SK A personal perspective by SHEILA KHAMA

A COMMENTARY ON THE LEGAL, ECONOMIC AND SOCIAL IMPLICATIONS OF AN AMENDMENT TO **BOTSWANA'S MINES AND MINERALS ACT**

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Botswana changes the mining law and adds an option to cede **State Equity to citizens**.

1 BACKGROUND

During the last sitting of Parliament under the BDP majority rule in late 2024, Botswana's Parliamentarians approved an amendment to the Mines and Minerals Act. The Bill was approved with two significant changes that are yet to be enacted into law. **The first was a motion to increase the State's automatic entitlement to equity in mining projects from 15% to 24%**. The genesis of the State's entitlement is an Act of Parliament titled, *The Mineral Rights In Tribal Territories Act of 1967* which also entrusts all mineral resources with the State. Among others, the decision presumes the Government will design policies and pass laws necessary for the resources to be developed for the benefit of all citizens. The second amendment provides that, **in the event that the State chooses to forfeit its entitlement to equity in a particular project, the State can henceforth cede this right to citizen entrepreneurs**. Based on this, corporate or individual citizens would substitute the State (which represents all citizens) by acquiring an equity stake in the company that discovers a mineral deposit to enjoy the benefits to the exclusion of other citizens. The individuals benefit by replacing the Government as a shareholder in the joint venture company that is subsequently licensed by the Government to develop a mineral deposit. **This means that on the matter of equity participation, the private company or individual who partner with foreign investors** stand to enjoy benefits that legally and historically were reserved for the Nation State.

2 WHAT DOES THIS MEAN?

To respond to the question, I first provide some context. National Policies and Laws are not a panacea but have limitations instead. Hence these amendments, like the creation of any policy or law, implies certain trade-offs. This is an important consideration for introducing new laws and policies or amending existing. Other considerations include compliance with relevant provisions of the Constitution, and principles of governance. From a developmental perspective, the assumption is that the revision of legal or policy frameworks enhances socio-economic justice and improves contribution towards national development goals in keeping with changing socio-economic needs. To achieve this given the historical context of Botswana's mineral wealth, this means being true to the spirit of the law upon which the resources were intended to benefit all citizens equally. In this context, the concept of 'the spirit of the law' is defined as *"the original function or purpose of the particular clauses and general structure of the text."* The Letter and the Spirit: A Unified Theory of Originalism | Georgetown Law Journal | Georgetown Law.

Using this logic, I comment on the amendment based on the knowledge that a law is not an end in itself but a means to an end. I start with broader implications on the role of mineral wealth in promoting equity and the unintended consequence of the changes, including potentially undermining other statutes for economic development. I examine the opportunity cost to the

Government of a cession. I consider the citizen empowerment principles and pros and cons as relates to minerals assets and the need for economic justice. I comment of the problematic nature of lack of specificity over conditions under which the State might opt not to exercise its right to equity and conditions of the cession. I also comment of potential impacts of the amendments on Botswana's trade competitiveness.

A DEVIATION FROM THE SPIRIT OF BOTSWANA'S 1967 ACT

Taken on face value, one can argue that the amendment is a departure from the spirit of the law as relates to the rights of citizens to enjoy benefits from minerals equally. This is primarily because the amendment leads to some citizens (individuals or companies) having an advantage over the rest of the population as relates to material benefits from Botswana's mineral wealth. To appreciate the logic, a useful starting point is the precursor to the law itself. At independence Botswana's Traditional Chiefs were custodians of minerals discovered in their territories. However, in 1967, and at the invitation of the late President Sir Seretse Khama (who was himself a chief by birth), tribal chiefs signed a Memorandum of Understanding in which the traditional leaders agreed to relinquish this right and transferred ownership to the newly created Republic instead. The predominant principle being that the collective wealth would be developed to benefit all citizens regardless of where in the country and by whom the minerals were discovered. Speaking at Chatham House in 2008, the former Attorney General Dr Athalia Molokomme said; *"the policy of the Botswana Government is that all mineral deposits are entrusted to the state, irrespective of who owns the land on which they are found."*

