needs to be more direct emphasis placed on metallurgical training and engineering. A key dynamic within the organisational set of Zambian mining, is that foreign firms hold the knowledge for undertaking large mining ventures. Access to high-quality engineers and technical specialists is key, especially given the complexity of mining in Zambia (Masinja & Simukanga, 2012). Throughout Zambia's history, a key issue holding back the development of the mining sector was the lack of access to human resources, a central issue during the nationalisation period (Limpitlaw, 2011). This has advanced somewhat but not significantly during the privatisation period, owing to the reliance on foreign firms for extraction. A recent study on the state of mining education in Zambia demonstrated that a lack of emphasis is placed on mining governance and technology use, a lack of state-of-the-art research centres in Zambia that focus on the future technology to be used for mining is also an issue that needs to be re-evaluated (Banda & Besa, 2021). Chile has been able to have a highly centralised copper mining sector, owing to the output of quality mining education. The lack of educational foundations for mining is rooted in the colonial history of Zambia, as discussed previously Northern Rhodesia, was not developed as a colony instead used as an outpost for cheap labour and extraction by foreign firms (Yorke, 2015). This differs greatly from the development of mining education in Chile, which started in the early 19th century (Collier & Sater, 2004). Even after independence from the Spanish, Chile placed a large emphasis on the role of tertiary education in the mining sector, with a focus not solely on engineering but also technological advancement and mineral governance. Although, this is not an aspect that has been revealed purely through institutional

shock it is an area which can be advanced upon without affecting the equilibrium of the mining sector.

Regional Cooperation

At the top level of the organisational set change can also occur. The decision of the incumbent UPND party to sign a cooperation agreement to manufacture Electric Vehicle (EV) batteries with neighbouring Democratic Republic of Congo is an example of this. Between the two nations they hold lithium, copper, cobalt, manganese, graphite and nickel, the elements needed for EV battery manufacturing. This is a key development that can capitalise on the alteration to the Zambian investor-state dynamic, an event that may not have occurred without the rupturing of the mining sector through the expropriations. This shift has meant that the incoming UPND government has had to adopt a fluid approach to its economic policy and set a course for new ideas. A notable development of more advanced economies in Africa is the manufacturing of products from their own resources, a situation that is seen in petroleum production in Nigeria and also mining developments in South Africa (Gboyega et al., 2011; Crankshaw, 2017). Batteries are central to the greening of the global economy and this demand is consistently projected to increase over the coming years (Straits, 2022). The decision of the Zambian government to cooperate regionally to improve the value chain of both nations resources is a highly disruptive act and one that could offer significant economic benefits beyond simple resource extraction and taxation of foreign firms. Taiwan represents a case study of a state which had little resources but flourished economically owing to its position as the global leader of semi-conductors, another industry that has grown from strength to strength (Liu, 1993). The ability for the government to craft agreements with like-minded and similarly situated regional actors, such as the DRC and other mining states in Southern Africa could further encourage the development of downstream linkages that are achieved domestically. If regional-cooperation occurs at the same point that further advancements are made in education, this act of disruption could have profound effects on the economic direction of resource-dependent states in the Global South.

Findings

From the critical juncture of 1924 which split mining from the state to the reverse of state ownership of KCM and MCM in 2021, the Zambian mining sector has been characterised by a diachronic path dependence. Succinctly put, that the desire to create a colony that was solely attractive for mining firms rather than habitation has constrained the available choices of successive governments that followed. This ties in well with Acemoglu & Robinson (2001) and the impact of extractive institutions on postcolonial states. The constraints on decisions, have led to further decisions which make Zambia beneficial for foreign mining investors over the needs of their inhabitants, a point underscored by the development agreements and their stabilisation clauses.

Through Aoki (2001) and the perspective of self-sustaining belief, we can explain the complex dynamics at play in development agreements and stabilisation clauses. Although there remains little consensus on whether stabilisation clauses are an effective measure for firms in the international courts they remained a tangible constraint on the decisions available for the Zambian government (Lungu, 2008; Cameron, 2014; Sornarajah, 2017). This self-sustained belief in the institution had a tangible impact on Zambia's environment and ability to raise tax revenues during the stability periods for KCM and MCM.

Through path dependence it is observable that the equilibrium for the Zambian mining sector is one of foreign ownership. This diachronic process is punctuated by synchronic events. These synchronic events, such as independence, privatisation and expropriation reset the institutional actors involved in mining, often creating shock and the emergence of new paths. However, this shock does not alter the diachronic path, or equilibrium. Instead it resets actors. This can take the shape of new governments, new mining firms, and new stakeholders generally. This change has fundamentally little effect on the equilibrium itself, however, it does open up new possibilities for the more marginalised members of the organisational set.

