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Legislative Paper Tiger – Challenges and Solutions to Natural Resource Governance in Zambia

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I. Introduction

Zambia has been called by some as a near quintessential example of the resource curse, with severe dependence on single income-generating streams (Boos and Holm-Müller, 2016, 882). Indeed, the lifeblood of the country has almost always been copper, with the health of its economic system heavily reliant on the rise and fall of international market prices. Yet, despite these challenges, the country has been lauded by the Extractive Industries Transparency Initiative (EITI) as making considerable and satisfactory progress with regard to the governance of its natural resources. It is led by efforts to tackle corruption and tax evasion, promote transparency in beneficial ownership and improve public knowledge of the governance system. It also attempts to identify gaps in the law that should be filled (EITI Secretariat, 2017).

In some ways, Zambia is a legislative paper tiger, a country replete with strong institutions and a presumptively powerful policy. But it remains incapable of leveraging that legislation to bring about effective positive and diversified economic growth through its minerals sector. This is the case within and outside the copper industry. Indeed, it poses the question as to whether legislation is indeed the silver bullet required for strong natural resource governance. Therefore, this policy brief explores two endemic challenges facing policymakers in Zambia. It also makes recommendations to drive sustainable growth by building from the stable legislative base currently established.

II. Mining Legislation

Today, Zambia's mining sector is governed by the Mines and Minerals Development Act 11 of 2015 (MMDA). Read together with the subsequent Mines and Minerals Development Act (Amendment Bill) of 2016, the MMDA is responsible for overseeing all aspects of mining operations in the country. This includes exploration, licenses, large-scale mining, gemstones, health and safety, and environmental proscriptions (ICLG, 2017). The MMDA established that mining companies will need to adhere to an income tax rate of 30 per cent, with the elimination of the country's variable tax on profits (ICLG, 2017). All active companies must equally obtain environmental authorisation from the Zambia Environmental Management Agency, beyond application for an exploration and operation license. There are also no legal restrictions on the ownership of holders of large-scale mining licenses (ICLG, 2017). Subsequent iterations of the Mines and Minerals Development Act, including in 2015, proposed that the legislation applies to all non-renewable resources. It vested the rights of ownership for those resources in the state and required that the resources be 'conserved, developed, and used prudently, taking into account the needs of the present and future generations… mineral resources shall be explored and developed in a manner that promotes and contributes to socio-economic development in accordance with international conventions' (Mines and Minerals Development Act, 2015, 172).

More recently, the Government of Zambia introduced an amendment to the Mines and Minerals Development Act. Subsequently read together, it amended the royalty rates outlined in Section 89 of the Act. After passage of the Mines and Minerals Development (Amendment) Act 18 of 2018, a holder of a mining license would be required to pay the following royalty rates for any minerals produced or recovered: 5 per cent of the norm value of base metals; 5 per cent of the gross value of energy and industrial minerals; 6 per cent of the gross value of gemstones; and 6 per cent of the gross value of precious metals (Government of Zambia, Amendment Act, 2015). That said, and as one might expect, royalty rates differ for Zambia's primary commodity, copper. For the latter, 4 per cent royalty rates apply when the average price of copper is less than US$4500.00 per ton, while a 5 per cent rate applies for average prices between US$4500.00 and US$6000.00 per ton (Government of Zambia, Amendment Act, 2015). If copper prices were to rise beyond US$6000.00 per ton, a royalty rate of 6 per cent would apply (Government of Zambia, Amendment Act, 2015). Analysis suggests that the government believed that the Mines and Minerals Development (Amendment) Act would spur Zambia's push to the position of largest copper producer in the world, bypassing the Democratic Republic of Congo, as previous royalty rates from 2015 were deemed to be too stifling to promote business (Kapembwa, "Zambia Reforms Mining Laws," 2017).

But what must Zambia do to leverage this legislation so as to further benefit from the mining sector? Recommendations can be divided into two categories: enforcement; and solving the problem of partnership.

