

Transparency regulation in the diamond mining sector in Lesotho: Lessons from South Africa

TM MATS'ELA

 <https://orcid.org/0000-0002-4999-7556>

Dissertation submitted in *partial* fulfillment of the requirements
for the degree *Magister Legum* in Environmental Law and
Governance at the North-West University

Supervisor: Prof W du Plessis

Graduation: May 2019

Student number: 29336295

ACKNOWLEDGEMENTS

“I knew you before I formed you in your mother’s womb. Before you were born, I set you apart and appointed you as my prophet to the nations.” –Jeremiah 1:5

I thank the God almighty for giving me the strength to complete my studies, for he did immeasurably more than all I could ask or imagine according to his power that is at work within us. No words can describe the greatness of God in this journey.

I would like to extend my heartfelt gratitude to my study supervisor, Professor Willemien Du Plessis. She has been the epitome of hard work and dedication. Her joy and her smile always removed any doubt that I had in me. What I learned and will forever cherish from her are the encouraging words that someone will always criticise your work, and that does not make you a bad writer, it builds the researcher in you. I would like to thank her for the role she played in this study, sharing her vast knowledge and assisting me with continuous support.

I would like to give thanks to my campus church leaders at Every Nation Faith City because this research was driven by so much intimacy with God, through their support and prayers they made for me.

I want to give all of my thanks to my friends and sisters in Christ, Awelani, Tshepy, Tash, Kunashe and Thuto, for their consistent support and being my prayer partners in this journey. Lastly, my family, this study is dedicated to my late mother who was filled with so much fire for great things and believed so hard in God and that I must live a purpose-filled life. To my grandmother, my brother, Mocheta Makara and little sister, ‘Masejake Mats’ela, I thank you for believing that anything that I set my mind to is possible through Jesus Christ who strengthens me.

ABSTRACT

Transparency regulation in the diamond mining sector in Lesotho: Lessons from South Africa

The aim of the study was to discuss the mining legislation in Lesotho in relation to transparency that enables local communities to participate in the diamond mining sector taking lessons from South Africa. The study makes recommendations for the Minerals and Mining Bill. The study explores the reasons for transparency in the extractive industry in relation to good governance. The *Extractive Industries Transparency Initiative*, the *Kimberley Process Certification Scheme*, and the *Open Governance Partnership* are used as benchmarks to determine best practice in the regulation of transparency in the diamond sector. The study found that Lesotho's legal framework is still lacking in regulating transparency in the diamond sector. Taking learning points from South Africa, and the international initiatives, recommendations are made as to how to improve the *Minerals and Mining Bill* of 2017 of Lesotho to ensure transparency within the diamond industry in Lesotho.

Keywords: Lesotho, South Africa, diamond industry, regulation in the Extractive Industries Transparency Initiative, Kimberley Process Certification Scheme, Open Governance Partnership, Lesotho Mineral and Mining Bill, 2017

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	I
ABSTRACT	II
LIST OF ABBREVIATIONS	VII
1	Introduction.....1
2	Background on the notion of transparency6
2.1	<i>Need for transparency in Africa and corruption6</i>
2.1.1	<i>Eradication of corruption.....7</i>
2.1.2	<i>Democracy, governance and public participation10</i>
2.1.3	<i>Public participation11</i>
2.1.4	<i>Accountability and transparency12</i>
2.1.5	<i>Conclusion13</i>
2.2	<i>Rationale for transparency in the extractive sector..... 13</i>
2.2.1	<i>Who benefits from mining approval decisions?16</i>
2.2.2	<i>How ethical and fair is the process for allocation of land in mining purposes?16</i>
2.2.3	<i>How fair and transparent is the licence process?17</i>
2.2.4	<i>Who gets the right to mine and how accountable are companies for ESIA's?17</i>
2.2.5	<i>How meaningful is community consultation?18</i>

2.2.6	<i>Where do the minerals go and does the government receive revenues?</i>	<i>18</i>
2.3	<i>International guidelines for transparency</i>	<i>19</i>
2.3.1	<i>KPCS</i>	<i>19</i>
2.3.1.1	Establishment of the KPCS	19
2.3.1.2	KPCS a tool towards transparency	21
2.3.1.3	Effectiveness and limitations of the KPCS	23
2.3.2	<i>EITI.....</i>	<i>25</i>
2.3.2.1	Background on the EITI	25
2.3.2.2	EITI as a tool towards transparency	28
2.3.2.3	Effectiveness and limitations of the EITI	30
2.3.3	<i>OGP.....</i>	<i>32</i>
2.3.3.1	Establishment of the OGP.....	32
2.3.3.2	Assessing the implementation of the OGP as a tool to transparency.....	33
2.4	<i>Conclusion.....</i>	<i>35</i>
3	Transparency regulation in the diamond sector in Lesotho	38
3.1	<i>Introduction.....</i>	<i>38</i>
3.2	<i>Transparency regulation framework</i>	<i>39</i>
3.2.1	<i>Background.....</i>	<i>39</i>
3.2.2	<i>Position pre-2005</i>	<i>40</i>
3.2.3	<i>Mines and Minerals Act 37 of 2005</i>	<i>44</i>

3.3	<i>Advancing transparency regulation through the KPCS in Lesotho.....</i>	49
3.3.1	<i>Lesotho’s compliance with the KPCS</i>	50
3.3.1.1	<i>Non-compliance with the KPCS.....</i>	52
3.4	<i>Developments post-2005.....</i>	53
3.4.1	<i>Prevention of Corruption and Economic Offences (Amendment) Act 63 of 2006</i>	53
3.4.2	<i>Draft Mining and Minerals Policy 2014.....</i>	55
3.4.3	<i>Minerals and Mining Bill</i>	56
3.5	<i>Advancing transparency regulation through the EITI in Lesotho.....</i>	59
3.6	<i>Advancing transparency regulation through the OGP in Lesotho.....</i>	61
3.7	<i>Conclusion.....</i>	63
4	Transparency regulation in the diamond sector in South Africa	65
4.1	<i>Transparency regulation framework in South Africa</i>	65
4.1.1	<i>Diamond Act 56 of 1986</i>	65
4.2	<i>Advancing transparency regulation through the KPCS.....</i>	69
4.2.1	<i>South Africa’s compliance with the KPCS.....</i>	69
4.2.2	<i>South Africa’s non-compliance with the KPCS.....</i>	72
4.3	<i>Advancing transparency regulation through the OGP.....</i>	73

4.3.1 *South Africa’s compliance with the OGP 73*

4.3.2 *South Africa’s non-compliance with the OGP 74*

4.4 *Advancing transparency regulation through the EITI 75*

4.4.1 *South Africa’s compliance with the EITI 75*

4.4.2 *South Africa’s non-compliance with the EITI..... 76*

4.5 *Conclusion..... 76*

5 *Conclusion and recommendations..... 79*

5.1 *Conclusion..... 79*

5.2 *Recommendations 83*

ANNEXURE I-KPCS CERTIFICATES 86

LIST OF ABBREVIATIONS

ASM	Artisanal Small-Scale Mining
BNP	Basotho National Party
CSOs	Civil Society Organisations
Ct. Rev	Constitutional Court Review
DRC	Democratic Republic of Congo
DMR	Department of Mineral Resources
EITI	Extractive Industries Transparency Initiative
Gencor	General Mining Finance and Corporation
GW	Global Witness
IBP Inc.	Iowa Beef Packers
IRM	Independent Reporting Mechanism
J S Afr Inst Min Metall	Journal of the Southern African Institute of Mining and Metallurgy
J South Afr His	South African Historical Journal
KPCS	Kimberley Process Certification Scheme
LCD	Lesotho Congress for Democracy
MPRDA	<i>Mineral and Petroleum Resources Development Act 28 of 2000</i>
MIT Press	Massachusetts Institute of Technology Press
NAPs	National Action Plans

OGD	Open Government Data
OBI	Open Budget Index
OGP	Open Government Partnership
OSF	Open Society Foundation
PAIA	<i>Promotion of Access to Information Act 2 of 2000</i>
PCEO	<i>Prevention of Corruption and Economic Offences (Amendment) Act 63 of 2006</i>
PELJ	Potchefstroom Electronic Law Journal
PWPYP	Publish What You Pay
ROEC	Romania Energy Centre
SAIIA	South African Institute of International Affairs
SARW	Southern Africa Resource Watch
S C J Int'l L & Bus	South Carolina Journal of International Law and Business
TI	Transparency International
UNECA	United Nations Economic for Africa
Wash U Global L Rev	Washington University Global Studies Law Review
WBGs	World Bank Group

1 Introduction

The Kingdom of Lesotho, like most African countries is rich in mineral resources, with diamonds being its main mining industry. There are currently five diamond mines in Lesotho, one producing the best quality diamonds in the world.¹ The mining sector in Lesotho is regulated by the *Mines and Minerals Act*.² Section 3 of the Act states that all rights of ownership in minerals are vested in the Basotho Nation. Although the Lesotho government has a stake in the diamond mining, foreign companies are involved.³

Lesotho unlike South Africa, has had limited experience as a democracy since its independence from the United Kingdom in 1966.⁴ The *Mines and Minerals Act* authorises the state to negotiate and participate in diamond concessions,⁵ and states that such participation is not limited by law.⁶ It is, however, not clear which considerations the Lesotho government take into account when negotiating the terms of a diamond mining agreement.⁷ A problem may arise when these contracts are performed in secrecy, or where mining authorisations are awarded to undeserving mining companies as a result to benefit those in power or for private gain.⁸ The public has no information to control or benefit from these contracts.⁹ Nevertheless, having identified the gaps in the mining legislation, the government of Lesotho have passed a *Draft Green Paper on the Mining and Minerals Policy* (hereafter *Draft Mining and Minerals Policy*) in 2014,¹⁰ and a *Minerals and Mining Bill 2017* (hereafter the Bill) which attempt to address the transparency in mining.¹¹

¹ Jamasmie 'Gem Diamonds finds another huge diamonds at Lesotho Mine' mining.com 19 September 2017 <http://www.mining.com/gem-diamonds-finds-another-huge-diamond-at-lesotho-mine> accessed 26 September 2017.

² Mines and Minerals Act 37 of 2005.

³ See Para 3.2.3 of Chapter 3.

⁴ Monyane *The Kingdom of Lesotho: An Assessment of Problems in Democratic Consolidation* 15. Lesotho gained full independence from Britain on 4 October 1966, and became Lesotho instead of Basutoland.

⁵ <https://www.dictionary.com> "A diamond concession is an acknowledgement by a government or a controlling authority, as a grant of land, a privilege, or a franchise." accessed 31 July 2018.

⁶ Santho "The socio-economic and political impact of Mining in Lesotho" 52-70.

⁷ Santho "The socio-economic and political impact of Mining in Lesotho" 52-70.

⁸ Santho "The socio-economic and political impact of Mining in Lesotho" 52-70.

⁹ Santho "The socio-economic and political impact of Mining in Lesotho" 52-70.

¹⁰ See Para 3.2.4.2 of Chapter 3.

¹¹ See Para 3.2.4.3 of Chapter 3.

The South African mining law is regulated by the *Mineral and Petroleum Resources Development Act 28 of 2002* (hereafter the MPRDA) and the diamond trade by the *Diamonds Act 56 of 1986* (hereafter *Diamond Act*). The MPRDA deals with the acquisition of mining rights to conduct reconnaissance, prospecting and mining.¹² The *Diamond Act* deals with the institution of the state diamond trader, for control over possession, the purchase and sale, the processing, the local beneficiation and the export of diamonds and for matters connected therein.

In resource-rich countries like Lesotho and South Africa, accountability and transparency in the mining sector are strengthened by legislation, such as the Lesotho's *Prevention of Corruption and Economic Offences Act 5 of 1999* (hereafter PCEO),¹³ read with section 20 of the *Constitution of Lesotho, 1993*. In South Africa section 32 of the *Constitution of the Republic of South Africa, 1996* read with the *Promotion of Access to Information Act 2 of 2000* (hereafter PAIA),¹⁴ also fortify transparency and accountability.¹⁵

Talane¹⁶ maintains that little has, however, been done by the South African authorities to prosecute acts of corruption in the mining sector. Adam's¹⁷ concerns about cases of corruption in South Africa are that there is sometimes a close relationship between those with political and those with financial power.¹⁸ Development in the mining sector is

¹² Budiardjo *et al The International Comparative Legal Guide to Mining Law* 177.

¹³ *Prevention of Corruption and Economic Offences Act 5 of 1999*.

¹⁴ Bryan and Hofmann *Transparency and Accountability in Africa's Extractive Industries: The role of the Legislature* 26.

¹⁵ South Africa has other legislation such as the *Prevention of Organized Crime Act 121 of 1998*, the *Prevention and Combatting of Corrupt Activities Act 12 of 2004*, and the *Preferential Procurement Policy Framework Act 5 of 2000* that also attempt to reduce the level of corruption in public and private sectors of government. South Africa's *Companies' Act 71 of 2008*, the *JSE* and the *Income Tax Act 58 of 1962* also have measures where companies must state their income. Due to the scope of this mini-dissertation, these laws will not be discussed.

¹⁶ Talane *Corruption Watch* 1.

¹⁷ Adam *Mail and Guardian* 22.

¹⁸ Adam *Mail and Guardian* 22. Hence the emergence of corrupt deals, such as the acquisition of optimum coal acquired as a result of the Guptas' close relationship with the government, and by default Eskom. The Gupta family is a controversial Indian-born South African business family, and they are controversial for their close relationship with the former South African President, Jacob Zuma: See also *National Director of Public Prosecutions v Bank of Baroda and others* (unreported) case number 168/2018 of 09 March 2018, where the court granted an order for the Asset Forfeiture Unit to seize assets from the Gupta Family in terms of *Prevention and Combatting of Corrupt Activities Act 12 of 2004* to ensure that the government recovers money connected to the corrupt deals. The High court reversed the order due to lack of sufficient evidence to secure a conviction.

hindered when corrupt behaviour resulting in secret deals with those in power is not exposed.¹⁹

Kabemba²⁰ states that African countries' internal rules and regulations for resource management and commercialisation are not transparent.²¹ Transparency initiatives are deemed to be effective in an organised state where good governance is respected.²² Corruption leads to pressing social, economic and environmental questions that may inhibit a democratic environment.²³

A number of international initiatives encourage accountability and transparency in the mining sector. These include the *Extractive Industries Transparency Initiative* (hereafter EITI) and the *Kimberley Process Certification Scheme* (hereafter the KPCS). Lesotho and South Africa are signatories to the KPCS but not to the EITI.²⁴ South Africa decided to become a member to the *Open Governance Partnership* (hereafter OGP) rather than the EITI.²⁵

The EITI was launched by the United Kingdom Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg during September 2002.²⁶ The objective of the EITI is to encourage transparency over payments and revenues in the extractive sector in countries heavily dependent on these revenues.²⁷ It also encourages governments to work together voluntarily to develop a framework to promote transparency of payments and revenues.²⁸

¹⁹ Adam *Mail and Guardian* 22.

²⁰ Kabemba 2009 *SARW* 13; Some African countries seem to ignore the rule of law, see also Africa IOA 2014 <http://www.polity.org.za> accessed 26 September 2017.

²¹ Kabemba 2009 *SARW* 13

²² Kabemba 2009 *SARW* 13.

²³ Kabemba 2009 *SARW* 13.

²⁴ <https://www.kimberleyprocess.com/en/kpcs-core-document> accessed 18 June 2018.

²⁵ Compaore' 2013 *SAIIA* 7. Compaore' maintains that, given similar concerns held by both initiatives, South Africa's choice to be part of the OGP and not the EITI appears enigmatic. The OGP has been lauded for promoting transparency in the diamond mining sector. Compaore' declares that the OGP does not make direct provisions for extractive commitment to transparency while the EITI does. However, both initiatives enhance transparency in the diamond industry by promoting that government must publish whatever revenues they obtain from the diamond mining industry; see also Para 2.3.3 of Chapter 2 where the OGP is discussed.