The underlying governance principle is the expectation that as a trustee with fiduciary responsibility, the Government will protect interests of the public and not those special interest groups. Further that as custodians of mineral wealth, successive Governments would continuously deploy the resources of the State to maximize the value of minerals and manage them such that no single citizen or groups of people would enjoyed greater benefit than another. Referring to the justification for treating minerals as national heritage while addressing an audience in Tunis in 2008, former President Mogae said; *"This ensures that our citizens as a whole have a common stake and enjoy common benefits from our mineral revenues, rather than just those few who by chance of birthplace or geography might find themselves sitting on diamonds or gold."* Interpreted this way, the amendment is problematic because it departs from these principles in a number of ways. To start with, the Government enjoys an equity stake because it represents the owners of the minerals and ranks superior to any individual or investor. Secondly that the State acts in the interest of an entire nation not a handful and as such has moral authority to make certain demands on investors. But beneficiaries who would enjoy the position of advantage cannot be expected to act on behalf of the entire nation. **As such the Government cannot justifiably transfer such rights to private citizens or companies to whom the Government might periodically elect to. By ceding its rights, by default the Government abandons its responsibility to citizens and fails to develop**.

RISK OF UNINTENDED CONSEQUENCES

A rule of thumb in policy design is to exercise duty of care in order to avoid unintended outcomes. Policies and laws governing development of natural resources are not exempt. Of importance is the need for the tools to meet standards for sound policy frameworks. While the specifics vary from

one policy instrument to another, in general according to the OECD this means *'been sustainable, equitable, and proactive, focusing on achieving the common good and addressing inequalities.'* https://www.oecd.org/en/publications/2011/09/better-policies-for-development_g1g13de8.html
The guidelines necessitate additional considerations and institutional frameworks but the above is the basis foundation. Policy watchdogs like the OECD caution that failure to abide by this principle increases the risk of broad-based policy ineffectiveness and unintended consequences. Yet in the case of the recent amendments, there is no record of a systematic analysis of potential adverse impacts and risk of unintended consequences.

LEAVING NO-ONE BEHIND

Specifically, to be sustainable, natural resources policies must ensure that development of natural resources not only benefit all citizens, but that they also benefit future generations. *https://www.iisd.org/mission-and-goals/sustainable-development*. Based on this principle therefore, a mere unconditional transfer of equity into the hands of private citizens does not meet the sustainability threshold. Instead, one could argue that the State not only abdicates its responsibility, but that it simultaneously disenfranchises current and future generations by channeling benefits from mineral wealth to a few. Given the finite nature of minerals resources, the intergeneration economic, environmental and social impacts of mineral projects, the significance of this amendment is therefore potentially far reaching. Through the Bill, Parliament fails the test of fiduciary responsibility to the citizenry. Based on the concept of socio-economic justice, the **UN Sustainable Development Goals** call for no-one to be left behind. Yet, the amendment places privileged elite entrepreneurs in the lead while relegating those not privileged enough to have benefited from State education and unable to influence policy, in the economic exclusion zone. The result is a perpetual advantage for some and marginalization of many.

3 CITIZEN OR ELITE EMPOWERMENT?

Some will argue that the reviewed Mines and Minerals Act empowers citizens especially following a 2021 law through which the Botswana Parliament enacted *'The Economic Inclusion Act'.* https://dailynews.gov.bw/news-detail/63939.

The law laid the foundation for a special purpose vehicle (SPV) whose mandate among others is *'to promote the effective participation of targeted citizens in the economic growth and development of the economy---'* Consistent with this law, the 2022 Minerals Policy Statement also approved by Parliament commits to the promotion of citizens in the mining industry. Taken on face value, therefore, while a departure from the spirit of the law and Memorandum of Understanding signed by chiefs in 1967, based only on the need for citizen empowerment, one could justify the amendment. However, this is predicated upon the resulting collective and cumulative economic, financial and social benefits outweighing the opportunity **cost** to the State and other citizens. However, a few factors rule out this argument. The first being that in the absence of Parliament having conducted any trade-off studies, it is hard to see how the lawmakers could have reached such the conclusion that in the end the country and rest of the citizens are better off.

On the other hand, ideally, the justification for citizen empowerment initiatives should address three factors. That is, to correct the wrongs of the past by creating a level playing field to pave the way for a groundswell of citizen entrepreneurship. Based on the power of the State since the 1967 Act, through the rights of the State relative to all investors, in modern day Botswana citizens were and remain protected relative to foreigners. On the other hand, Botswana law on acquisition of mineral exploration licenses are deliberately affordable to attract investment in searching and finding minerals. https://gov.bw/mining/prospecting-licence-application. Importantly, research shows that access to capital and the cost of mineral exploration programs is a major market entry barrier globally and not just in Botswana. Queensland Minerals Research Barriers and Priorities. So, based on tribal chiefs having been in control of minerals at pre-independence and the State stepping in soon after self-rule, it is hard to argue citizens disenfranchisement, especially fifty years into self-rule is an impediment to entrepreneurship. Based on studies of capital markets, any assumption of some an advantage on the part of foreigners relative to citizens seeking finance.