III. Enforcement and the Problem of Partnership

In 2015, Zambia's former Minister of Mines and Minerals Development, Maxwell Mwale, was convicted of corruption. This came about after the issuance of mining licenses to a Chinese company in 2009, named the Zhonghui International Mining Industry Group Limited (Reuters, "Zambian Ex-Mines," 2015). Testimony suggested that the ex-minister had done so with the expectation of some form of personal gain. The licensing process time period for this company was being shortened from months to days (Reuters, "Zambia's Former," 2017). And yet, in 2017, the minister would be acquitted of the charges, in the same week that another former minister would have his own corruption charges stayed (Phiri, "Former Mines, 2017). Indeed, it is not the first time that Zambian officials have been caught in a corruption scandal associated with the minerals sector. In 2015, the Minister of Mines and Minerals Development, Christopher Yaluma, and the Provincial Minister of the Copperbelt Province, Mwenya Musenge, were both linked to a US$2 million payout. The payout was from Chinese mining companies in the form of monthly stipends. This was while Zambia's Minister of Justice, Wynter Kabimba, had been under investigation in 2012 for taking bribes from Trafigura, a multinational trading company (Sakala, "Zambian Officials," 2015; Neate, "£5bn Illegally," 2012). In its analysis of the Zambian context, U4, Transparency International and the Zambia Bribe Payers Index (ZBPI) agree that corruption is not an isolated instance. This is despite considerable progress made by the country in ending these practices among political and government institutions. U4 in particular argues that corruption continues to be widespread in Zambia's bureaucracy, as part of patronage networks, and in political institutions (U4, "Zambia: Overview," 2014). As a result, corruption derived from poor enforcement of existing legislation remains the second most prominent inhibitor of doing business in the country. The most prominent inhibitor is access to financing, although indicators in this category are largely levelling out as opposed to previous years (Schwab, 312-313).

According to the Department of Commerce, Zambia has indeed made progress in battling corruption. Yet, it remains a serious impediment to the ability of the country to enforce existing legislation (USCS, 2017). Therefore, Zambia must solve the issue of investigative and enforcement units too often being understaffed and poorly funded. This includes the Financial Intelligence Unit. The problem has inhibited its ability to enforce legislation and end corruption. This is while gaps in existing legislation, including a significant lack of information transparency, shields the government from scrutiny (U4, "Zambia: Overview," 2014; USCS, 2017). A step in the right direction would include provisions in new natural resource legislation that guarantees a portion of revenues for legislative enforcement, monitoring and evaluation, as well as investigative agencies.

If properly broached, the private sector can also be an ally with regard to achieving this goal. Given the importance of the mineral sector in Zambia, a successful implementation of public-private partnerships (PPPs) would indeed significantly impact the country's economic growth and development. Typically, successful partnerships of this type, often termed 'public-private partnerships (PPP)', establish a more predictable business environment. It also attracts increased foreign investment which the government needs for important developments, such as infrastructure. The prospect of optimum service delivery through collaboration with the private sector is the strongest selling point of the idea behind PPPs. This is what separates it from the ordinary outsourcing (Public-Private Partnerships Act, 2009). It holds the promise of each partner doing what they do best, allowing government to assure the provision of critical goods or services to the public in the most economical way.

Beyond corruption, partnership development in Zambia is inhibited by a number of factors. The first is transparency. In this regard the implementation of the legislation and policies is impacted negatively. This is due to the lack of adequate laws to support transparency, such as asset disclosure, evidence, and freedom of information. This is compounded by a lack of legislation for the protection of whistle-blowers (Chileshe, p.10-11, 2010). For instance, mining companies provide audited financial statements upon request. But often these do not include detailed financial records since they are considered to be confidential (NRGI, 2017). Similarly, the Zambian government does not publicly disclose mining contracts, nor any mining assets held by public officials (NRGI, 2017). Second is trust, within which transparency plays a key role (World Bank, p.7-20, 2008). Typically trust needs to be cultivated over time by efforts from both sides, from day one of the partnership. Open candid communication and transparency, both with the internal and external stakeholders that compose the partnership, are essential to engender trust (World Bank, p.7-20, 2008). Civil society organisations (CSO) can facilitate the trust-building process not only between government and the private sector involved in mining but also with the communities where mining takes place (Eigen, 2009). However, civil society organisations also need the building of capacity and recognition of the important role that they can effectively assume in the PPPs (World Bank p.53-55, 2008). This exercise can be undertaken within a programme for government agents or can be organised for CSOs by the private sector (World Bank, p.53-55).