²⁶ Compaore' 2013 *SAIIA* 7.

²⁷ See Para 2.3.2 in Chapter 2.

²⁸ See Para 2.3.2 in Chapter 2.

The KPCS, is a public-private partnership of governments, the diamond industry and several civil society organisations.²⁹ Lekomte³⁰ opines that the KPCS aims at regulating the sale of conflict diamonds and eliminating such diamonds from entering the world of international trade. Lesotho did not only sign the KPCS but went further to pass the *Precious Stones Regulations*,³¹ to enact the provisions of the Kimberley Process in its national law.³² South Africa also assimilated the KPCS in its national law by amending the *Diamond Act*.³³

The research question of this study is whether the mining legislation of Lesotho cater for transparency to enable the local community to participate in the diamond mining sector taking lessons from South Africa?

The aim of the study is therefore to discuss the mining legislation in Lesotho in relation to transparency that enables local communities to participate in the diamond mining sector taking lessons from South Africa, in order to make recommendations for inclusion in Lesotho's *Draft Minerals and Mining Bill*. To support the main aim, sub-objectives are stated, namely to

- Review the necessity for transparency in the regulation of the extractive sector.
- To discuss the mining legislation of Lesotho and the steps that have been taken by the government to amend the existing laws in the transparency regulation of diamonds.

²⁹ Lekomte *The Kimberley Process, a new actor on the conflict resolution scene?* 14; see also Para 2.3.1 in Chapter 2.

³⁰ Lekomte *The Kimberley Process, a new actor on the conflict resolution scene?* 14.

³¹ Legal Notice 160 of 2004 (hereafter the 2004 regulations); see also para 3.2.4 in Chapter 3, developments post-2005 Act.

³² Santho "The socio-economic and political impact of Mining in Lesotho" 57-68. The KPCS finds fertile ground for progressive implementation in countries that uphold the rule of law and ensure good governance. However, the KPCS has been criticised as it focuses more on the trade and export end of the industry and far less on the production of diamonds; See Kabemba 2009 *SARW* 10. The KPCS has serious challenges in countries where there is entrenched illegal artisanal mining operations such as Lesotho and South Africa. Kabemba declares that because artisanal miners are unregistered, and operate in conditions that make them vulnerable to the buyer, they sell their diamonds to whomever comes first.

³³ *Diamond Act* 56 of 1986 as subsequently amended by the *Diamond Amendment Act* 30 of 2005 and the *Second Diamond Amendment Act* 30 of 2005, that has to be read with the *Precious Metals Act* 37 of 2005; see also Para 4.1.2 of Chapter 4, developments post 1986 Act.

- To discuss the diamond mining and transparency legislation in South Africa.
- To make recommendations for Lesotho's *Draft Minerals and Mining Bill*, taking learning points from South African law.

This study will be conducted by means of a literature review and will consider all relevant legislation, government policies, textbooks, journal articles and applicable electronic resources. Specific reference will also be made to the KPCS, the EITI and the OGP providing international guidelines for transparency in the mining sector and specifically the diamond mining sector. These guidelines will be used to determine a framework against which to benchmark transparency laws in the diamond mining sector in Lesotho and South Africa. South Africa has extensive transparency laws that Lesotho can draw lessons from on transparency and accountability. Lesotho has, however a different history pertaining to transparency and therefore might not necessarily need such extensive regulation as South Africa. Therefore, the study is not a full-blown comparative study.³⁴

In this study the background on the notion of transparency will first be discussed, reviewing the need for transparency in the mining sector, as well as the international guidelines for transparency (chapter 2). The transparency regulation in the diamond mining sector in Lesotho will then be examined (chapter 3), followed by a discussion of the transparency regulation in the diamond mining sector in South Africa (chapter 4) in order to reach a conclusion and suggest recommendations (chapter 5).

³⁴ Dube 'The Law and Legal Research in Lesotho' February 2008 <http://www.nyulawglobal.org/globallex/Lesotho.html> accessed 29 August 2018. Although Lesotho and South Africa share a mixed legal system of Roman-Dutch and English law, its legal system is not similar to South African law. On Comparative Environmental Law see Fischer *Research Handbook on Fundamental Concepts of Environmental Law* 111 and Wiener 2001 *Ecology L.Q* 1321.

2 Background on the notion of transparency

This chapter examines the background of the notion of transparency regulation. It introduces the need of transparency in government especially in the regulation of the extractive sector. It reviews the rationale for transparency in the extractive sector. Lastly, this chapter outlines three international guidelines that promote transparency, namely the KPCS, the EITI and the OGP.

2.1 Need for transparency in Africa and corruption

The natural resource business in Africa has been the object of significant attention from important players.³⁵ As far back as the tenth century, Arab and African traders traded in gold and other resources.³⁶ There has been increased exploratory activity on the African continent in the last two decades.³⁷

Botchway³⁸ maintains that by the mid-1960s, marked by military coups in Congo, Togo, Nigeria and Ghana, and in the full throes of Cold War hostilities, African governments increasingly ditched democratic principles and moved on towards dictatorship and bad governance. He argues that as a result there has been massive corruption, poor leadership, bureaucracy, and obsession with political power.³⁹

McFerson⁴⁰ holds that since 1975, the economies of resource-rich countries have grown less than countries that could not rely on large exports of minerals. As a result, in the 1980s,⁴¹ the notion that abundant natural resources are not a blessing emerged. McFerson⁴² contends further that unsatisfactory economic performance was sometimes

³⁵ Botchway "Introduction" 1-6.

³⁶ Botchway "Introduction" 1-6.

³⁷ Botchway "Introduction" 1-6.

³⁸ Botchway "Introduction" 1-6.

³⁹ Botchway "Introduction" 1-6.

⁴⁰ McFerson 2010 *International Studies Perspectives* 336. The "resource-curse" expression may be credited to Alan Gelb and associates who assessed the effects of the oil windfall of 1973 and 1979 on six developing countries. He concluded that much of the potential benefit had been dissipated; some oil producers ended up actually worse off; and the major oil exporters performed less well than their resource-poor counterparts.

⁴¹ McFerson 2010 *International Studies Perspectives* 336.

⁴² McFerson 2010 *International Studies Perspectives* 338. Corruption remains a huge problem. An estimated \$0.5-\$1 trillion is lost annually to corruption worldwide, and the African Union puts the figure for Africa at around \$150 billion, equivalent to one quarter of Africa's GDP.

linked to bad governance which weakened democracy and governance in the country and therefore attracted corruption. Kolstad and Wig⁴³ aver that the term “resource-curse” is a phenomenon in explaining why resource-rich countries perform badly in terms of socio-economic development.

In light of the historical overview of corruption in Africa, there is a need for transparency. The need for transparency include, amongst others, the eradication of corruption, good governance, democracy, public participation and accountability and transparency, that will be discussed in the following paragraphs.

2.1.1 Eradication of corruption

Corruption is a worldwide phenomenon that most resource-rich countries are battling with.⁴⁴ The High Level Panel of the United Nations Economic Commission for Africa (UNECA 2015), highlighted how, particularly in the area of natural resources, illicit financial flows occur through illegal resource exploitation, tax evasion and corruption.⁴⁵

Kanyehamba⁴⁶ avers that it is important to know and appreciate the meaning of corruption as provided in law and perceived in society.⁴⁷ In this regard, he refers to section 1 of the *Uganda Prevention of Corruption Act*⁴⁸ which is similar to other national Acts in many Commonwealth countries. It provides that:

- a) Any person who, by himself or herself or with any other person corruptly solicits or receives, or agrees to receive for himself or for any other person, or
- b) Corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to,⁴⁹ or

⁴³ Kolstad and Wiig 2009 *World Development* 521.

⁴⁴ Kanyehamba *Kanyehamba's Commentaries on Law, Politics and Governance* 126.

⁴⁵ Fjeldstad *et al Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa* 100.

⁴⁶ Kanyehamba *Kanyehamba's Commentaries on Law, Politics and Governance* 125.

⁴⁷ Kanyehamba *Kanyehamba's Commentaries on Law, Politics and Governance* 125.

⁴⁸ *Uganda Prevention of Corruption Act* 1970.

⁴⁹ S 29 of *Uganda Prevention of Corruption Act* 1970 defines “gratification to include money or any gift, loan, fee reward, commission, valuable security or any other property, movable or immovable, any office, employment, contract, any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part, any other service, favour, or advantage of any description whatsoever including protection from penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted,

reward for, or otherwise on account of any member, officer or servant of a public body for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of an offence.⁵⁰

Verma's⁵¹ meaning on corruption is distilled from the Latin word *corruptio* that connotes "moral decay, wicked behaviour, putridity or rottenness." He classifies corruption by type:⁵²

- a) Political corruption involves lawmakers (monarchs, dictators, legislators) acting in their role as creators of the rules and standards by which a polity operates. Such officials seek bribes or funds for their political and personal benefit and provide favours to their supporters at the expense of broader public benefits.
- b) Administrative corruption includes the use of bribery and favouritism to lower taxes, escape regulations and win low-level procurements contracts.
- c) Corporate corruption occurs between private businesses and suppliers or private service providers. It also involves illegal behaviour by corporate officials for private monetary gain.⁵³

National laws and regulations should ensure that anyone accused of corruption may be investigated, tried and punished.⁵⁴ There are relatively few cases of convictions and punishments recorded to indicate that countries take administrative or legal measures to combat this social, political and economic curse seriously.⁵⁵ The *prima facie* and prove cases of corruption and gratification that are reported to the authorities concerned, land up in national archives, rather than to be tried.⁵⁶

and including the exercise of or the forbearance from the exercise of any right or any official power or duty and any offer, undertaking or promise of any gratification within the meaning of all the above types and descriptions of gratification."

⁵⁰ Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* 125.

⁵¹ Verma *Corruption and Human Rights* 251.

⁵² Verma *Corruption and Human Rights* 251.

⁵³ Verma *Corruption and Human Rights* 251.

⁵⁴ Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* 126.

⁵⁵ Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* 126; also see *Lebogang Phillips v The State* (370/2016) [2016] ZASCA 187 (1 December 2016).

⁵⁶ Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* 126. Those authorities that are empowered to take action feign ignorance, exhibit indifference or reluctance to follow up stories and, in a significant number of incidents, actually condone the offences committed. In some of the cases, culprits whether actual or suspected appear to benefit from accusation made against them, for they are either appointed to public offices or promoted, apparently in the belief that thereafter their loyalty to the appointing authority becomes firm and unalterable under any circumstances.

The press has been quite courageous, influential and vigilant in researching allegations of corruption and abuse of office by public officials.⁵⁷ However, the response of the government, the police, and the public prosecution authorities to the findings of the press have generally been poor and occasionally hostile.⁵⁸

When people claim that corruption “violates” human rights, they have a range of issues in mind.⁵⁹ They mean that they do not have access to justice, they are not secure and cannot protect their livelihoods due to bad governance that leads to corruption.⁶⁰

The World Bank perceives corruption as a governance issue.⁶¹ It defines corruption as the “misuse of public office for private gain.”⁶² Langseth⁶³ maintains that as such, it involves the improper and unlawful behaviour of public service officials, both politicians and civil servants, whose positions create opportunities for the diversion of money and assets from government for themselves and their accomplices.

From the above discussion it is clear that there is no universally acceptable definition for corruption. However, commonalities exist within the above definitions. These include to corruptly receive or give for private gain, to misuse or abuse the authority given to in public office and to behave in an improper and illegal way in order to gain money or assets from government for private use.

Based on the above commonalities corruption for the purpose of this study, will be referred to as a governance challenge whereby there is misuse of authority by a public official, through improper behaviour of corruptly receiving or giving of money or assets from the government for private gain, through rewards and the allocation of contracts or

⁵⁷ Kanyeihamba *Kanyeihamba’s Commentaries on Law, Politics and Governance* 140.

⁵⁸ Kanyeihamba *Kanyeihamba’s Commentaries on Law, Politics and Governance* 140.

⁵⁹ Verma *Corruption and Human Rights* 255.

⁶⁰ Verma *Corruption and Human Rights* 255.

⁶¹ The World Bank Helping Countries to Combat Corruption: The Role of the World Bank. Poverty Reduction and Economic Management Network September 1997. Available at www1.worldbank.org/publicsector/anticorrupt/corrupt/corrptn.pdf 5 accessed 7 April 2018.

⁶² The World Bank Helping Countries to Combat Corruption: The Role of the World Bank. Poverty Reduction and Economic Management Network September 1997. Available at www1.worldbank.org/publicsector/anticorrupt/corrupt/corrptn.pdf 19-20 accessed 7 April 2018.

⁶³ Langseth “Prevention: An effective Tool to Reduce Corruption”.

rights. Corruption is linked to governance in that good governance is sometimes seen as the absence of corruption.⁶⁴

2.1.2 *Democracy, governance and public participation*

It is necessary to determine what governance and good governance are. Goldsmith⁶⁵ argues that being poorly governed is something humans can alter if they set their minds to it. Ako and Uddin⁶⁶ prefer the United Nations Development Programme definition of governance, namely:

the exercise of economic, political, and administrative authority to manage a country's affairs at all levels including the mechanisms, processes, and institutions through which citizens and groups articulate their interests, exercise their rights, meet their obligations, and mediate their differences.⁶⁷

Johnston⁶⁸ explains good governance as processes and structures that guide political and socio-economic relationships and lists the ingredients to achieve this to include participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness, efficiency, accountability and strategic vision.⁶⁹

Generally, definitions of good governance include several principles. The list is not exhaustive, however, for purposes of this study two stand out, namely democracy and honesty. Ako and Uddin⁷⁰ draw a link between the two principles and natural resource management:

- a) Democracy: is a form of governance based on some degree of popular sovereignty and collective decision-making. Democracy therefore includes principles or values such as free and fair elections, equity, accountability, participation and constitutionally guaranteed citizens' freedom. It is therefore advantageous that democratic governments manage the country's natural resources to achieve maximum benefits not only for the government but also for its citizenry. Democracy is a good in itself, since to some degree it gives a regime's population collective power to determine its own fate.

⁶⁴ See the following discussion.

⁶⁵ Goldsmith 2007 *Governance: An International Journal of Policy, Administration, and Institutions* 166.

⁶⁶ Ako and Uddin "Good governance and resource management in Africa" 21-48.

⁶⁷ Ako and Uddin "Good governance and resource management in Africa" 21-48.

⁶⁸ Johnston 1991 *Journal of Democracy* 51.

⁶⁹ Johnston 1991 *Journal of Democracy* 51.

⁷⁰ Ako and Uddin "Good governance and resource management in Africa" 21-48.

- b) Honesty: In the management of the minerals, the holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Based on the above definitions, good governance in relation to the natural resource management can be defined as the exercising of public power and the public interests in an accountable and transparent manner while ensuring participative governance with those governed.

2.1.3 Public participation

The public at large must be able to participate in governance. Public participation became relevant in the 1960s.⁷¹ Subsequently, the public demanded a voice like never before in government and private sector decisions affecting their lives, interests and values.⁷²

Pring⁷³ avers that the public participation "revolution" is referred to as "citizen involvement," "political rights," "local community consultation," "indigenous peoples' rights," and "stakeholders engagement." All these terms boil down to the same thing, that the governed must have a voice in their governance as well as in the governance of natural resources.⁷⁴ Weak consultation and public participation mechanisms may lead to poor management of natural resources and less transparency.⁷⁵ Although it is easy to develop a list of activities that are generally considered to be examples of public participation, it is harder to come up with a precise definition of the term.⁷⁶ It has been argued that public participation cannot have one singular meaning.⁷⁷

⁷¹ Pring "The public participation 'revolution' in natural resources management: Joe Bloggs has a voice" 349-367.