By contrast, the value that accrues to those individuals who enjoy the carried interests otherwise reserved for the State post mineral discovery is easy to see. Firstly, given the risk and cost associated with mineral exploration, by taking equity post exploration, the beneficiaries profit by being shielded from investor financial risk as exploration project costs would have already been incurred by a foreign investor. This also means the citizen would benefit from certainty of project economically viability and bankability because only post the Bankable Feasibility Study does the Botswana Government start mining license negotiations at which point among others equity participation because a consideration. This means the beneficiaries would avoid the need to raise millions of dollars otherwise incurred at early stage exploration to project phase because by this stage their foreign counterparts would have borne the brunt of the cost and associated risk. Costs include collecting data using airborne and/or ground geophysical surveys, drilling to extract samples, procuring mineral chemistry laboratory services, precuring mineral economic, geological, geotechnical experts to manage programs, and more. Because exploration is intended to establish prospects for a discovery, most investors only invest when a discovery have been made. This creates a chicken and egg financing dilemma for all prospecting companies. By requiring companies to partner with citizens, Botswana has solved the problem for a few citizen firms at the expense of the rest of the population and foreign investors. Sadly, this decision also risks disincentivizing citizens to compete and creates a culture of entitlement instead.

LACK OF GUIDELINES ON THE CESSION

From an enforcement viewpoint, the amendment is problematic in a number of ways. The amendment does not spell out conditions under which the State might relinquish its right to equity, leaving the matter to discretion. The amendment also does not stipulate conditions that the beneficiaries must meet to have the right ceded to them. Nor does the law make any reference to ways by which beneficiaries compensate foreign investors, the State or the rest of the citizens for the privilege. By not demanding compensation for the cession, the State gives a select few 'a free ride' in prime national assets. In economics, the free-rider problem is explained as ***'a type of** market failure that occurs when those who benefit from resources, public goods and common pool resources [a] do not pay for them [1] or under-pay.'* https://corporatefinanceinstitute.com/resources/economics/free-rider/#:~:text.

Therefore, this means in addition to a departure from the spirit of the law, rather than increase the value of the minerals assets which is an essential responsibility of any trustee, the bill erodes value instead. This is a major concession on the part of the State because, though some may erroneously equate any compensation by citizens to foreign firms to be sufficient, the logic is flawed because it conflates the value of the foreign company's balance to the value mineral resources to the rest of the population. The fact is the two are mutually exclusive. This is why any payment to the foreign firm by citizens will not flow to any citizens but only to the company and its original shareholders. Put another way the value of minerals speaks to national wealth while the equity speaks to the value of the company in which citizen elites become partners.

4 SOME POLICY INCONSISTENCY

In June 2020, the Botswana Parliament passed a bill establishing a State-Owned Enterprise called the Mineral Development Company Botswana (MDCB). https://www.developmentaid.org/organizations/view/515579/mineral-development-company-of-botswana-mdcb/

The Government described MDCB as a mining investment holding company that is mandated to hold and develop all of Botswana's current and future mining interests. MDCB's purpose is to optimize returns to Government from its equity stakes in the mining industry. Based on the amendment, citizens to whom the States cedes its rights compete with MDCB and undermine the company's ability to discharge its mandate. The company's mandate puts its current and future business goals at loggerheads with that of the aim new law as well as the aspirations of potential citizens hoping to benefit from the new law. On a project by-project basis, it is not clear how the Government decides which of these goals would take preceded. This is especially because the criteria for relinquishing the right to equity is not stipulated upfront. The solution to the problem lies partly in the availability of documented regulations. These are yet to be issued but once produced would ensure ease of administration and relieve technocrats of the burden and potential risk of misinterpreting the law. Any failure to bridge the gap could introduce powers of discretion and add to regulatory instability. This is especially so because the decision to cede equity will be taken on a project-by-project basis.