In addition, Zambia contends with the challenges of unconventional donors like China and other BRICS states. Within a weak regulatory setting, Chinese investments pose significant challenges (Chileshe, p.11, 2010). In countries like Zambia, the Chinese take full advantage of the weaknesses, such as poor-quality control and labour protection or land allocation. They export their bad practices alongside their investments (Chileshe, p.11, 2010). The exporting of bad practices is one of the major causes of the controversial debate about China dumping cheap, low-quality products in Africa in general. In Zambia the effect of these imports has been drastic and has choked many Zambian small traders (Chileshe, p.11, 2010). It is noted that while China is favoured as partner, it has not assisted Zambia in benefitting from partnerships. These partnerships incorporate the modernisation of manufacturing technologies that produce and export finished goods (Chen and Myers, December 28 2013).

In addition, China's unconventional approach to aid gives it access to political elites who serve as the territorial gatekeepers of resources and to some extent of the markets (Carmody, December 28 2015). The policy of non-interference (no conditionalities) further facilitates China's co-operation with political elites (Carmody, December 28, 2013). On the one hand, the policy of no conditionalities provides the country with greater ownership of the resource aids accessed (Carmody, December 28, 2015). On the other hand, such policy undermines local efforts to increase good governance (Okeowo, October 9 2013). By proclaiming political non-interference, China ends up giving some pretext and legitimacy to the authoritarian governments to continue governing as they wish (Chen and Myers, December 28 2013). Although Zambia would be considered a democratic country, the opportunity for the government to rule as they please is not lost on them (Okeowo, October 9 2013).

IV. Recommendations

Government has not yet demonstrated an eagerness to perform its responsibilities under existing legislation and legal agreements with companies. Instead, it opts to change royalty rates at irregular intervals leaving the private sector to interpret these changes on its own accord. It creates a situation in which mining companies are performing self-reporting and compliance monitoring due to being hamstrung by at-odds legislative requirements. This is while the government fails to perform auditing due to a lack of monitoring personnel and a weak overall administrative and technical capacity. Personal ambition, leading to wholesale corruption in government, appears to prevent holistic approaches with regard to collaboration with the private sector. It also prevents the uniform enforcement of existing legislation. This is not aided by the fact that natural resource policies and legislation are constantly shifting. New governance documents regularly fails to engage with, or adhere to, existing legislation. The creation of new legislation without ensuring a functional relationship with previous documents creates loopholes and inconsistencies. This can be exploited by both government and private sector actors. Zambia is in desperate need of legislative harmonisation; the government must take up the mantle of this challenge, rather than opting to perform intermittent, piecemeal legislative review when it suits their interests.

In response to the above, the government would do well to acknowledge that legislation alone is not enough to drive an escape from the resource curse. Legislation is a framing mechanism, a map to a perceived post-curse utopia. Zambia has done well to draft genuinely positive natural resource legislation, perhaps even a model for other African states. It does seem that the country has learnt some lessons from the rise and fall of copper prices and their dependence on them. But legislation, as was argued throughout this paper, is simply not enough to fundamentally remedy the resource curse. Indeed, Zambia must broach a number of other concerns. Principal among these is the problem of poor enforcement. Too often, Zambian politicians and officials responsible for resource governance have been found to perpetuate severe corruption. This ultimately impairs the country's ability to grow sustainably and attract investment from abroad. A state with deep corruption is labelled a risky investment. Specifically, corruption must be remedied in public procurement and contracting procedures. At the same time the government must do more to end the practices of kickbacks and bribery for favourable reviews of purchasing and site lease agreements. Zambia would do well to consider the implementation of a well-funded, independent investigatory body for resource-related governance.