⁷² Pring "The public participation 'revolution' in natural resources management: Joe Bloggs has a voice" 349-367.

⁷³ Pring "The public participation 'revolution' in natural resources management: Joe Bloggs has a voice" 349-367.

⁷⁴ Pring "The public participation 'revolution' in natural resources management: Joe Bloggs has a voice" 349-367.

⁷⁵ Blanco and Razzaque *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* 3.

⁷⁶ Pring and Noe "The Emerging International Law of public participation affecting Global Mining, Energy, and Resource Development" 11-76.

⁷⁷ Pring and Noe "The Emerging International Law of public participation affecting Global Mining, Energy, and Resource Development" 11-76.

Creating more meaningful, productive relationships between people and their public institutions can be a powerful force to solve problems and a key to the development of democracy.⁷⁸ Within the confines of this study, public participation is an umbrella term that describes activities by which people's concerns, needs, interests, and values are incorporated into decisions and actions that ensure transparency in the use of natural resources in the extractive industry.⁷⁹

Meaningful participation in decision-making presupposes that access to justice cannot occur without access to information.⁸⁰ The South African Constitutional Court in *PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd*,⁸¹ averred that the importance of the right of access to information in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give expression to the founding values, the public must have access to information held by the state.⁸² It further stated that the *Constitution* demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."⁸³ There is therefore a direct link between public participation in the extractive industry and the right of access to information.

2.1.4 Accountability and transparency

Accountability and transparency are related, and they form the cornerstone of good governance.⁸⁴ Together they ensure that governments are subject to some form of control and oversight.⁸⁵ Accountability in the context of good governance refers to the holders of

⁷⁸ Nabatchi *Public participation for 21st century democracy* 10.

⁷⁹ Nabatchi *Public participation for 21st century democracy* 14.

⁸⁰ Pring and Noe "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development" 11-76, Access to information has been conceived as an aspect of the right to freedom of expression, a most fundamental human right, thus directly linked to the democratic ideal.

⁸¹ *PFE International Inc. (BVI) v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21 para 3.

⁸² *PFE International Inc. (BVI) v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21 para 3.

⁸³ *PFE International Inc. (BVI) v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21 para 3.

⁸⁴ Ako and Uddin "Good governance and resource management in Africa" 21-48.

⁸⁵ Ako and Uddin "Good governance and resource management in Africa" 21-48.

public office being accountable for their decisions and actions to the public. They must submit themselves to whatever scrutiny is appropriate to their office.⁸⁶

Transparency may be described as an “extension” of accountability wherein the responsibility to be “open” extends beyond the public in question to include the international community.⁸⁷ The lack of accountability and transparency in governance may breed corruption, which is the hallmark of “bad” governance.⁸⁸

Bad governance also enables foreign companies to obtain resource rights (prospecting and mining rights) on very generous terms, whereby they pay relatively little to governments in terms of taxes and royalties.⁸⁹ The aim of transparency in the extractive sector is to build trust between the state and the public and to promote the accountability of the state entities and private sector to members of the public, who should be the actual beneficiaries of the states’ natural resources.⁹⁰

2.1.5 Conclusion

This section provided an overview for the need of transparency in Africa. Some of the key reasons discussed include the eradication of corruption, democracy, governance, public participation, accountability and transparency. The section indicated that corruption is often linked to governance and sometimes good governance is seen as the absence of corruption. Participation of the public is also important because in this manner, the public have a say in decisions or matters related to governance in relation to the extractive sector. In order to promote transparency in a state, it is essential that state officials are held accountable for their actions.

2.2 Rationale for transparency in the extractive sector

This section discusses the rationale or need for transparency, specifically in the extractive sector. The relevance and value of transparency as an important part of reform in the

⁸⁶ Ako and Uddin “Good governance and resource management in Africa” 21-48.

⁸⁷ Hale 2008 *Global Governance* 75.

⁸⁸ Nabatchi *Public participation for 21st century democracy* 14. The consequences of bad governance are not limited to tyranny or corruption.

⁸⁹ Ako and Uddin “Good governance and resource management in Africa” 21-48.

⁹⁰ Ako and Uddin “Good governance and resource management in Africa” 21-48.

extractive industry will be reviewed. As indicated above,⁹¹ the objective of transparency is to strengthen trust and to advance the responsibility of the state and the private sector to members of the public, who should be the actual recipients of the states' natural resources.⁹²

In the early 1990s,⁹³ the importance of transparency was highlighted by Peter Eigen, a manager at the World Bank who became increasingly distressed by the bank's failure to address corruption in its loan-giving to nations. Eigen and his partners had informal talks on how to reduce government and business corruption. When Eigen became convinced that he could not address corruption from his position within the World Bank, he and his partners decided to form a new organisation, Transparency International (hereafter TI).

TI examines the effects and consequences of corruption for the public, reports on its findings across nations, and advocates policy changes in global institutions to address corrupt practices.⁹⁴ Ball⁹⁵ states that only Europeans understood the importance of TI, where transparency means openness. The meaning of transparency had to be redefined as it became vital for the rest of the world to be included in the TI in order to understand the importance of transparency and how to tackle corruption.⁹⁶

Transparency is seen as an expansion of accountability where the responsibility to be open extends beyond citizens of the country in question to include the international community.⁹⁷ Accountability, for example, should ensure that the government adheres to the needs of their citizens and not only to the revenue sources that keep them in power.⁹⁸

Some commentators argue that natural resources increase corruption in the form of rent-seeking and patronage.⁹⁹ Caripis¹⁰⁰ asserts that the first link to transparency in mining is

⁹¹ See 2.1 above.

⁹² Adeleke and Humby 2016 *Open Society Foundations for South Africa* 1.

⁹³ Ball 2009 *Public Integrity* 295.

⁹⁴ Ball 2009 *Public Integrity* 295.

⁹⁵ Ball 2009 *Public Integrity* 295.

⁹⁶ Ball 2009 *Public Integrity* 295.

⁹⁷ Ako and Uddin "Good governance and resource management in Africa" 21-48; See also Para 2.1 above.

⁹⁸ Corrigan 2014 *Resources Policy* 19.

⁹⁹ Kolstad and Soreide 2009 *Resource Policy* 218.

¹⁰⁰ Caripis 2017 *Transparency International* 5.

when decisions are made about whether, where, and under what circumstances to permit mining rights, including who is awarded rights or contracts. Transparency and accountability ¹⁰¹ in the extractive sector begin with corruption-free approvals of mining rights, permits, licences and contracts.¹⁰² For this reason, it can be deduced that transparency in the extractive sector must be instituted from the issuance of the mining rights, permits, licences and contracts, the terms contained in such mining concessions and the manner in which revenues and royalties extracted from the industry are distributed amongst the citizens of a country.¹⁰³ The challenges the extractive industry faces in its regulation are various. Caripis¹⁰⁴ avers that the TI framed seven questions to help identify where and how an approval regime is vulnerable. The seven questions are as follows:

- a) Who benefits from the mining approval decisions? This question includes decisions on whether to approve a particular mining project and whether such an approval puts the public interest first, and how conflicts of interest are declared and addressed?¹⁰⁵
- b) How ethical and fair is the process for allocating land for mining purposes?¹⁰⁶
- c) How fair and transparent is the licencing process? A fair and transparent licencing process has clear rules and an effective licencing authority, with a complete and accurate register of licences.¹⁰⁷
- d) Who gets the right to mine?¹⁰⁸
- e) How accountable are companies for their environmental and social impacts?¹⁰⁹
- f) How meaningful is community consultation? Ensuring genuine consultation and negotiations with communities are critical to securing the legitimacy of mining approvals.¹¹⁰

¹⁰¹ See Para 2.1.4 above.

¹⁰² Caripis 2017 *Transparency International* 5.

¹⁰³ Caripis 2017 *Transparency International* 5.

¹⁰⁴ Caripis 2017 *Transparency International* 6.

¹⁰⁵ Caripis 2017 *Transparency International* 6.

¹⁰⁶ Caripis 2017 *Transparency International* 6.

¹⁰⁷ Caripis 2017 *Transparency International* 6.

¹⁰⁸ Caripis 2017 *Transparency International* 6.

¹⁰⁹ Caripis 2017 *Transparency International* 6.

¹¹⁰ Caripis 2017 *Transparency International* 7.

- g) Where does the minerals go after extraction?
- h) Does the country receive revenue?

These questions are addressed in the following paragraphs.

2.2.1 Who benefits from mining approval decisions?

For mining to benefit a country's citizens and support sustainable development, the legal, regulatory and administrative framework must be designed to ensure that approval decisions put the public interest first.¹¹¹ Before mining can take place, mining companies must get permission from the government.¹¹² In its guide the Centre for Environmental Rights (herein CER) stipulates that this permission allows the mining company to assess the environmental impacts and learn about the community and consult with everyone who will be affected by the proposed mining.¹¹³

Corruption is more likely to happen where politicians and senior officials do not declare their assets and interests in mining. There should also be beneficial disclosure requirements to ensure licence applicants disclose who really owns and ultimately profits from their companies.¹¹⁴

2.2.2 How ethical and fair is the process for allocation of land in mining purposes?

The notion that development projects may impoverish people might seem strange to those who own, finance, underwrite or otherwise promote mining.¹¹⁵ To better understand the concept of allocation of land in mining purposes is to view the criteria and transparency in processes for opening land to mining and who stands the chance to lose

¹¹¹ Caripis 2017 *Transparency International* 7.

¹¹² CER 2013 "Mining and Your Community: Know Your Environmental Rights" <https://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> accessed 20 June 2018.

¹¹³ CER 2013 "Mining and Your Community: Know Your Environmental Rights" <https://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> accessed 20 June 2018.

¹¹⁴ Caripis 2017 *Transparency International* 19; Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance* 140, Kanyeihamba argues that in every state, there are constitutional and legal provisions, rules and regulations, giving ample opportunities and powers to appointing authorities and those vested with powers of discipline and dismissal, to effectively reduce if not eliminate altogether corruption and abuse of office.

¹¹⁵ Downing *Avoiding New Poverty: Mining-Induced Displaced and Resettlement* 5.

or to gain in the process.¹¹⁶ There should also be a complete up to date and coordinated register of land and clear land rights in law that are also protected in practice.¹¹⁷

2.2.3 How fair and transparent is the licence process?

If the steps of the licencing process are unclear, corruption is likely because there would be no transparent licencing rules and evaluation criteria, and in the negotiation process, where agreements or contracts are used.¹¹⁸ To eliminate this hurdle, Caripis¹¹⁹ argues that there must be publication of licences and licence details by an independent licencing authority.

2.2.4 Who gets the right to mine and how accountable are companies for ESIA's?

In the South African context, before a mining company can begin mining or prospecting, it is usually required to have four permissions from government, namely:

1. A mining or prospecting right;
2. An authorised environmental management programme or plan;
3. A water use licence; and
4. An environmental authorisation.¹²⁰

In order to eliminate corruption there must be clear and transparent criteria for mining and environmental approvals and effective due diligence on financial resources, technical capacity, compliance history and a corruption track record of licence applicants and their beneficial owners.¹²¹ The public must be able to access information including ESIA's reports and related documents in order to enable them to scrutinise the approval process.

¹¹⁶ Downing *Avoiding New Poverty: Mining-Induced Displaced and Resettlement* 9.

¹¹⁷ CER 2013 "Mining and Your Community: Know Your Environmental Rights" <https://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> accessed 20 June 2018.

¹¹⁸ Caripis 2017 *Transparency International* 19.

¹¹⁹ Caripis 2017 *Transparency International* 19.

¹²⁰ CER 2013 "Mining and Your Community: Know Your Environmental Rights" <https://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> accessed 20 June 2018.

¹²¹ Caripis 2017 *Transparency International* 19, when the procedure relating to mining rights approvals is corrupt, companies may provide misleading information, resulting in mining rights falling into the hands of unqualified investors or speculators. Inadequate due diligence procedure can enable companies with a history of corruption, tax evasion or money laundering to enter a country's mining sector. Where a state has a proper licencing regime, and where legislation sets out all terms and

2.2.5 How meaningful is community consultation?

Community-mine relations and local attitudes are shaped by complex interactions of positive and negative factors, influenced by both mining companies and government attempts at sustainable development and relations-building.¹²² Communities are forced to adhere to decisions made by the government and mining companies without proper consultation, and this as a result open doors for corruption.¹²³

At times consultation with local elites is considered sufficient and proper to proceed with the mining operations on the land where owners have not been consulted. Corruption therefore is likely to happen where there are no clear, binding process and principles to set minimum standards for content, timing, participants and mode of consultation.¹²⁴

2.2.6 Where do the minerals go and does the government receive revenues?

Natural resources belong to the people, and any profits attained from the extractive sector should benefit the people, not a company or any government official.¹²⁵ This increases the pressure on government to use revenues for public services rather than for private gain.¹²⁶ Corruption is likely to happen where there is no clear information captured of minerals exported outside and imported into a country. There is likelihood of corruption where there is an increase in extraction of minerals versus the development of a nation, socially and economically.

As it seems that countries are not always able to allocate mining rights, utilise properly the revenues attained from the extractive sector, engage meaningfully the affected communities and to ensure transparent trade in the minerals, the international community came up with few international initiatives that address the issues mentioned.

conditions as well as application requirements and decision-making criteria in the licencing process, it will be more difficult for unscrupulous mining companies to take advantage of the system or to bribe officials.

¹²² Van der Plank *et al* 2016 *Resource Policy* 130.

¹²³ Van der Plank *et al* 2016 *Resource Policy* 130.

¹²⁴ Caripis 2017 *Transparency International* 19. Mode of consultation address the questions of what, when, who, how, and why?

¹²⁵ Duarte *Business Report* 1.

¹²⁶ Duarte *Business Report* 1.

For purposes of this study, the following section deals with the three international initiatives namely the KPCS, EITI and OGP.

2.3 International guidelines for transparency

This section reviews the global initiatives that focus on the extractive sector to promote greater transparency in the sector and allows the community to participate fully in the sector.

2.3.1 KPCS

This section explores the core KPCS document and the requirements laid down for participating countries. The section commences with the establishment of the KPCS.

2.3.1.1 Establishment of the KPCS

In May 2000 the Kimberley Process (herein KP) was initiated when the Southern African diamond-producing states met in Kimberley, South Africa, to discuss ways to stop the trade in “conflict diamonds” and to ensure that diamond purchases were not financing violent rebel movements or their allies who seek to undermine legitimate governments.¹²⁷ The KPCS had to solve the exploitation of mineral resource wealth that has been used to finance armed conflicts during the 1990s.¹²⁸ In December 2000, the United Nations General Assembly adopted a landmark resolution,¹²⁹ supporting the creation of an international Certification Scheme for rough diamonds.¹³⁰

Negotiations between governments, the international diamond industry and civil society organisations during 2002 resulted in the creation of the KPCS.¹³¹ In 2003, the KPCS entered into force. Participating countries started to implement its rules in their states.¹³²

¹²⁷ <https://www.kimberleyprocess.com/en/about> accessed on 7 February 2018.

¹²⁸ Cullen 2013 *Macquarie Law Journal* 61.

¹²⁹ Preamble of the KPCS 2003. United Nations General Assembly Resolution 55/56 (2000).

¹³⁰ <https://www.kimberleyprocess.com/en/about> accessed on 7 February 2018.

¹³¹ <https://www.kimberleyprocess.com/en/about> accessed on 7 February 2018.