TRADE COMPETITIVENESS

Thanks to the country's laws, regulations and institutions and policymakers, for decades, Botswana has been rated higher than many emerging markets and some developed countries for a favourable mineral investment climate by executives of mining companies. *https://www.miningweekly.com/article/fraser-institute-survey-shows-marked-declines-in-african-countries-investment-attractiveness-2024-05-16*

Based on a concept known as ***'policy effectiveness'***, Botswana policies and laws were deemed more effective in attracting mineral explorers that countries that are known to have greater prospects for mineral discoveries. The main contributing factors are stable mining and tax laws as well as predictable regulatory frameworks including the absence of powers of discretion. Another contributing factor is regard for property rights such that there are no demands or entitlement to equity by citizens. The amendment erodes this advantage relative to more established jurisdictions like South Africa because Botswana does not set itself apart from regional competitors. Given this fact and in a world in which except for diamonds Botswana has no geological advantage over other jurisdictions, one must ask how this helps Botswana compete for FDI in mineral exploration at a time when demand for clean energy minerals is expected to increase by 500% by 2050.
Mineral Production to Soar as Demand for Clean Energy Increases

The carried interest ceded to citizen firms has other potential negative impacts at national economic level too. Effectively the new provisions of the law dilutes the original investment without any requirement for upfront compensation. To hedge against this and other future risk relating to potential partners, financiers could raise the cost of capital to foreign investors. A major concern being reduction in the economic value of the asset and return on investment made by foreign firms. Based on this, the Government risks undermining economic growth through FDI in greenfield and brownfield mineral projects at a time when critical minerals calls for more exploration. The timing may prove unfortunate.

STAKEHOLDER CONSULTATIONS

On the positive side, consultative meetings with industry associations and investors were held prior to their proposed amendments. Through constructive dialogue, Botswana gave investors an opportunity to air their concerns and presumably reached an amenable resolution. On the other hand, rather than prescribe the terms under which investors will partner with potential citizens, the new bill leaves the matter to the foreign investor to independently identify partners, negotiate and agree terms. Both factors are consistent with Botswana's reputation and auger well for investor relations. However, based on limited knowledge of the full implications of the amendments, the process though important, fails the test of *'prior informed consent'* which argues that consultation without first fully informing stakeholders of policy impacts is not enough.

5 AN OPPORTUNITY COST TO THE GOVERNMENT

On face value, the law gives the appearance that the State only forfeits equity. However, this is far from true. Though it is correct that the State forfeits equity and future dividends, this belies the reality because much more will be lost. The point being that the **value of the State's equity is not confined to financial benefits. Rather benefits of all other privileges that come with being a shareholder including access to information on strategic decisions with long-term impacts on the country. By the same token, the State will be unable to influence decisions made by the companies. Yet this is important to align corporate strategy to national development goals which is an immense source of value that cannot be expected of private investors foreign or citizen**. On the other hand, the very ability of governments to design laws to drive economic growth is premised on intimate knowledge of the investment, commercial and operating environments that its agencies regulate. To this end, direct participation in such entities is an effective way of acquiring the necessary knowledge through shareholder fora, boards and other platforms that are the exclusive reserve of shareholders. The result being State institutions, official representatives, policymakers, lawmakers, regulators and others acquire industry knowhow and become incrementally capacitated based on having a seat at the table. Through partnerships countries can also negotiate public private partnership to leapfrog infrastructure and other vehicles of development. So, by forfeiting equity, the State relinquishes these privileges, yet it is the very fact that a government can capitalize upon its position in multiple ways that places it above all other shareholders in companies that invest in a country's mineral wealth.

CONCLUSION

Amendments to any law should improve the status quo socially economically and otherwise. However, viewed from a few perspectives, this amendment does not appear to meet this standard. From the viewpoint of the legacy of traditional chiefs, Botswana's founding fathers, it detracts from the spirit of nationhood based on collective ownership and benefits. From a sustainable development perspective, the amendment does not meet the standard of protection of intergenerational value. From a socio-economic justice viewpoint, it risks leaving others behind in perpetuity. From sovereign trade competitiveness Botswana relinquishes one of its main sources of trade competitiveness relative to countries in the region with a history of racial exclusion. Importantly, under the pretext of citizen empowerment, the amended empowers the elite at the expense of the rest of the citizens that the 1967 law sought to protect. From a socio-economic lens therefore, it is difficult to see how the amendment represents progress in comparison to the last fifty years of mining.

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