Zambia must also work to improve the dispersal of resource-related revenues from Lusaka into rural areas. Interviews conducted for this research suggested that officials were content with the fact that revenues derived from primarily foreign-owned mine sites could be contained in the capital city. Encouraging mine ownership by small and medium enterprises in Zambia may well be a partial remedy to this problem. Of course, legislative and enforcement loopholes, derived primarily from ad-hoc, overlapping laws, must also be closed. These continue to be exploited by multinationals to expatriate revenues derived from resource sites. This brief calls for a thorough review of existing legislation so as to end the overlap of institutional and agency mandates, enforcement procedures, and at-odds proscriptions.

With regard to the problem of partnership, a number of issues must be resolved. First, the government must work to engage private sector actors as equal partners in development processes, and not simply as sources of revenue. Interviews conducted in Zambia in 2016 suggested that the current discussions on these topics tend to originate from companies themselves, rather than the government. This is because the Ministry of Mines and Mineral Development and related agencies rarely proactively engage with mining firms (Interview, Consultants with Experience in Zambia, 2016). It was denoted in these conversations that Corporate Social

Responsibility largely stems from the companies themselves, rather than as a product of productive engagement between the private and public sectors. To build partnership, the paper suggested augmentation in at least four areas: the administrative capacity in Lusaka; corruption; transparency; and, trust. With regard to capacity, solutions begin with defining the appropriate coordinating authority that would be responsible for negotiating, monitoring and managing a formalised public-private partnership (PPP). Contracting authorities must build the capacity of its agents who assume responsibility for negotiations, monitoring, and the management of PPPs. Finally, the specific CSR role of mining companies in the communities needs to be defined and clearly communicated to community leaders and members. This would lead to more effective service delivery within PPPs. It will also improve the relationships of the private sector with communities. Coupled with capacity, the government must improve the reporting response rate for the ownership of mine sites and operations in country. This must be done as a means of improving the overall trust and transparency within PPP agreements.

When it comes to non-traditional partners, Zambia must improve its bargaining position with countries like China. It must do so by remedying poor quality control and ineffective labour protection or land allocation laws. Indeed, Zambia should be wary of BRICS states attempting to export and mask their bad practices through attractive investments with companion loan cancellation agreements. Second, Zambia must take a closer look at China's policy of non-interference, which can often undermine efforts to increase good governance.

Zambia is an interesting case, a legislative paper tiger with all the right ingredients for promising economic growth derived from natural resources. But thus far, it appears that those ingredients have yet to be used in the proper order. Some of those ingredients have been oversaturated while others were ignored. It is not a problem unique to Zambia. Indeed, most resource-rich countries have at one time experienced the incapacity to leverage their natural resource wealth for sustainable development. With concentrated effort, Zambia may well emerge from the grasp of the resource curse. In this way it will become not just a model state on paper, but one held up as a source of best practices to emulate.