The new possibilities seen in the synchronic event of the state acquisitions related to the advancement of small-scale mining, strategic litigation for the marginalised, the improvement of domestic mining education and bilateral cooperation with the DRC. Consequently, we see that these synchronic events have meaning and outcomes, even if they do not explicitly alter the path dependence of the mining sector. SSM can provide additional incomes for citizens around mining that do not explicitly affect the operations of large-scale projects. Litigation on behalf of communities affected by mining operations not only serves as compensation and restitution but also provides a deterrence for future operations to not cut corners related to

environmental management. Further education can bring about more technical roles for Zambian citizens within the framework of the state-firm dynamic that relies on foreign capital. Further cooperation with DRC can help de-enclavise mining intensive areas and forge a new economic path based on manufacturing rather than extraction. A process which would aid diversification without disruption to the equilibrium. In plain terms the chaotic moments create institutional ruptures which can be capitalised on, the end goal does not need to be to replace the equilibrium but instead find avenues for the marginalised members of Zambian society to benefit within it.

Conclusions

The key purpose of the research is to demonstrate that Zambia's mining sector is path-dependent and the central reason as to why efforts for nationalisation or path breaks have failed so convincingly, specifically the incident of Konkola and Mopani Copper Mines. In addition to demonstrating the limited legislative capacity of successive Zambian administrations. This research adds to the literature by demonstrating that the path occurred owing to the initial split in 1924 between mining policy and production with that of the rest of the state's governance. This occurred largely through the incompetence of the British administration who at the time were unaware of the value of the sector (Chanock, 1968; Slinn, 1971). The critical juncture, that is the establishment of the British Protectorate in 1924, separated the states administrative functions from that of mining policy and production which was left entirely with BSAC. BSAC continued to operate with considerable power and the Empire was unable to introduce tangible policy or development over the territory. In this period private firms such as Anglo and RST were able to mine considerable amounts and carve out their own spheres of influence (Slinn, 1971; Ndulo, 1977; 1986).

This separation led to the overmining of the most accessible ores by external firms which meant that in the future the state became reliant on actors with the most advanced technology and capital-raising ability: large foreign firms. The separation also entrenched institutions that made a territory that was solely attractive to external mining firms with no tangible institutions for future statecraft. Consequently at independence, Zambia was effectively a series of scattered mining assets that were still in private hands. The state also carried over debt at independence through the acquisition of their own mineral rights from BSAC (Ndulo, 1986). This created a twin issue firstly the genesis of debt which required revenue from the mines to service and secondly, a central economic driver which required continued management from colonial firms owing to a lack of human and technical resources.

At the point of independence, the newly liberated Zambia was left with debt and reliance on colonial firms to maintain mineral production. The maintenance of mineral production was salient as this was the only available means to fund much needed social development and service the immediate debt. However, the economy as a consequence continued to remain

mineral dependent, as such when copper crashed in 1975 the new state went into turmoil and required external assistance that led to more debt (Auty, 1991).

The IMF made multiple errors in the context of Zambia. The devaluation of the Kwacha under Kaunda, the failure to diversify meaningfully and the privatising of mining cheaply at a particularly low price point for copper. The timing of the privatisation in hindsight had profound economic effects (Colclough, 1988; Clark & Allison, 1989).

The initial path led to further involvement by foreign firms and the ever-increasing debt led to further external control over policy by the IMF. The constraints imposed by IMF interference owing to the constraints of legacy debt, led to development agreements. A matter which effectively negated policy and legal measures against the firms through the use of stabilisation clauses. A further aspect added to the literature by the research is the demonstration that stabilisation clauses remain the most tangible legal aspect that reinforced and codified path dependence in the mining sector. Consequently, demonstrating the relationship between path dependency and this specific form of clause in investor-state contracts. These clauses, although contentious under international law were self-sustained by the collective belief in them.

The limitations of policy usage against the firms protected by stabilisation clauses held deep similarities to the views of the British Empire while BSAC retained the mineral rights. The Empire would not legislate in Northern Rhodesia owing to BSAC's control of mineral rights, stating that legislation would be pointless owing to the wide scope of the rights (Colonial Office, 1946). Almost all significant legislation between 2000-2020 was either blocked or obfuscated by the development agreements.

Beyond the disincentive to enact policy against firms are the clear examples of policy either failing or being directed externally. Legislation was reasonably ineffective under Kaunda, as demonstrated by the continuation of colonial firm extraction up until 1982. Moreover, the legislation enacted after the copper crisis was directed by external bodies such as the IMF against the backdrop of severe economic decline. This same issue was even more apparent after 1991, as legislation conducted in the privatisation period was constrained by the same factors of IMF conditionalities and growing debt.