¹³² Preamble of the KPCS 2003. The KPCS is open to all countries that are willing and able to implement its requirements. The KPCS has 54 participants, representing 81 countries, with the European Union and its Member States counting as a single participant. KPCS members account for approximately 99.8% of the global production of rough diamonds. In addition, the World Diamond Council, representing the international diamond industry, and civil society organisations, such as Partnership-Africa Canada, participate in the KP and have played a major role since its outset. The initial countries

As stipulated in the Core Document of the KPCS, participation in the Certification Scheme is open on a global, non-discriminatory basis to all applicants willing and able to fulfil the requirements of the Scheme.¹³³

The KPCS is deliberately construed to avoid the creation of legally binding rules under international law.¹³⁴ The states that set up the KP went to great lengths to ensure that the system would not create binding obligations at international law.¹³⁵ The terminology used emphasises the effort to avoid being categorised as a treaty and there is no mention of signature or ratification.¹³⁶

The states are referred to as participants rather than parties.¹³⁷ The document itself is called the '*Core Document*' rather than a treaty, convention or covenant.¹³⁸ The provisions are called 'undertakings' rather than obligations.¹³⁹ The KPCS can be described as soft law.¹⁴⁰ Soft law obligations,¹⁴¹ being non-binding, do not give rise to state responsibility when they are breached.¹⁴² Even though soft law instruments do not comply with some of the traditional criteria that establish legal rules, they cannot be regarded as irrelevant in law, this includes the KPCS.¹⁴³ The KPCS can also be viewed as a voluntary instrument where participants cannot be held against its provisions.

The KPCS document sets out the requirements for controlling rough diamond production and trade.¹⁴⁴ The KPCS imposes extensive requirements on its members to enable them

who signed the KPCS were South Africa, Canada, Russia, Botswana, the European Union, India, Namibia, Israel, the Democratic Republic of the Congo, the United States of America, Republic of China and Angola.

¹³³ S VI (8) of the KPCS 2003.

¹³⁴ Cullen 2013 *Macquarie Law Journal* 62.

¹³⁵ Cullen 2013 *Macquarie Law Journal* 62.

¹³⁶ Cullen 2013 *Macquarie Law Journal* 62.

¹³⁷ See the Preamble of the KPCS 2003.

¹³⁸ Cullen 2013 *Macquarie Law Journal* 62.

¹³⁹ Cullen 2013 *Macquarie Law Journal* 62.

¹⁴⁰ Cullen 2013 *Macquarie Law Journal* 62; On the binding nature of soft law see also Ataputtu "International Environmental Law and Soft Law: A New Direction or a Contradiction?" 200-226.

¹⁴¹ Guzman and Timothy 2010 *Journal of Legal Analysis* 175; see also Ataputtu "International Environmental Law and Soft Law: A New Direction or a Contradiction?" 200-226.

¹⁴² Weiss and Kammel *The Changing Landscape of Global Financial Governance and the Role of Soft Law* 239. However, the distinction between hard and soft law in international law may be one of degree rather than kind. Many binding international law obligations are not subject to compulsory arbitration or adjudication. Soft laws are not directly enforceable.

¹⁴³ Naicker *The use of soft law in international legal system in the context of global governance* 11.

¹⁴⁴ Preamble of the KPCS 2003.

to certify shipment of rough diamonds as “conflict free” and prevent conflict diamonds from entering the legitimate trade. This is discussed in the following section where the KPCS document is reviewed.

2.3.1.2 KPCS a tool towards transparency

The KPCS recognises in its preamble that the trade in conflict diamonds is a matter of serious international concern.¹⁴⁵ The KPCS core document defines “conflict diamonds” as rough diamonds used by rebel movements or their allies to finance conflict aimed weapons with the intention of undermining legitimate governments.¹⁴⁶ The KPCS certificate (referred to the Certificate) in the KPCS document is expounded as a forgery resistant document with a particular format that identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme.¹⁴⁷

The KPCS core document stipulates in section II how the certificate works. It states that each participant should ensure that a certificate accompanies each shipment of rough diamonds on export.¹⁴⁸ Each participant should also ensure that certificates meet the requirements set out in Annexure I attached below to this study.¹⁴⁹

As long as the requirements in Annexure I are met, participants may at their discretion establish additional characteristics for their own Certificates, for example, in relation to form, additional data or security elements.¹⁵⁰ For purposes of validation, each participant should ensure that it notifies all other participants through the Chair of their features of its Certificate as specified in Annexure I.¹⁵¹

With regard to the shipment of rough diamonds exported to a participant or imported, it is each participants’ duty to require that each shipment is accompanied by a duly validated Certificate.¹⁵² It is also the responsibility of each participant to ensure that no shipment

¹⁴⁵ Shaik-Peremanov 2014 *PELJ* 330.

¹⁴⁶ See Chapter 2 Para 2.1.

¹⁴⁷ S I of the KPCS 2003.

¹⁴⁸ S II(a) of the KPCS 2003.

¹⁴⁹ S II(c) of the KPCS 2003.

¹⁵⁰ S II(c) of the KPCS 2003.

¹⁵¹ S II(d) of the KPCS 2003.

¹⁵² S III(a) and (b) of the KPCS 2003.

of rough diamonds is imported from or exported to a non-participant country.¹⁵³ Also as previously indicated, the members must certify the shipment of rough diamonds as “conflict free” when it enters the legitimate trade.¹⁵⁴

The Core Document of the KPCS also requires that each participant should establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipment of rough diamonds imported into and exported out of its territory.¹⁵⁵ Each participant should also amend its existing laws or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to introduce dissuasive and proportional penalties for transgressions.¹⁵⁶

From 2005 onwards, the KPCS expanded its focus to include alluvial diamond production.¹⁵⁷ The Moscow Declaration followed a report from a sub-group of the Working Group on monitoring on challenges facing alluvial miners and examples of best practice.¹⁵⁸ The recommendations in the Declaration focus on ensuring traceability through a stringent regime of recording production and regulation of both mining and trade in alluvial diamonds.¹⁵⁹ Artisanal miners¹⁶⁰ were also encouraged to move into the formal economy.¹⁶¹

To ensure transparency and co-operation, the KPCS document states that each participant should exchange information through the Chair that identifies their designated authorities or bodies responsible for implementing the provisions of the KPCS.¹⁶²

¹⁵³ S III(c) of the KPCS 2003.

¹⁵⁴ See Para 2.3.1.1 above.

¹⁵⁵ S IV(a) of the KPCS 2003.

¹⁵⁶ S IV(d) of the KPCS 2003.

¹⁵⁷ Cullen 2013 *Macquarie Law Journal* 65.

¹⁵⁸ KPCS *Improving Internal Controls Over Alluvial Diamond Production – Declaration Adopted by the Moscow Plenary Meeting of the Kimberley Process* (16 November 2005) available at https://www.kimberleyprocess.com/en/system/files/documents/2006%20Administrative%20Decision%20on%20Internal%20Controls_0.pdf accessed 7 April 2018.

¹⁵⁹ KPCS *Improving Internal Controls Over Alluvial Diamond Production – Declaration Adopted by the Moscow Plenary Meeting of the Kimberley Process* (16 November 2005) available at https://www.kimberleyprocess.com/en/system/files/documents/2006%20Administrative%20Decision%20on%20Internal%20Controls_0.pdf Accessed 7 April 2018.

¹⁶⁰ Preamble of the KPCS 2003. Artisanal and small-scale mining (hereafter ASM) refers to informal mining activities carried out using low technology or with minimal machinery. In developing countries, it is estimated that 100 million people rely on this sector for income.

¹⁶¹ Cullen 2013 *Macquarie Law Journal* 65.

¹⁶² S V(a) of the KPCS 2003.

Information about relevant laws, regulations, rules, procedures and practices, should also be availed to other participants and it should be updated as required.¹⁶³

Participants must encourage, through relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of participants.¹⁶⁴ In their plenary meetings each participant must invite two representatives from civil society, the diamond industry, non-participating governments and international organisations to be observers on the issues discussed thereof.¹⁶⁵

In light of what has been discussed in this section, it is deduced that the KPCS is not binding in nature, it is a voluntary instrument that participants implement on a voluntary basis in order to ensure the desired reduction in the trade of illicit diamonds. Although not binding, once a country decides to implement the KPCS, such a state must adhere to the minimum requirements stipulated above. The next section briefly addresses the strengths and weaknesses of the KPCS.

2.3.1.3 Effectiveness and limitations of the KPCS

Despite its successes in the elimination of the illicit diamond trade the KPCS is not without flaws. Some of these flaws are discussed briefly. Howard¹⁶⁶ submits that a strong testimony of the KPCS failure is the fact that the Global Witness (hereafter GW) ¹⁶⁷ withdrew from the KPCS. Many of the world's worst environmental and human rights abuses are reportedly driven by the exploitation of natural resources and corruption in the global political and economic system.¹⁶⁸ GW had been campaigning to end this in the extractive sector and mainly the diamond industry.¹⁶⁹

¹⁶³ S V(a) of the KPCS 2003.

¹⁶⁴ S V(g) of the KPCS 2003.

¹⁶⁵ S IV (10) of the KPCS 2003.

¹⁶⁶ Howard 2016 *Wash U Global Stud L Rev* 153.

¹⁶⁷ Howard 2016 *Wash U Global Stud L Rev* 153. The GW is an organisation that strives to effect change in areas of the world suffering from conflict, corruption or environmental destruction.

¹⁶⁸ Ndlovu *An analysis of the impact of the Kimberley Process Certification Scheme (KPCS) on national diamond regulation regimes: The case of Zimbabwe* 18.

¹⁶⁹ Ndlovu *An analysis of the impact of the Kimberley Process Certification Scheme (KPCS) on national diamond regulation regimes: The case of Zimbabwe* 18. The withdrawal of GW was preceded by the resignation of Ian Smillie in 2009 who was one of the leading conflict diamond experts and key architect of the KPCS. In the midst of frustration, Ian Smillie, declared his resignation to the KPCS declaring the process ineffective.

The extent to which the KPCS observes state sovereignty has become a hindrance to the diamond regulating process.¹⁷⁰ Failure by the KPCS to significantly challenge sovereign states is explained by the concept of "captive regulation."¹⁷¹ Munemu¹⁷² argues that this is when an authority who ought to protect public interests abandons its duty in favour of commercial or special concerns of interests group that have control over sectors or the industry.

Participant countries only rely on the KPCS to deal with problems that are mainly caused by internal dysfunctional systems of government.¹⁷³ The conflict and illicit diamond trade may be solved when countries like the Democratic Republic of Congo (referred to as DRC) and Angola can introduce accountable and transparent resource management systems. Where government officials themselves prey on the mineral wealth of their countries, it is unsustainable for the KPCS to produce positive results. This situation challenges the design of a KPCS system that focuses on the diamond trade and not on governance in different countries.¹⁷⁴

Kabemba¹⁷⁵ alludes that in countries where there is a wide range of artisanal mining operations, the KPCS faces a lot of challenges. The greatest challenge is that not all artisanal mining is illegal, but rather that it is badly regulated and disorganised. The KPCS faces challenges because there is no organised structure for these miners, and because they are unregistered, they operate in conditions that make them vulnerable to the buyers.¹⁷⁶

¹⁷⁰ Munemu *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo* 49.

¹⁷¹ Munemu *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo* 49.

¹⁷² Munemu *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo* 49.

¹⁷³ Kabemba 2008 *SARW* 5.

¹⁷⁴ Kabemba 2008 *SARW* 5.

¹⁷⁵ Kabemba 2008 *SARW* 7. As much as 90% of the production in countries like the DRC, Angola and Lesotho is produced by artisanal laborers' using simple tools and equipment, and living in conditions of insecurity and poverty.

¹⁷⁶ Kabemba 2008 *SARW* 7. The distribution channels from this sector are not always clear, making it difficult to monitor diamond transactions.

The effectiveness of the KPCS varies from country to country.¹⁷⁷ Kabemba¹⁷⁸ holds that the KPCS is easily implemented in democratic and functional states. This means that functional states have the capacity to regulate, monitor and protect the extraction and commercialisation of diamonds. Since the end of the Sierra Leonean civil war in 2002, there has been a significant reduction in conflict diamonds coming from Africa's conflict zones reaching the formal diamond retail markets.¹⁷⁹

There is evidence that the KPCS lessened the negative impacts on people living in countries where conflict diamonds endangered civilian lives and threatened human rights.¹⁸⁰ It is also necessary to recognise that the system has succeeded in reducing the trade of conflict diamonds.¹⁸¹ However the KPCS focuses on the diamond sector only and not the extractive sector as a whole, hence the prevalence of other initiatives such as the EITI.

2.3.2 EITI

The section will give a brief background on the EITI, the initiative is discussed as a tool to transparency, and lastly the section explores the effectiveness and limitations of the EITI.

2.3.2.1 Background on the EITI

The EITI has evolved from its beginnings as a narrow set of rules focused on revenue collection into an international standard covering the wider governance of the extractive sector.¹⁸² The late 1990s and early 2000s brought an expansion of academic literature

¹⁷⁷ Kabemba 2008 *SARW* 4.

¹⁷⁸ Kabemba 2008 *SARW* 4.

¹⁷⁹ Munemu *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo* 53.

¹⁸⁰ Howard 2016 *Wash U Global Stud L Rev* 158. Angola, Sierra Leone and Zimbabwe are examples of a successful implementation of the KPCS.

¹⁸¹ Howard 2016 *Wash U Global Stud L Rev* 152.

¹⁸² <https://eiti.org/history> accessed on the 30 January 2018. It now encompasses beneficial ownership disclosure, contract transparency, the integration of the EITI into government systems and transparency in commodity trading. The focus of the EITI reports has moved from compiling data to building systems for open data and making recommendations for reforms to improve the extractive sector governance more generally.

around the “resource curse” detailing how the huge potential benefits of oil, gas and mining were not being realised and were associated with increased poverty, conflict and corruption.¹⁸³

As highlighted before,¹⁸⁴ the literature outlined the complexities of extractive resource governance, which amongst others include bidding, exploration, licences, contracts, operations, revenues, supply chains, local content, transit, services, allocations and spending.¹⁸⁵ This being noted, authors recognised environmental, social and political concerns, and each outlined remedies for addressing the curse, often noting that no single action would be capable of tackling all of these challenges.¹⁸⁶

Launched in December 1999, the civil society campaign slogan of “Publish What You Pay” (hereafter PWYP),¹⁸⁷ was drawn from a GW Report.¹⁸⁸ The report focused on the non-transparent mismanagement of oil in Angola. The report concluded by calling on the operating companies to adopt “a policy of full transparency in Angola and in other countries with similar problems of lack of transparency and government accountability.”¹⁸⁹

The oil companies argued for a shift away from company reporting, as sought by PWYP and others, to reporting by governments, in order to reduce conflict with host governments that put contracts at risk.¹⁹⁰ If company reporting was to be required they wanted a global effort to level the playing field that required all companies in a country

¹⁸³ See 2.1 above.

¹⁸⁴ See 2.2 above.

¹⁸⁵ <https://eiti.org/history> accessed 30 January 2018.

¹⁸⁶ <https://eiti.org/history> accessed 30 January 2018.

¹⁸⁷ Publish What You Pay (PWYP) is a global membership-based coalition of civil society organisations (CSOs) in over 40 countries united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries and that extraction is carried out in a responsible manner that benefits countries and their citizens. Available at <http://www.publishwhatyoupay.org/about/> Accessed on the 07 April 2018.

¹⁸⁸ <https://eiti.org/history> Accessed on the 30th January 2018. The Global Witness report was called the “A Crude Awakening”.

¹⁸⁹ <https://eiti.org/history> accessed 30 January 2018.