References

1. Boos, Adrian, and Karin Holm-Müller. 2016. "The Zambian Resource Curse and Its Influence on Genuine Savings as an Indicator for 'weak' Sustainable Development." Environment, Development and Sustainability 18 (3):881–919. https://doi.org/10.1007/s10668-015-9667-5.
2. Carmody, Padraig. December 28, 2015. "The New Scramble for Africa". Jacobin. Retrieved fromhttps://www.jacobinmag.com/2015/12/china-south-africa-imperialism-zambia-brics-globalization
3. Chen, Xiangming & Myers, Garth. December 28, 2013. "China and Africa: The Crucial Urban Connection". The European Financial Review. Retrieved from China and Africa: The Crucial Urban Connection
4. Chêne, Marie. 2014. "Zambia: Overview of Corruption and Anti-Corruption." Expert Answer 2014:08. U4 Expert Answers. London, United Kingdom: Anti-Corruption Resource Centre.
5. Chileshe, Chilifuya. December 2010. "Chinese Debt, Aid and Trade: Opportunity or Threat for Zambia?". South African Institute of International Affairs: China in Africa Project. Occasional Paper. 72. Retrieved from file:///C:/Users/David%20Lochead/Downloads/SAIIA_Occasional_Paper_no_72.pdf
6. Eigen, Peter. July 7, 2009. "Transparency as a tool for trust-building". EITI. (Blog). Retrieved from https://eiti.org/blog/transparency-as-tool-for-trustbuilding
7. EITI Secretariat. 2017. "Zambia Makes Stride in Ensuring Accountable Management of Oil, Gas and Minerals | Extractive Industries Transparency Initiative." Extractive Industries Transparency Initiative. October 25, 2017. https://eiti.org/news/zambia-makes-stride-in-ensuring-accountable-management-of-oil-gas-minerals.
8. Government of Zambia. 2015. The Mines and Minerals Development Amendment Bill 2016. N.A.B 6 2016. http://www.parliament.gov.zm/sites/default/files/documents/bills/THE%20MINES%20AND%20MINERALS%20DEVELOPMENT%20%28AMENDMENT%29%20BILL%2C%202016.pdf.
9. Kapembwa, Jeff. 2017. "Zambia Reforms Mining Laws." The Southern Times (blog). May 29, 2017. https://southernafrican.news/2017/05/29/zambia-reforms-mining-laws/.
10. ICLG. n.d. "International Comparative Legal Guides." Text. Mining Law 2018 | Laws and Regulations | Zambia | ICLG. Accessed December 11, 2017. //iclg.com/practice-areas/mining-laws-and-regulations/zambia.
11. Neate, Rupert. 2012. "5bn Illegally Taken Out of Zambia Over Past Decade, Says Report. The Guardian. 18 Dec 2018. https://www.theguardian.com/world/2012/dec/17/5bn-illegally-taken-out-zambia-report.
12. NRGI. July 12, 2017. 2017 Resource Governance Index. National Resource Governance Institute. Retrieved from https://resourcegovernance.org/sites/default/files/documents/2017-resource-governance-index.pdf
13. Phiri, Chris. 2017. "Former Mines Minister Acquitted of Corruption Charges by High Court." Zambia Reports. June 27, 2017. https://zambiareports.com/2017/06/27/former-mines-minister-acquitted-corruption-charges-high-court/.
14. Republic of Zambia. 2015. Mines and Minerals Development Act 2015. Vol. No 11 of 2015.
15. Reuters Staff. 2015. "Zambian Ex-Mines Minister Found Guilty of Corruption." Reuters, February 25, 2015. https://www.reuters.com/article/zambia-mining-corruption/zambian-ex-mines-minister-found-guilty-of-corruption-idUSL5N0VZ57S20150225.
16. ———. 2009. Public-Private Partnerships Act of 2009. Vol. No. 14 of 2009. http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/zambia_ppp_act_2009.pdf.
17. ———. 2017. "Zambia's Former Mines Minister Jailed for Corruption." Reuters. February 27, 2017. https://af.reuters.com/article/topNews/idAFKBN0LV0RO20150227.
18. Sakala, Charles. 2015. "Zambian Officials Linked to $2m Mining Scandal." Zambia Reports. September 2, 2015. https://zambiareports.com/2015/09/02/zambian-officials-linked-to-2m-mining-scandal/.
19. U.S. Commercial Service (USCS). 2017. "Zambia - 9-Corruption | Export.gov." U.S. Department of Commerce. November 21, 2017. https://www.export.gov/article?id=Zambia-Corruption.
20. World Bank. 2008. "Implementing the Extractive Industries Transparency Initiative : Applying Early Lessons From the Field". Washington, DC : World Bank. World Bank. https://openknowledge.worldbank.org/handle/10986/6399 License: CC BY 3.0 IGO."

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