Furthermore, much of the crimes related to environmental damage and transfer mispricing which were meted out by mining firms in each period, the crimes themselves were a replication of the previous actions of mining firms in another time. Transfer mispricing was engaged in by RST and Anglo in both the colonial and independence periods, and Vedanta and Glencore post privatisation (Simwinga, 1977; Readhead, 2016). Mining firms at every point in Rhodesian and Zambian history have committed indelible environmental violations as well (Waters,

2019). In essence, path dependence entrenched a set of actions applicable to mining firms to use regardless of their legality. The path born out of a colonial oversight has had far-reaching effects on both the states' application of policy and it's environmental well-being.

The path dependence of the sector had a comprehensive effect on the development of BITs and regional cooperation generally. The structure of the mineral dependent economy coupled with mining firm's ability to lean on weak domestic institutions for their goals rendered the ratification of BITs futile. In some instances BITs were only adopted as they aided a specific mining initiative at the time of its ratification. This research confirms the view that BITs do not necessarily drive FDI, specifically in the Zambian context. As such BITs generally lacked incentive for both firm and state. Path dependence of the sector and the entrenchment of mineral dependence bled into international cooperation, where we see limited incentive to integrate at the regional or continental level owing to the central push of diversification.

As such Zambia's path has not only constrained its choices but each choice constrained it further. So much so, that the chaotic events of KCM and MCM were subject to an immediate reversal. The action of state acquisition was a path break similar to the actions of Kaunda in 1987 when he rejected IMF. A further similarity was the swift reversal that followed, owing to the path dependence of the sector.

Path dependence entrenched mining firm actions such as mispricing and environmental damage which fuelled public resentment. This resentment bled into the government whose relationship with firms continued to deteriorate before the culmination of expropriation in 2019 (Musonda & Larmer, 2023). Path dependence led to the conditions for expropriation to occur, but simultaneously path dependence clarifies the immediate reversal.

However, even though the reversal occurred the deterioration of the dynamic between mines and state created interesting effects on the institutions around mining in the period under the PF. It led to litigation for communities effected and the advancement of SSM, this also led to the UPND agreement with the DRC on cobalt and copper. A diplomatic achievement that had never occurred under the auspices of the IMF and era of multinationals. In fact, the policies implemented in the privatisation period fostered disincentive for regional cooperation.

The rupture from expropriation however brief had tangible effects and allowed institutional actors to perceive change, a factor that can be capitalised on piecemeal. The reversal, however, is indicative of the ever-present reality of Zambian mining. The state relies on it but is not able to singularly access the resources it needs from it. It is a constant cycle of trying to increase production to service increasing debt. As such the *rational* option will always be to turn to foreign firms who have little concern for the environmental and social well-being of the state.

The development of Zambia as a state has occurred as a secondary aspect to the development of a mining sector that was designed to be exploited externally by foreign firms. Institutions, debt, and limited technical capacity have passed down from each generation to the next further exacerbating the state's economic, legal, and regional development and deepening reliance on a handful of foreign firms to extract minerals. The antecedent conditions from colonialism provided a territory to be exploited and extracted by foreign entities, this has evolved over time and remains the same outcome in the present day. The institutional structure and path dependence of the sector has created an equilibrium that runs counter to the needs of the state's inhabitants. The equilibrium of foreign firm control of mineral assets has proven to be highly resilient, even in the face of growing calls for nationalisation and wider awareness on matters of tax evasion and labour violations. The event of expropriation had stochastic impact on the institutional make-up. As such the discussed avenues such as SSM, education and litigation represent an opportunity made by institutional disruption more attractive and more plausible. Simultaneously, these new avenues do not negate the equilibrium in place, but instead provide some institutional break-through for marginalised actors. The importance of the new avenues relates to the resilience of the equilibrium across different time periods. Rather than aggressively seeking to reverse or break the path which often ends in reversal, options exist that can benefit those marginalised by the firms without drastically affecting the equilibrium.

As demonstrated, the development of the path of the mining sector has centred around this equilibrium. Radical attempts to alter the path such as the efforts of Kaunda in the 1980s and the nationalisation attempts of 2019-2020 have proven futile. Each period transmits or develops news institutions around and after stochastic political events, and each institution developed, entrenched, or transmitted further deepens the path and maintains the equilibrium. The structure of the mining sector from the time of colonialism has placed Zambia in mineral dependence, removed incentive for regional cooperation, limited education, taken vital funds from the reach of the state and left communities near the mines to suffer from the environmental effects. These factors have exacerbated over time, even with attempts to alter it, consequently the optimal course of action is to develop beneficial avenues that occur at times of institutional shock. Community led litigation, small-scale mining, battery partnerships with similar states, and more mining education would have significant effects over time. The state may not be able to alter the path but it can utilise the new avenues that emerged to benefit its inhabitants.

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