¹⁹⁰ <https://eiti.org/history> accessed 30 January 2018.

to disclose.¹⁹¹ The government of the United Kingdom saw the opportunity to develop an initiative built on the notion of equal transparency from governments and companies.¹⁹²

Criticism arose from the global non-governmental community to the World Bank Group's (hereafter WBGs) financial and technical support for the extraction of resources, which prompted the WBG to offer the first substantive response to the challenges confronting the extractive sector.¹⁹³ In 2000, the then World Bank President, James Wolfensohn, promised to review the WBG role in the extractive sector, and executed an investigation and report into the role of the WBG in the industry.¹⁹⁴

Subsequently, as already mentioned above,¹⁹⁵ at the instruction of the then British Prime Minister, Tony Blair, the United Kingdom Department for International Development held a meeting of civil societies, private companies and governmental representatives at the World Summit for Sustainable Development in Johannesburg in 2002.¹⁹⁶ After an agreement was reached of principles that would increase transparency of payments and revenues in the extractive sector, the EITI was subsequently launched in June 2003.¹⁹⁷ The EITI is also termed as "soft law" as it is not labelled as a treaty and it is voluntary in nature.¹⁹⁸

Since the EITI principles were agreed upon in 2003, the EITI standard is in its fifth version.¹⁹⁹ The principles, on which the EITI is still based, state that the wealth from the

¹⁹¹ <https://eiti.org/history> accessed 30 January 2018.

¹⁹² <https://eiti.org/history> accessed 30 January 2018.

¹⁹³ <https://eiti.org/history> accessed 30 January 2018.

¹⁹⁴ <https://eiti.org/history> accessed 30 January 2018; Budeanu 2013 *Romania Energy Centre (ROEC)* 3. It should be noted that the EITI was born after years of development and research towards the idea of good governance, natural resources and country development. Similar ideas appeared before, such as Publish What You Pay (PWYP), which concerned the extractive sector related money circulation. The PWYP and EITI share the same objective of increased transparency in extractive industries to promote good governance in the management of resource revenues.

¹⁹⁵ See Chapter 1, the Introduction.

¹⁹⁶ <https://eiti.org/history> accessed 30 January 2018.

¹⁹⁷ <https://eiti.org/history> accessed 30 January 2018. The stakeholders include mining companies, civil society organisations, supporting countries, partner organisations and financial institutions.

¹⁹⁸ Chawani *Towards the adoption of the Extractive Industries Transparency Code and the Implications for Transparency in Malawi's Mining Sector* 60; see also Para 2.3.1.2 above.

¹⁹⁹ https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf accessed 30 January 2018. There are relatively few changes in the 2016 EITI version from the previous ones. Most are

country's natural resources should benefit all its citizens requiring high standards of transparency and accountability.²⁰⁰ States implementing the EITI are supposed to always bear in mind that the fundamental aspect of the EITI remains revenue transparency.

2.3.2.2 EITI as a tool towards transparency

Blair intended from the beginning for the EITI to be adopted widely by resource-rich states, even though it was a foreign policy initiative of the United Kingdom government.²⁰¹ Haulier²⁰² contends that Blair shifted the focus of the EITI away from company reporting, which is the target of the PWYP activism, to reporting and membership by governments. The 2016 version of the EITI standards construe that countries who wish to implement the EITI must ensure that all stakeholders are engaged and must comply with the requirements laid down in the EITI.²⁰³

The EITI standards aver that in order to become EITI compliant, implementing countries must demonstrate through validation that they have met all the EITI requirements. The first requirement that the EITI laid down, is that there must be effective multi-stakeholder oversight, including a functioning multi-stakeholder group that involves the government, companies and full, independent, active and effective participation of civil society.²⁰⁴

minor refinements and revisions that clarify ambiguities and address inconsistencies. There are also changes to the validation system, which assess whether countries have implemented the EITI in accordance with the requirements.

²⁰⁰ EITI Standard 2016 10. EITI principles.

²⁰¹ Haulier 2010 *Massachusetts Institute of Technology press (MIT press)* 64.

²⁰² Haulier 2010 *Massachusetts Institute of Technology press (MIT press)* 64.

²⁰³ EITI Standard 2016 13-38. Due to the long elaboration of the requirements set in the EITI document, an Annexure labelled Annex I is attached at the end of the dissertation of the requirements for the EITI implementing countries. However, a brief explanation of the requirements is given in text. The following are the outlines or headings of EITI requirements as what they entail:

- a) Oversight by the multi-stakeholder group.
- b) Legal and institutional framework, including allocation of contracts and licenses.
- c) Exploration and production.
- d) Revenue collection.
- e) Revenue allocations.
- f) Social and economic spending.
- g) Outcomes and impacts.
- h) Compliance and deadline for implementing countries.

²⁰⁴ EITI Standard 2016 13.

The second requirement, is that the EITI requires disclosure of information related to rules as to how the extractive sector is managed.²⁰⁵ This enables stakeholders to understand the laws and procedures for the award of exploration and production rights, the legal, regulatory and contractual framework that apply to the extractive sector and institutional responsibilities of the state in managing the sector.²⁰⁶

Thirdly, there should be disclosure of information related to exploration and production. This enables all stakeholders to understand the potential of the sector.²⁰⁷ The fourth requirement is that the public should be informed about company payments and government revenues and about the governance of the extractive sector. The EITI stipulates that the public must be able to comprehend all the information provided by the companies and the governments.

The fifth requirement is to enable stakeholders to understand revenue allocations. The EITI further requires, that stakeholders must be assisted in assessing whether the extractive sector is leading to a desirable social and economic impacts outcome by disclosing information related to revenues and royalties collected by the government and the impact of the extractive sector on the economy.²⁰⁸

Lastly, the EITI ²⁰⁹ stipulates that, all stakeholders must be engaged in a dialogue about natural resources. The stakeholders must be informed about the outcomes and impact of natural resource revenue management. There must also be reports on the fulfilment of the EITI principles to ensure wider public debate.²¹⁰ It is also important that lessons learned during the implementation are acted upon, that discrepancies identified in the EITI reports are explained and addressed.²¹¹

²⁰⁵ EITI Standard 2016 17.
²⁰⁶ EITI Standard 2016 17.
²⁰⁷ EITI Standard 2016 22.
²⁰⁸ EITI Standard 2016 26.
²⁰⁹ EITI Standard 2016 29.
²¹⁰ EITI Standard 2016 29.
²¹¹ EITI Standard 2016 30.

Nevertheless, the EITI's focus on revenue transparency and its requirements to promote transparency has shifted from being aspirations of transparency to expectations in order to achieve transparency.²¹² It is therefore important to evaluate the implementation of the EITI in promoting transparency and its efficacy as a tool of law.

2.3.2.3 Effectiveness and limitations of the EITI

Generally, due to its vast support from donors, non-governmental organisations, extractive industry companies, and the dependent governments that have committed to it, the EITI is considered a success story.²¹³ Corrigan²¹⁴ argues that proponents of the EITI believe that through the disclosure of company payments and government revenues from minerals, corruption within a government could be controlled. In addition, the proponents see participation by a government in the EITI as a signal of willingness to reform. The country accepts the validity of its international standards by acceding to the EITI.²¹⁵

The adoption of the EITI increases the legitimacy of a country in the international arena, and since the countries that join the EITI are developing countries, this effect could be more significant.²¹⁶ Corrigan²¹⁷ maintains that the EITI also brings unity in a state, because the EITI validation forces governments, companies and civil society to increase accountability and to promote participation by the whole society within the resource extraction process. The EITI also attracts more investors into a country where there is an assurance of stability and where business can be conducted corruption-free.²¹⁸ This

²¹² Van Straaten *Partners, not adversaries: Adopting the EITI toward effective collective governance to improve the extractive industry in South Africa* 17.

²¹³ Rustad *et al* 2017 *Resources Policy* 151.

²¹⁴ Corrigan 2014 *Resources Policy* 20.

²¹⁵ Corrigan 2014 *Resources Policy* 20. The countries that have chosen to join the EITI are countries with a higher share of natural resource exports.

²¹⁶ Corrigan 2014 *Resources Policy* 20. The countries that have chosen to join the EITI are countries with a higher share of natural resource exports, a higher amount of ethnic fractionalisation and higher incidence of corruption.

²¹⁷ Corrigan 2014 *Resources Policy* 20.

²¹⁸ Corrigan 2014 *Resources Policy* 20.

also assures the public to benefit from the extractive sector by requiring information along the extractive industry value chain.²¹⁹

While its effectiveness appears sound in theory, the EITI is not without defects. Chawawi²²⁰ avers that the EITI effectiveness of implementation heavily depends on the government.²²¹ Ironically, transparency can either be good or bad, in that it can detect corruption but may also identify the relevant officials to approach for bribes and kickbacks.²²²

The EITI standard came into being as one of the practical steps to guide resource-rich countries out of the “resource curse,” however, the cure for the curse is not easy to find.²²³ Moreover it can be derived that the EITI only excels in countries that are compliant.²²⁴ Many countries still struggle to strike a balance of information availed to all stakeholders.²²⁵

The other deficiency is that many countries, the public and legislators have not been made aware of the EITI.²²⁶ Thus, the most compelling power through which the EITI could work, public scrutiny, is not being adequately utilised.²²⁷ This however, does not disqualify the EITI as a tool that advances transparency in the extractive sector. There

²¹⁹ Van Straaten *Partners, not adversaries: Adopting the EITI toward effective collective governance to improve the extractive industry in South Africa* 17.

²²⁰ Chawani *Towards the adoption of the Extractive Industries Transparency Code and the Implications for Transparency in Malawi’s Mining Sector* 53.

²²¹ Chawani *Towards the adoption of the Extractive Industries Transparency Code and the Implications for Transparency in Malawi’s Mining Sector* 53. Assessment of governance of revenue is impossible if government does not release information to be held accountable.

²²² Sovacool *et al* 2016 *World Development* 179. This critique is not meant to tarnish the efforts toward transparency in the extractive sector because, as the 2014 EITI Progress Report indicates, transparency does matter. The report available at <https://eiti.org/document/eiti-progress-report-2014>.

²²³ Sovacool *et al* 2016 *World Development* 179.

²²⁴ https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf accessed 30 January 2018. On October 2017, the EITI Board agreed to delist Yemen from the EITI, because in the light of continued political instability and conflict after more than two years of suspension, the environment for EITI implementation remains unchanged and prevents adherence to significant aspects of the EITI principles and requirements.

²²⁵ Corrigan 2014 *Resources Policy* 20.

²²⁶ Corrigan 2014 *Resources Policy* 20. South Africa and Lesotho are still not participants to the EITI.

²²⁷ Corrigan 2014 *Resources Policy* 20.

are initiatives that countries like South Africa has adopted to allow the public to scrutinise the decisions of the government by disclosing information held by the government. Below is a brief overview of the OGP.

2.3.3 OGP

Initiatives such as the OGP complement the efforts of the EITI in promoting transparency, however, unlike the EITI and KPCS the OGP does not focus specifically on the extractive sector or diamond mining sector. This section reviews the establishment of the OGP and assess the implementation of the OGP as a tool to transparency.

2.3.3.1 Establishment of the OGP

The OGP is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.²²⁸ In 2011, the OGP was launched to provide an international platform for domestic reformers committed to making their governments more accountable, open, and responsive to citizens.²²⁹ Similar to the KPCS and the EITI,²³⁰ the OGP is soft law and therefore does not have a binding effect. However, unlike the EITI and KPCS where membership is voluntary, the eligibility to join the OGP is determined by comparing a country's openness and transparency against of a range of criteria.²³¹ The OGP document also stipulates that individuals and organisations are also encouraged to participate in numerous ways. An individual can assist by sharing knowledge and experience with government officials as they work to implement their commitments.²³²

When the OGP was launched there were initially eight founding governments who endorsed the Open Government Declaration (hereafter OGD),²³³ and announced their

²²⁸ <https://www.opengovpartnership.org/about/about-ogp> accessed 12 February 2018.

²²⁹ OGP 2011 1. In the Open Government Declaration.

²³⁰ See para 2.3.1.1 and 2.3.2.1 above.

²³¹ OGP 2011 2. "Meeting the OGP's eligibility must be in four areas; (a) Fiscal transparency, (b) Access to information, (c) Public officials' asset disclosure and (d) Citizens engagement."

²³² OGP 2011 2.

²³³ In the OGD, countries commit to uphold the principles of open and transparency government. The Declaration has been endorsed by 75 OGP participating countries. Available at <https://www.opengovpartnership.org/open-government-declaration> accessed 7 April 2018.

country's action plans.²³⁴ By endorsing the OGD, countries commit to "foster a global culture of open government that empowers and delivers for citizens and advances the ideals of open and participatory 21st century government."²³⁵

Furthermore, participant countries declare to be committed to the principles enshrined in the Universal Declaration of Human Rights,²³⁶ the UN Convention against corruption,²³⁷ and other applicable international instruments related to human rights and good governance. Regarding the participant countries, National Action Plans (hereafter NAPs) must be co-created with civil society since they are the core of a country's participation in the OGP.²³⁸ It is necessary to understand how the OGP operates in promoting transparency in a country.

2.3.3.2 Assessing the implementation of the OGP as a tool to transparency

The OGP creates a platform where high level political leaders create a political space at the domestic level for reformers to implement open government initiatives and, at the international level, to encourage each other to promote greater transparency.²³⁹ The OGP also creates a podium where mid-level government officials collaborate with civil society

²³⁴ OGP 2011 1. The Eight founding countries were, Brazil, Indonesia, Mexico, Norway, the Philippines, South Africa, the United Kingdom and the United States. Since 2011, the OGP has welcomed the commitment of 67 additional governments to join the Partnership. In total, over 70 OGP participating countries, and 15 subnational governments have made over 2,500 commitments to make their governments more open and accountable.

²³⁵ <https://www.opengovpartnership.org/> Accessed 12 February 2018. "By joining the OGP, participant countries declare that; together they will increase the availability of information about governmental activities, support civic participation, Implement the highest standard of professional integrity throughout their administrations, and Increase access to new technologies for openness and accountability."

²³⁶ Universal Declaration of Human Rights (1948) available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf accessed on the 7 April 2018.

²³⁷ General Assembly resolution 58/4 of 31st October 2003 United Nations Convention against Corruption. Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf accessed 7 April 2018.

²³⁸ OGP Mid-term Review Call for Proposals 1, one participant country to the OGP that is explored in chapter 4 P 64 is South Africa. The chapter elaborates on the benefits and the disadvantages of the OGP in South Africa, and relevant legislation that is used to corroborate the OGP.

²³⁹ OGP mid-term review Call for Proposals 2.

organisations at the domestic level, and network with their peers at the international level to implement ambitious open government reforms.²⁴⁰

In addition, the OGP establishes a stand where civil society organisations (hereafter CSOs) use domestic and international platforms to advocate for the implementation of more ambitious transparency policies and programmes in their countries.²⁴¹ The OGP's Independent Reporting Mechanism (hereafter IRM) holds governments accountable for their commitments and allows stakeholders to track OGP progress in participating countries by producing thorough, impartial reports that track progress of every NAP.²⁴²

Beausang ²⁴³ holds that the OGP promotes open government by providing dialogue between the governments and their citizens. To its participating countries and to the world the OGP drives credible action on open government reform through a unique consultation and assessment process that brings civil society and governments together.²⁴⁴ The OGP empowers citizens and strengthens governance.²⁴⁵ Beausang ²⁴⁶ maintains further that a principle of the OGP is the provision of government and public sector Open Government Data (hereafter OGD). OGD promotes government accountability and stronger democracy.

Attard *et al* ²⁴⁷ hold that there are three reasons for opening government data. Transparency is one of the reasons. They maintain that the success to achieve transparency results in a considerable increase in citizen social control.²⁴⁸ The second

²⁴⁰ OGP mid-term review Call for Proposals 2.

²⁴¹ OGP mid-term review Call for Proposals 2.

²⁴² OGP 2011 3. The reports are intended to inform the development of the subsequent NAP, and stimulate dialogue and promote accountability between governments.

²⁴³ Beausang "Open Government Partnership Business Case Brief" <http://www.per.gov.ie/wp-content/uploads/OGP-Business-Case-031212.pdf> accessed 12 February 2018.

²⁴⁴ Beausang "Open Government Partnership Business Case Brief" <http://www.per.gov.ie/wp-content/uploads/OGP-Business-Case-031212.pdf> accessed 12 February 2018. The OGP helps to provide a framework for discussion between the government and civil society. It has also been reported that the number of CSOs involved in the OGP is growing. OGP has helped civil society to promote public policies in the field of transparency and access to information, and has proven especially useful as an advocacy instrument.

²⁴⁵ https://www.opengovpartnership.org/sites/default/files/OGP%20mid-term%20review%20-%20Call%20for%20Proposals_0.pdf accessed 12 February 2018.

²⁴⁶ Beausang "Open Government Partnership Business Case Brief" <http://www.per.gov.ie/wp-content/uploads/OGP-Business-Case-031212.pdf> accessed 12 February 2018

²⁴⁷ Attard *et al* 2015 *Government Information Quarterly* 399.

²⁴⁸ Attard *et al* 2015 *Government Information Quarterly* 399.

reason is its social and commercial value. This is so because governments are the largest producers and collectors of data in many different domains.²⁴⁹

The third and last reason is that of participatory governance, where participation goes beyond the narrow circle of CSOs that are currently involved in the OGP process, but extend to include locally based and smaller CSOs.²⁵⁰ The OGD's focus has been discussed as a new phenomenon: a technologically enabled discontinuity from the past.²⁵¹ South Africa is a member to the OGP, Lesotho is not. South Africa has committed to open government and working together with its citizens to enhance transparency.²⁵²

The OGD has also been criticised in that open data initiatives are largely supply-driven.²⁵³ On the side of the user perspective, the initiatives lack sufficient attention even though the benefits of the OGD programmes are expected to come mostly from innovative external data use. This hinders the public to easily access the open data.²⁵⁴

The OGD is, however, the cornerstone of the OGP. The information or data that needs to be disclosed promotes government accountability and stronger democracy. This also enables the public to hold government officials accountable for their actions. As a result, the OGP initiates a podium where the government and the public unite together to become reformers of open government initiatives and of policies that promote transparency. This initiative raises a bar in transparency. It is a general commitment to openness and open data and does not necessarily relate to the diamond industry.

2.4 Conclusion

This chapter examined the background of the notion of transparency regulation. It gave a brief overview on the need for transparency in Africa. It introduced the need of transparency in a state especially in the regulation of the extractive sector. It reviewed the rationale of transparency in the extractive sector. In elaborating this, the chapter

²⁴⁹ Attard *et al* 2015 *Government Information Quarterly* 399.

²⁵⁰ Attard *et al* 2015 *Government Information Quarterly* 400.

²⁵¹ Davies and Bawa 2012 "The Promises and Perils of Open Government Data JCI" available at <http://cijournal.net/index.php/ciej/article/view/929/926> accessed 12 February 2018.

²⁵² See chapter 4 where South Africa is discussed in relation to transparency.

²⁵³ Dawes *et al* 2016 *Government Information Quarterly* 15.

²⁵⁴ Dawes *et al* 2016 *Government Information Quarterly* 16.

illustrated questions that need to be asked in order to obtain clarity as to who benefits in the extractive sector, how mining approvals are obtained, how meaningful is consultation with the community and how revenues obtained are utilised. Lastly this chapter discussed three international guidelines that promote transparency, the KPCS, the EITI, and the OGP.

The cornerstone of good governance is accountability and transparency. Transparency therefore boils down, to the openness in governance and holding those governing the public accountable for all their actions, through information disclosure in order to promote democracy in a state. Without transparency, corruption can easily erupt in a state, leading to bad governance and secrecy; but where there is an advancement of transparency in a state, democracy, the rule of law and honesty get promoted. Therefore, in a mining sector where transparency and good governance are encouraged, the regulation of mining approvals or agreements, consultation with the communities affected by the mining operation, disclosure of all the information relating to the sector, honest recordings of revenues availed to the public and amended laws that eliminate possible prospects of corruption.

In addition, the three international guidelines discussed in this chapter, the KPCS, the EITI and the OGP are voluntary instruments that states can apply in promoting transparency regulation in the extractive sector. Lesotho is a member to one initiative, the KPCS, while South Africa went further to join both the KPCS and the OGP. However, neither country endorsed the EITI. The EITI is used as a benchmark to determine what transparency measures should be in a specific country.

In relation to the extractive industry in general the following could be deduced from the EITI: the importance of openness in government, being accountable to the ones governed, opening dialogue amongst stakeholders, the significance of participation from all stakeholders in government especially the public and the openness of revenues collected from the sector.

In relation to the KPCS, in order to ensure that illegal diamonds do not enter the international market, the KPCS encourages that diamonds traded must at all times be

accompanied by a KP certificate. The KPCS also motivates state members to formulate internal controls that promote the removal of illegal diamonds in the market.

Although not directly addressing the extractive sector, the OGP like the EITI advances open dialogue between the government and its citizens. It authorises citizens to access information held by the government, and to hold government officials accountable based on the available information.

The following chapter examines the transparency laws in the diamond mining sector in Lesotho.

3 Transparency regulation in the diamond sector in Lesotho

3.1 Introduction

This chapter discusses the transparency regulation in the diamond mining sector in Lesotho. The chapter commences by reviewing the operating mining regimes in Lesotho and relevant provisions that promote transparency. This is done by first considering how diamonds were regulated prior to the current legislation.

The chapter continues to explore whether the mining regimes in Lesotho advocate for transparency in the diamond mining sector, in relation to the allocation of mining contracts to foreign companies and the allocation of prospecting rights, mining rights and mining permits. This chapter evaluates how the mining regime in Lesotho accommodates ASM.

The chapter also evaluates whether the exploited minerals in Lesotho, benefit the citizens of the country and if revenues collected from the extractive sector in Lesotho are distributed in a satisfactory manner. By doing this, the chapter explores the inclusion of the communities around the mining areas and if they benefit from such operations. As part of the regulatory framework and the supreme law in Lesotho, the mining and mineral rights are firstly regulated by the Constitution. The Constitution protects the rights over land and minerals under the chapter dealing with the protection of fundamental human rights and freedoms.²⁵⁵

The chapter measures the mining legislation in Lesotho with the requirements set out in Chapter 2,²⁵⁶ on how to promote transparency in the mining sector through the international initiatives particularly the KPCS, and its implementation in the Lesotho diamond mining sector.

²⁵⁵ S 17 of the *Constitution* of Lesotho.

²⁵⁶ See Chapter 2 Para 2.3.1.2.

3.2 Transparency regulation framework

3.2.1 Background

In the early 1930s, the local Lesotho community already knew of the existence of diamonds.²⁵⁷ Thabane²⁵⁸ holds that the colonial government and professional geologists for a long time dismissed declarations by the local community that there were areas in the country where diamonds could be found. In 1954 at Kao, a woman died when debris fell on her while she was digging for diamonds.²⁵⁹ It was only after the incident, that the colonial government acknowledged the existence of diamonds.²⁶⁰ Makhetha²⁶¹ holds that the death of this woman marked the end of ASM for diamonds in Kao.²⁶²

Thereafter, Kao became a site of contestation between commercial mining companies and individual diggers, with the state opting with the commercial mining companies most of the time.²⁶³ It still took close to a decade for the government to devise a written policy on how Lesotho's diamonds should be mined.²⁶⁴ In relation to the mines and minerals, the parliament of Lesotho also passed the *Mining Rights Act* of 1967.²⁶⁵ The *Mining Rights Act* of 1967 has been repealed by the *Mines and Minerals Act* of 2005, which is still in force.²⁶⁶

²⁵⁷ Thabane 2003 *J South Afr His* 148.

²⁵⁸ Thabane 2003 *J South Afr His* 148.

²⁵⁹ Thabane 2003 *J South Afr His* 148.

²⁶⁰ Thabane 2003 *J South Afr His* 148.

²⁶¹ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 143.

²⁶² IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 38. Kao's main pipe, which is an irregular oval, is the largest in the country at 19.8 ha and situated at an altitude of 2500m in the north approximately 200 kilometers from Maseru. Its satellite is 3.2 ha and lies 400m to the west of the main pipe. Kao Diamond Mine (Pty) Ltd started production in November 2007. The government owns 20% of the shares and will receive royalties on the gross sales.

²⁶³ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 143.

²⁶⁴ Thabane 2003 *J South Afr His* 148.

²⁶⁵ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

²⁶⁶ See Para 3.2.3 below.

3.2.2 Position pre-2005

In 1955, the granting of mining rights was done by the Paramount Chieftainess 'Mants'ebo Seeiso who was convinced by the colonial government²⁶⁷ to allow government to grant an exclusive prospecting and mining right to a South African company, the General Mining Finance and Corporation (hereafter Gencor) for five years.²⁶⁸ Makhetha²⁶⁹ avers that the local community strongly opposed Chieftainess 'Mants'ebo Seeiso's decision as it imposed on the traditional land tenure system. The other chiefs within Lesotho considered her to be undemocratic.²⁷⁰

As soon as Gencor began diamond exploration in 1955, the colonial state proceeded to deny access to individual diggers to the diamond deposits.²⁷¹ In the meantime, Gencor discovered other exploration sites such as, Lets'eng, Lihobong and Kolo. The Lets'eng kimberlite was officially discovered in 1957 and Gencor was granted a second prospecting agreement in 1961.²⁷²

In 1966, the then leading government party, the Basotho National Party (hereafter BNP) enacted the *Mining Rights Act* 43 of 1967.²⁷³ The purpose of the legislation was to regulate the allocation of rights to prospect and mine for mines,²⁷⁴ the issuing of mining leases and licences,²⁷⁵ and the granting of dealers licences.²⁷⁶ The preamble to the *Mining Rights Act* states that this legislation came as a genesis to the mining sector because there was no stated general mining policy that guided development of the mining sector.²⁷⁷ Section

²⁶⁷ Before Lesotho attained its independence in 1966, it was under the British government colony, available at www.countriesquest.com >Africa >Lesotho >History accessed 18 April 2018.

²⁶⁸ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144.

²⁶⁹ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144.

²⁷⁰ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144.

²⁷¹ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144. The Government of Lesotho forced artisanal diamond miners to abandon their activities, resulting in deprivation of a means of livelihood for artisanal miners.

²⁷² Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144.

²⁷³ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 150.

²⁷⁴ Ss 4 and 6 of the *Mining Rights Act* 43 of 1967 (thereafter *Mining Rights Act*).

²⁷⁵ S 12 of the *Mining Rights Act*.

²⁷⁶ S 15 of the *Mining Rights Act*.

²⁷⁷ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 144.

2 of the Act made provision that the rights to minerals in any land in Lesotho were vested in the Basotho nation.²⁷⁸

In addition, the Act allowed lawful holders of prospecting or mining rights, who prior to the commencement of the Act were already mining for minerals on any land under the authority of an existing grant, to be entitled to continue to do so in terms of the conditions of that grant.²⁷⁹ The owner of the land on which the mineral lies could apply for a prospecting or mining right to prospect and mine the specified minerals on the land.²⁸⁰ The prospecting permit for precious stones entitled the holder, during the period for which the permit is issued, to secure a prospecting area on the land to which it relates and to dispose of such precious stones as he or she wishes.²⁸¹

In addition to this, the mining board²⁸² laid down conditions that were applicable to the prospecting and mining licences.²⁸³ These conditions included that there should be transparency in the mining approvals through the *Mining Rights Act*.²⁸⁴ In his or her discretion, the minister could reserve land for public purposes such as public buildings, schools, places of worship, hospitals, police barracks, government offices, burial grounds that would not prejudice the public.²⁸⁵ This land is then excluded from prospecting and mining.

The Act discouraged the illicit possession of precious stones.²⁸⁶ It stipulated five conditions in which a person may be found with raw precious minerals and it stated the conditions as follows:

- a. Such a person had to be a producer of the precious mineral.²⁸⁷

²⁷⁸ S 2 of the *Mining Rights Act*; S 92 of the *Lesotho Constitution* 5 of 1993.

²⁷⁹ S 3 of the *Mining Rights Act*.

²⁸⁰ S 8 of the *Mining Rights Act*.

²⁸¹ S 9 of the *Mining Rights Act*.

²⁸² S 5(1) of the *Mining Rights Act*. A Board ("the Mining Board") may be established by the Minister consisting of such member or members (not exceeding five), nominated by the Minister, as he may determine with the power to the Minister to remove any member and replace any member who ceases to hold office whether by death, resignation, removal, or any other cause.

²⁸³ S 16 of the *Mining Rights Act*.

²⁸⁴ S 16(1)(a) of the *Mining Rights Act*.

²⁸⁵ S 20 of the *Mining Rights Act*.

²⁸⁶ S 21(3) of the *Mining Rights Act*.

²⁸⁷ S 21(3)(i) of the *Mining Rights Act*.

- b. He or she had to be a licenced dealer in the precious mineral.²⁸⁸
- c. It had to be a commercial bank in Lesotho.²⁸⁹
- d. It had to be a holder of a recovery works licence issued under the authority of the Minister; or²⁹⁰ it had to be.
- e. An employee of the producer of precious minerals, a licenced dealer, commercial bank or holder of the recovery works who held rough precious minerals on that person's behalf.²⁹¹

As a result, if there were any suspicious actions such as the unlawful possession of rough minerals, the Act averred that any member of the police force in charge of the investigation could at all times enter upon, examine and search any place or vehicle suspected to be conveying rough precious stones.²⁹² This also reduced the illicit trade of minerals because under the same Act, the dealer's licence enabled a diamond dealer to buy, sell, and import and export minerals such as precious stones.

Following the promulgation of the *Mining Rights Act* in 1967, the *Precious Stones Order* of 1970 (hereafter *the Order*) and its regulations were introduced, and the Order is still in force.²⁹³ The aim of the *Precious Stones Order* is to regulate dealings in rough precious stones, including diamonds, and the protection of mining areas.²⁹⁴

The Order prohibits any person from receiving or dealing in any manner in rough diamonds without a valid licence.²⁹⁵ In 1982, section 6 of the Order was referred to in the case of *R v Molefe*²⁹⁶ to convict two perpetrators who had 11 uncut diamonds in their possession and tried to sell them for M2 500 to a South African police officer. The High Court convicted them to a fine not exceeding M10 000 or imprisonment for a period not exceeding 15 years. When delivering its judgement, the court averred that it wanted to

²⁸⁸ S 21(3)(ii) of the *Mining Rights Act*.

²⁸⁹ S 21(3)(iii) of the *Mining Rights Act*.

²⁹⁰ S 21(3)(iv) of the *Mining Rights Act*.

²⁹¹ S 21(3)(v) of the *Mining Rights Act*.

²⁹² S 21(6)(a) and (b) of the *Mining Rights Act*.

²⁹³ See IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 38.

²⁹⁴ *Precious Stone Order* 24 of 1970.

²⁹⁵ S 6 of the *Precious Stone Order* 24 of 1970.

²⁹⁶ *R v Molefe* (CRI/A/18/82) (CRI/A/18/82) [1882] LSHC 55 (6 October 1982).

send a clear message to the nation of the seriousness of the legislature in dealing with the trade in uncut diamonds. This is so, because those engaging in this illegal trade seek to enrich themselves at the expense of the economy as a whole.²⁹⁷

Police officials, arresting persons who were found in possession of the uncut diamonds, often misinterpreted section 6 of the Order. In *S v Sephumula*²⁹⁸ the accused was arrested for possession of three rough and uncut diamonds, which were in her pocket at the time. The learned judge adjudicated that at the time the accused was arrested she was not *selling* or *buying* the diamonds. Consequently, she was not dealing in diamonds. She told the arresting officer that she intended to sell those diamonds. The court held further that to constitute a crime there must be an act or omission. A mere subjective contemplation of future criminal conduct, which does not find outward expression in deed or omission, is not criminally punishable. Therefore, section 6 must be construed in a manner that it prohibits the actual selling and buying of illicit diamonds.²⁹⁹

Unlike the *Mining Rights Act*, which focused on prospecting and mining activities as well as diamond dealings, the *Precious Stones Order* regulates dealings in rough precious stones including diamonds.³⁰⁰ The Order enhances transparency regulation in the diamond mining sector by eliminating the trade of rough diamonds that may impact negatively on Lesotho's economy.³⁰¹

In 2000 the then Minister of Natural Resources of the Lesotho Congress for Democracy-led (hereafter LCD) government, amended the Order with the aim of "tightening" the criterion for granting a diamond dealers licence, which was already being provided for.³⁰² The new measures, which are discussed in the following section,³⁰³ makes it more difficult for an ordinary person to obtain a licence to deal with diamonds.³⁰⁴ This also prompted the government to repeal and replace the *Mining Rights Act*. In 2005, a new *Mines and*

²⁹⁷ *R v Molefe* (CRI/A/18/82) (CRI/A/18/82) [1882] LSHC 55 (6 October 1982) para 2.

²⁹⁸ *S v Sephumula* (CR.142/84) (NULL) [1984] LSHC 46 (23 May 1984).

²⁹⁹ *S v Sephumula* (CR.142/84) (NULL) [1984] LSHC 46 (23 May 1984) para 2.

³⁰⁰ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 151.

³⁰¹ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 151.

³⁰² Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 152.

³⁰³ See Para 3.2.3 above.

³⁰⁴ S 6(1)(a) the *Precious Stones Order* 1970 as amended.

Minerals Act was enacted.³⁰⁵ The legislation introduced new measures that the previous legislation did not entail. The following section discusses the *Mines and Minerals Act* and its provisions that promote the transparency regulation in the mining sector.

3.2.3 *Mines and Minerals Act 37 of 2005*

The *Mines and Minerals Act* in Lesotho is the cornerstone of the mining legislation that deals with mining and minerals and the management of activities relating to mining.³⁰⁶ To assess the promotion of transparency in the mining industry, some provisions of this law will be reviewed.

The Basotho nation is bestowed with all rights of ownership in the minerals.³⁰⁷ The *Mines and Minerals Act* confer upon the Minister to act in the best interests of the public when ensuring that mineral resources are exploited.³⁰⁸ No person is allowed to prospect for or mine except under the provisions of this law.³⁰⁹ Any kind of rights in minerals may be acquired and held only in accordance with the provisions of this Act.³¹⁰

In acquisition of mineral rights and titles, the Act does not stipulate who has the right or the entitlement.³¹¹ Instead section 5 of the Act indicates who is not entitled to acquire mineral rights.³¹² Amongst others, the Act states that no mineral right may be acquired by an individual who is not a citizen of Lesotho or a company not established and registered in Lesotho.³¹³ The applicant shall not conceal any information required when applying or renewing a mining right.³¹⁴ The applicant shall also not cheat, deceive or

³⁰⁵ *Mines and Minerals Act 37 of 2005* (thereafter *Mines and Minerals Act*).

³⁰⁶ IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 54.

³⁰⁷ IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 54; see also s 3 of the *Mines and Minerals Act*.

³⁰⁸ S 3(2) of the *Mines and Minerals Act*.

³⁰⁹ S 4(2) of the *Mines and Minerals Act*.

³¹⁰ S 4(1) of the *Mines and Minerals Act*.

³¹¹ IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 55.

³¹² S 5 of the *Mines and Minerals Act*. "No mineral right shall be granted to or held by- (a) and individual who- (i) is not a citizen of Lesotho; (ii) is under the age of 18 years; (iii) is declared insolvent; (iv) has been convicted of an offence and sentenced to imprisonment without the option of a fine; (b) a company which- (i) has not been established and registered in Lesotho (ii) is in liquidation or under judicial management except where such liquidation or judicial management or amalgamation of such company; or (iii) has among its directors or shareholders a person who would be disqualified in terms of paragraph (a) (ii) (iii) or (iv)."

³¹³ S 5 (1)(a)(i) and (b) of the *Mines and Minerals Act*.

³¹⁴ S 73(g) of the *Mines and Minerals Act*.

defraud by mingling any sample ore, or any substance to enhance its value or in way to change the nature.³¹⁵

Section 6 establishes the office of the Commissioner of Mines and Geology who acts as a public officer.³¹⁶ The commissioner's functions, amongst others, are to inspect the area or premises, and to examine if prospecting or mining operations or treatment of minerals are being exploited.³¹⁷ Section 12 establishes the mining board.³¹⁸ In this particular provision the interests of the affected communities have not been represented on the board.³¹⁹ The board only invites a representative of the local authority to the meetings of the board, where discussions of the board relate to the land within the jurisdiction of a particular local authority, but such representative shall not have power to vote.³²⁰

The Act does not allow any mining board member,³²¹ authorised officer,³²² or the Commissioner who is a public officer,³²³ to directly or indirectly acquire any right or

³¹⁵ S 73(g) of the *Mines and Minerals Act*.

³¹⁶ S 6 of the *Mines and Minerals Act*.

³¹⁷ S 7 of the *Mines and Minerals Act*: "The Commissioner or an authorised officer may, in order to exercise any power or perform any duty conferred by this Act, enter upon any mineral right area or any premises thereon, other than a dwelling house, for the purposes of- (a) inspecting the area or premises, examining the prospecting or mining operations or the treatment of minerals being exploited in the area or premises; (b) giving directions and taking steps to enforce any provision of this Act; (c) ascertaining whether any nuisance or breach of environmental obligations exists in the area premises, building or workings; (d) taking samples or breaking of soil, rock, ore, concrete, tailing or minerals situated upon the area, premises or workings for the purposes of examinations or assay; (e) examining books, accounts, documents or records of any kind concerning a mineral right; and (f) obtaining information he may deem necessary."

³¹⁸ S 12(2) of the *Mines and Minerals Act*: "The Board shall consist of the following: (a) the Principal Secretary of the Ministry responsible for mining who shall be chairman; (b) the Commissioner; (c) the Legal Officer of the Ministry responsible for mining who shall be the Secretary; (d) a representative of the Ministry of Finance; (e) two other members who shall have knowledge and experience in financial, environmental, mining engineering or geological matters who shall be appointed by the Minister; and (f) a representative of the Chamber of Commerce nominated by the Chamber of Commerce, who shall be appointed by the Minister."

³¹⁹ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

³²⁰ S 12(3) of the *Mines and Minerals Act*; Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57. The local authority is invited not consulted. The use of the word "invitation" connotes that this representative has just to be invited or informed, but whether that invitation goes as far as consultation is a moot point. These discussions only involve the local government and not the trade community.

³²¹ Any member who is part of the board as established under s 12(2) of the *Mines and Minerals Act*.

³²² S 2 of the *Mines and Minerals Act*. Authorised officer means a public officer authorised by the Commissioner to exercise the functions under section 7.

³²³ S 2 of the *Mines and Minerals Act*. Commissioner means the Commissioner of Mines and Geology in the Ministry responsible for mining.

interest in any mineral.³²⁴ It also disqualifies such persons from holding any share or interest in a company that holds a mineral right.³²⁵ Public officers are only entrusted to act on behalf of the public,³²⁶ and they may not gain personally from the mining operations.

A person who wishes to attain a mining lease must apply to the board through the commissioner.³²⁷ Under section 17 of the Act and when the Minister,³²⁸ is satisfied that the conditions set out in section 33³²⁹ are met then he or she will issue such a lease.³³⁰

The 2005 Act, however, does not clearly stipulate whether the Minister at any stage can overrule a decision of another body. In the *Mining Rights Act* the Minister was bestowed with the power to make his or her own decisions.³³¹ However, the 2005 Act indicates that on advisory from the board, the Minister is conferred with the power to issue a mining lease or permit.³³²

This is an additional hurdle to prevent possible corruption or over-reliance on possible self-interest. The state acquires a 20% shareholding in any mine for which an authorisation is issued.³³³ The applicant shall be informed by the government through the Ministry of Natural Resources whether it is taking the shareholding in a proposed mine.³³⁴

³²⁴ S 8 (1)(a) of the *Mines and Minerals Act*.

³²⁵ S 8 (1)(b) of the *Mines and Minerals Act*.

³²⁶ IBP, Inc. *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* 54.

³²⁷ S 32 of the *Mines and Minerals Act*. This will be done by completing form C as specified in schedule I of the Act.

³²⁸ S 2 of the *Mines and Minerals Act*.

³²⁹ S 33(1) of the *Mines and Minerals Act*. "The Minister shall approve and issue a mining lease only if he is satisfied that- (a) the proposed work programme ensures the efficient, beneficial and timely use of the mineral resources in question; (b) the proposed mining area is not within or does not overlap with an existing mining area unless the holder of that mining lease consents to the grant of a mining lease, by completing a deed of transfer regarding the overlapping area; (c) The applicant had secured access to adequate financial resources, technical competence and experience to carry out effective mining operations; (d) the proposed financing plan is in accordance with good financial practice; (e) in the case of an application to mine diamonds, an agreement has been reached following a negotiation under section 44 (this is explained in the following paragraphs); (f) the applicant is not in default; or (g) the applicant has obtained an environmental impact assessment license from the Authority."

³³⁰ S 33 of the *Mines and Minerals Act*.

³³¹ S 5 of the *Mining Rights Act*; see also Para 3.2.2 above.

³³² S 17 of the *Mines and Minerals Act*.

³³³ S 34(1) of the *Mines and Minerals Act*.

³³⁴ S 34(2) of the *Mines and Minerals Act*.

Where an applicant applies for a lease to mine diamonds, section 44 stipulates that the terms of participation are agreed upon between the government through the Ministry of Natural Resources and the applicant.³³⁵ There are no clear guidelines on what should be taken into consideration in coming to that decision.³³⁶ This implies that the level of transparency in these agreements or the openness that allows the citizens and communities to fully participate in these agreements are very limited.

The Act appears to protect the interests of the public or land owners in that they must be consulted when certain operations take place.³³⁷ The Act therefore restricts the holder of a mining right or prospecting right to exercise any right without the written consent of the owner or lawful occupier.³³⁸ This is so, because such land may be used for agricultural purposes or for cultural activities of the community. If there are any disturbances made on the land of the land owner or land occupier, he or she is to be compensated for such disturbances.³³⁹

The Act criminalises ASM without a licence.³⁴⁰ A person who wishes to conduct small-scale mining operations must apply for a mineral permit to conduct such operation for any mineral other than diamonds over an area not exceeding 100 m².³⁴¹ Makhetha³⁴² avers that the Act has underplayed the role of ASM. She maintains that section 3 of the Act vests ownership of minerals in the Basotho nation yet the reality is that the set requirements to acquire a mining licence or start a company are beyond the reach of

³³⁵ S 44(1) of the *Mines and Minerals Act*. "Notwithstanding the provisions of the Act, the Board shall initiate negotiations with the applicant, in good faith, on an application for the issue, renewal, transfer or amendment of a mineral concession (mineral concession or agreement means a prospecting license, mining lease or mineral permit) for diamonds, covering all technical, financial and commercial aspects of the proposed project, including the Government participation."

³³⁶ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57, When Bloomberg news reported in September 2008, that Lets'eng Mine had discovered the world's twentieth largest diamond, "the Lesotho promise," some people criticised the Lesotho government for having acquired a small stake in the Lets'eng Diamond Mine, and said that a lot of the money that would be realised from the sale of that diamond would go to the foreign investor company, largely South Africa; See the Introduction in Chapter 1.

³³⁷ S 54 of the *Mines and Minerals Act*.

³³⁸ S 54(1)(d) of the *Mines and Minerals Act*.

³³⁹ S 56 of the *Mines and Minerals Act*.

³⁴⁰ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

³⁴¹ S 46(1) of the *Mines and Minerals Act*.

³⁴² Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

most ordinary Basotho; instead they favour larger diamond mining companies and even more so only where diamonds are concerned.³⁴³

The Act has been criticised for not promoting transparency in the mining sector especially within the diamond mining sector. As mentioned earlier, Makhetha³⁴⁴ opines that section 3 allows Basotho to start mining companies, but the reality is that the set requirements to acquire a mining licence and to start a company are not what most Basotho can attain to achieve.³⁴⁵ The Act is said to have failed to remove the barriers to entry of many Basotho to the diamond sector despite its rhetoric that ownership of minerals is vested in the Basotho nation.³⁴⁶

Arguably, the arrangement favours foreign commercial mining companies at the expense of locals despite its emphasis on local ownership of minerals.³⁴⁷ Mophethe³⁴⁸ opines that the Act is ambiguous. As noted above, there is no clarity relating to the terms agreed upon between the applicant and the government.³⁴⁹ It is not clear as to what terms are being negotiated with the applicant.³⁵⁰ The Act only stipulates that when the negotiations initiated by the board with an applicant are successful the Minister on advisory from the board shall issue a lease and an agreement that reflect the terms and conditions agreed upon.³⁵¹

The communities also do not participate in determining the compensation for the use of land.³⁵² There is no indication that a community should provide opinions as to how they should benefit from the mining developments or share in the profits of the mine.³⁵³ Unlike South Africa where companies are required to contribute to the development and social welfare of communities, Lesotho law is silent on how investors should contribute to

³⁴³ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153; Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

³⁴⁴ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

³⁴⁵ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

³⁴⁶ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

³⁴⁷ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 153.

³⁴⁸ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

³⁴⁹ Ss 34(3) and 44 of the *Mines and Minerals Act*.

³⁵⁰ As discussed earlier in this section.

³⁵¹ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

³⁵² Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57.

³⁵³ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57; see also S 56 of the *Mines and Minerals Act*.

developmental aspects of affected communities.³⁵⁴ In addition to this, investors take advantage of exploiting the mineral resources of the country to get rich at the expense of poor communities.³⁵⁵

The next paragraph discusses the Precious Stones (Kimberley Process) Regulations 2003³⁵⁶ and the Precious Stones (Diamond Dealer's License Grant and Renewals) Regulations of 2004 that were enacted to give effect to the KPCS.³⁵⁷

3.3 Advancing transparency regulation through the KPCS in Lesotho

In its preamble, the KPCS recognises that the trade in conflict diamonds is a matter of serious international concern.³⁵⁸ The KPCS has been discussed in detail in Chapter 2.³⁵⁹ This section explores how the introduction of the KPCS affected the Lesotho diamond mining sector.

The intention of the government to join the KPCS was to ensure that Lesotho's legally mined diamonds are sold on the international markets.³⁶⁰ The 2003 and 2004 Regulations regulate the importation of rough diamonds into Lesotho, as well as the exportation of rough diamonds from Lesotho, in accordance with the KPCS. The next part discusses Lesotho's compliance and non-compliance with the KPCS, and refers to the *Mining Minerals Act*, as well as the 2003 and 2004 Regulations.

³⁵⁴ Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" 48-57. In Lesotho, the government does not enforce the provisions of the mining legislation in that it does not investigate damage caused by mining operations around the community, as these communities' form part of the mining area.

³⁵⁵ MNN Centre for Investigative Journalism *Daily Maverick* 1. The MNN Centre for Investigative Journalism give a perfect scenario in Kolo. They reported that because of the operations at the Reskol diamond mine in Kolo, one of the community members, Mamokoena Bulane averred that it is just a matter of time before her two fractured houses collapsed. She held that she was caught in between two mining companies that either would or could not accept responsibility. Furthermore, the government did not seem to care about solving the problem.

³⁵⁶ Legal Notice No 66 of 2003 (hereafter the 2003 regulations).

³⁵⁷ Legal Notice No 160 of 2004 (hereafter the 2004 regulations).

³⁵⁸ Para 2.3.1.2 of chapter 2; see also Shaik-Peremanov 2014 *PELJ* 330.

³⁵⁹ See Para. 2.3.1 of Chapter 2.

³⁶⁰ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 154.

3.3.1 Lesotho's compliance with the KPCS

To ensure that Lesotho's diamonds are traded conflict free, the government of Lesotho needs to comply with the KPCS's mandate and the minimum requirements set out in the KPCS core document.³⁶¹ In doing this, the legislation in Lesotho is weighed against the principles laid down in the KPCS core document.

In the light of what has already been stipulated in Chapter 2, the KPCS core document requires that each participant should establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipment of rough diamonds imported and exported from its territory and Lesotho is no exception.³⁶² Lesotho is also required to also amend, enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions.³⁶³

As mentioned above, the *Mines and Minerals Act* is an important piece of legislation in advancing transparency in the diamond mining sector in Lesotho.³⁶⁴ It contains legal provisions that may be interpreted as intended to promote transparency in the diamond sector in Lesotho. It is an offence to omit or give misleading information in an application to attain a mineral right.³⁶⁵ This upholds transparency in the diamond sector because it hinders any mining company or dealer of diamonds to exploit the minerals or diamonds of the Basotho nation.

It is also an offence to mingle with any sample of ore, or any substance to enhance its value or in any way to change the nature of such ore with the intention to cheat, deceive or to defraud.³⁶⁶ Such illegal actions may impede the implementation of the KPCS. This is so because diamonds are not labelled, and they trade in the informal market.³⁶⁷

³⁶¹ See Para 2.3.1.2 of Chapter 2.

³⁶² See Para 2.3.1 of Chapter 2.

³⁶³ See Para 2.3.1 of Chapter 2.

³⁶⁴ See Para 3.2.3 above.

³⁶⁵ S 73(g) of the *Mineral and Mines Act*.

³⁶⁶ S 73(n) of the *Mineral and Mines Act*.

³⁶⁷ See Para 2.3.1.2 of Chapter 2.

Annexure II of the KPCS's recommendations provided for in section IV (f) makes mention that participants are encouraged to ensure that all diamond mines are licenced and to allow only those mines so licenced to mine diamonds.³⁶⁸ Section 44 of the *Mines and Minerals Act* also provides for a mining lease for diamonds and indicates how such a lease is negotiated between the government and the applicant.³⁶⁹

The KPCS core document state that all artisanal and informal miners must be encouraged to be licenced and only those persons so licenced must be encouraged to be allowed to mine diamonds.³⁷⁰ Although not elaborated in the *Mines and Minerals Act*, a person who wishes to conduct small-scale mining operations must apply for a mineral permit to conduct such operation for any mineral other than diamonds over an area not exceeding 100 m².³⁷¹

Lesotho's 2003 and 2004 Regulations enhance the provisions of the KPCS set down in Annexure II.³⁷² Rough diamonds imported into Lesotho, must be:

- a) From a country that is a participant in the Kimberley Process;³⁷³
- b) On condition that the exporting country has a Kimberley Process Certificate for these rough diamonds;³⁷⁴
- c) Done only if the original Kimberley Process Certificate is produced to a
 - Customs authority in accordance with custom laws; and the
 - Commissioner of Mines and Geology at the time of importation;³⁷⁵
- d) Imported in a tamper resistant container.³⁷⁶

The 2003 Regulations regulate that rough diamonds exported out of Lesotho, must be:

- a) In accordance with the Kimberley Process Certification Scheme,
- b) In respect of a country that is a participant in the Kimberley Process; and

³⁶⁸ Para 7 of Annexure II KPCS 2003.

³⁶⁹ See Para 3.2.3 above.

³⁷⁰ Para 9 of Annexure II KPCS 2003.

³⁷¹ See Para 3.2.3 above; S 46(1) of the *Mines and Minerals Act*.

³⁷² Para 15,16,17,18 & 19 of Annexure II KPCS 2003.

³⁷³ Reg 6(a) of the 2003 Regulations.

³⁷⁴ Reg 6(b) of the 2003 Regulations.

³⁷⁵ Reg 6(c)(i)(ii) of the 2003 Regulations.

³⁷⁶ Reg 6(d) of the 2003 Regulations.

- c) In addition to the export permit, all exported rough diamonds shall be accompanied by the Lesotho Government Kimberley Process Certificate.

The PCEO³⁷⁷ does not specifically state offences committed in the trade of conflict diamonds or where one is found in possession of rough diamonds with the intention to sell.³⁷⁸ However, where suspected corruption is reported to the Director of Corruption and Economic Offences; on his or her discretion, the director may refer the matter for prosecution.³⁷⁹

Where it is proved that the accused offered or accepted a benefit, the benefit shall be presumed to have been offered and accepted as such inducement or reward, as is alleged in the particulars of offences unless the contrary is proved.³⁸⁰ The stated clauses in the PCEO advocates for transparency where public officials abuse the power in governance even with agreements in the mining sector.

3.3.1.1 Non-compliance with the KPCS

Despite the above-mentioned provisions in the Lesotho mining legislation that seem to promote transparency, there are certain aspects of transparency in the KPCS³⁸¹ that are not included in Lesotho's legislation.

There is, for example no provision in the mining legislation that elaborates clearly on how Lesotho's diamonds should be traded legitimately.³⁸² To promote the scope for transparency in terms of access to information for members of the public, the legislation does provide for this. How the revenues and royalties are utilised is not mentioned or made known to the public.

The legislation does not also provide for an investigation of the applicants or mining companies before they are issued with a licence or permit as a way of checking their

³⁷⁷ See amendment to the Act in Para 3.4.1 below.

³⁷⁸ See Para 3.2.4.1 above.

³⁷⁹ S 43 of the PCEO 5 of 1999.

³⁸⁰ S 45 of the PCEO 5 of 1999.

³⁸¹ See Para 2.2 of Chapter 2.

³⁸² Para 8 of Annexure II KPCS 2003.

background or credentials. Ndlovu ³⁸³ contends that this may open the system to unethical diamond dealers and other criminals that may have been involved in illegal acts that are against the KPCS minimum requirements in Lesotho or other countries.

In ensuring that its system of internal controls meets the requirements of the KPCS the legislation of Lesotho must contain provisions that show the importing and exporting authority's records in a structured manner with all details of rough diamonds shipments. This will eliminate any ambiguities in the information shared between participants, and determine what is lacking in the internal controls of a country.

3.4 Developments post-2005

Although the 2005 *Mines and Minerals Act* contained loopholes in its provisions, the government of Lesotho took further steps to ensure that transparency is advanced in the country, especially in the regulation of the minerals. The government implemented the *Prevention of Corruption and Economic Offences (Amendment) Act*, the *Draft Mining and Minerals Policy*, and the *Minerals and Mining Bill*.

3.4.1 Prevention of Corruption and Economic Offences (Amendment) Act 63 of 2006

Accountability and transparency in Lesotho as mentioned in Chapter 1,³⁸⁴ are strengthened by legislation such as the *Prevention of Corruption and Economic Offences (Amendment) Act*, amending the PCEO. The Act does not specifically focus on corruption in the extractive sector, but it promotes transparency by stating the principle that public officials must be held accountable for all their actions that relate to corruption in governance.

The PCEO as amended, states that if any public officer embezzles, misappropriates or diverts for his or her benefit or for the benefit of another person, any property, public or private funds or anything entrusted to him or her by virtue of his or her position it will be deemed as an offence.³⁸⁵ A person commits the offence of corruption if he or she

³⁸³ Ndlovu *An analysis of the impact of the Kimberley Process Certification Scheme (KPCS) on national diamond regulation regimes: The case of Zimbabwe* 29.

³⁸⁴ See the Introduction in Chapter 1.

³⁸⁵ S 21(3)(a).

intentionally abuses the functions or position of his or her office in the performance or failure to execute an act, to act in violation of any law, or to discharge his or her functions for the purpose of obtaining an undue advantage for himself or herself or for another person.³⁸⁶

The PCEO provides for a clause that compels a public officer to make a full declaration of all assets belonging to him or her prior to his or her undertaking of office. It is expected that the declaration will be equivalent to his or her overall earnings and interests.³⁸⁷ The PCEO stipulates that where a public officer fails to make a full declaration and as a result, he or she is found blameworthy of any undisclosed assets, the assets shall be forfeited and disposed of as the Director-General may direct.³⁸⁸

The PCEO aims to curb corruption.³⁸⁹ The Act focuses on holding public officials accountable for bribery and illegal behaviour for private monetary gain.³⁹⁰ As noted above, it does not centre its principles around transparency in the extractive sector. The PCEO does not demand information disclosure of how revenues and royalties attained from the diamond sector are used and how they benefit the Basotho nation.

This creates a hurdle to prevent corruption in the extractive sector on information disclosure and public participation, as accountability ensures that the government adheres to the needs of their citizens and not only to the revenue sources that keep them in power.³⁹¹ Although the Director-General dealing with the mining sector has not yet reported any cases, the Act can be used to determine if someone privately benefit from

³⁸⁶ S 21(3)(b).

³⁸⁷ S 30A (1).

³⁸⁸ S 30A(4).The Director-General may require a public officer under investigation to make a full declaration of all assets belonging to him or her or the Director-General may on his or her discretion as it deems fit, appropriate the assets of the public officer without his or her consent: See *Mothejoa Metsing v Director General, Directorate on Corruption and Economic Offences* CC 11/14 2015 Para 71.

³⁸⁹ See Para 2.2.1 of chapter 2.

³⁹⁰ See Para 2.2.1 of chapter 2.

³⁹¹ See Para 2.2 of Chapter 2 in the discussion of the rationale of transparency in the extractive sector.

a contract involving the mining sector.³⁹² Many cases reported of corruption involving the mining sector, are those that are investigated through journalism.³⁹³

3.4.2 Draft Mining and Minerals Policy 2014

The government took measures for the optimal development of the sector. It created a conducive climate for change, by developing a *Draft Mining and Minerals Policy* that provides a strategic direction and strategies to manage the exploitation of the country's finite mineral resources.³⁹⁴ The *Draft Mining and Minerals Policy*, recognised stakeholder concerns namely that:

- a) Opportunities for transparent and accountable public consultation and participation in the governance of the minerals sector are limited.
- b) Excessive discretionary authority is vested in the Minister responsible for the sector and that,
- c) Information disclosure is restricted and subordinated to the protection of proprietary rights of holders of minerals rights.³⁹⁵

The Draft Mining and Minerals Policy further states that in its strategies to address the above concerns it will:

- a) Take steps that provide for open and accountable processes of governance,
- b) Limit the discretionary framework to specified grounds in the mining law,
- c) Provide access to information at all levels, and
- d) Provide for informed public participation and consultation including accession to all public participation international conventions such as the Protocol of Free Informed Consent which is particularly relevant to local communities in mining areas.³⁹⁶

Despite the Draft Policy's move in the direction to promote transparency in the extractive sector, the policy is often critiqued for not legalising ASM in Lesotho.³⁹⁷ Makhetha argues that the issuing of individual diamond diggers' licences ended in 2004 before the

³⁹² S 30A of the PCEO as amended. The Director-General will investigate any suspicious acts reported on corruption by a public officer.

³⁹³ See Para 3.2.3 above; see also MNN Center for Investigative Journalism *Daily Maverick* 1.

³⁹⁴ *Draft Mining and Minerals Policy* iii.

³⁹⁵ See Para 4.6 of *Draft Mining and Minerals Policy* 19.

³⁹⁶ See Para 4.6 of *Draft Mining and Minerals Policy* 20.

³⁹⁷ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification Lesotho* 154.

promulgation of the *Mines and Minerals Act*.³⁹⁸ This could be an obstacle, since most communities in Lesotho depend on ASM for their livelihood, and have limited participation in the sector.

However, the *Draft Mining and Minerals Policy* seems to tackle some of the hurdles that institute or lead to corruption in the extractive sector. The policy addresses the most important issue of information disclosure at all levels to the public and enough participation from local communities in mining areas. It seeks to strike a balance between public and private interests in the diamond mining sector and that all decisions relating to the sector must benefit both the government and its citizens.³⁹⁹

3.4.3 Minerals and Mining Bill

The reformation in the Lesotho mining sector legislation is gradual and does not respond positively to the demands that the mining sector should contribute to socio-economic development.⁴⁰⁰ The proposed *Minerals and Minerals Bill* was passed in 2017 and it is currently at the second stakeholder consultation stage.⁴⁰¹

The Bill proposes certain provisions that can advance transparency regulation in the mining sector.⁴⁰² It also describes the Basotho nation as a whole and, how communities around the mining area may become involved in the mining sector. The Bill stipulates that the Minister shall ensure in the public interest and on behalf of the people of Lesotho, that the mineral resources of Lesotho are extracted, processed and marketed in the most

³⁹⁸ Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* 154.

³⁹⁹ It should be noted that the *Draft Mining and Minerals Policy of 2014* was never followed up by a "final" Policy. For further reading see, UNECA 2015 *Lesotho Launches New Mining Policy* <http://www.uneca.org> accessed 05 September 2018.

⁴⁰⁰ Mahlo 2017 *Lesotho's Mining Legal Reforms are in Progress* available at <http://www.lesothotradeportal.org.ls> accessed 25 April 2018. This means that the eight Millennium Developmental Goals with measurable targets and clear deadlines for improving the lives of the world's poorest people, in Lesotho are achieved at a lower rate as a result of the old mining legislation used.

⁴⁰¹ Mpaki *Lesotho Times* 1. It should be noted that the Bill has not been promulgated as an Act by October 2018.

⁴⁰² Mpaki *Lesotho Times* 1.

efficient, responsible, equitable, optimal, sustainable and globally competitive manner, to the benefit of the nation.⁴⁰³

The Bill accommodates ASM, which was not mentioned in the Draft Policy. The Bill states that the minister in consultation with the local government authorities may designate, set aside, or recognise areas for mining by persons holding artisanal mining permits.⁴⁰⁴ Only citizens of Lesotho can apply for an artisanal mining permit.⁴⁰⁵ A holder shall be permitted to carry out operations within the permit area and according to the conditions of the permit.⁴⁰⁶

Before exporting diamonds outside Lesotho, a holder of a dealer's and marketing licence shall be required to submit the minerals to the Lesotho Diamond Centre (referred LDC) for assessment of their quality and to ensure compliance with various obligations including those contained in the KPCS,⁴⁰⁷ and shall apply for a certificate of compliance and a sale permit.⁴⁰⁸ The LDC, after being satisfied with standards and compliance to the obligations, shall apply for another certificate and permit for another round of sale.⁴⁰⁹ The certificate of compliance and the sale permit shall be valid for that round of sale only.⁴¹⁰ Lastly the sale shall be made through the LDC.⁴¹¹ These conditions are also encapsulated in clause 166 of the Bill for the importation of diamonds.⁴¹²

The Bill proposes that the Minister may create a forum of stakeholders in the mining sector, including representatives of villages or communities where mining takes place for purposes of carrying out a national dialogue about local content in the mining sector.⁴¹³ Clause 212(1) stipulates that through leadership, the communities or the said villages

⁴⁰³ Clause 6 of the Bill.

⁴⁰⁴ Clause 118 of the Bill.

⁴⁰⁵ Clause 122 of the Bill.

⁴⁰⁶ Clause 129(2) of the Bill.

⁴⁰⁷ See Para 2.3.1 of Chapter 2.

⁴⁰⁸ Clause 155(1)(a) of the Bill.

⁴⁰⁹ Clause 155(1)(b) of the Bill.

⁴¹⁰ Clause 155(1)(c) of the Bill. The applicant shall apply for another certificate and permit for another round of sale.

⁴¹¹ Clause 155(1)(d) of the Bill.

⁴¹² Clause 166(1)(a), (b), (c) and (d) of the Bill.

⁴¹³ Clause 215 of the Bill.

shall be given the opportunity to discuss amongst themselves and agree on issues like funding or any related issue relating to the mining operation.⁴¹⁴

The government, through the National Mining Corporation (hereafter NMC), will have a right to hold shares to the minimum of 25% and to have a free carried interest in respect of those shares on any mineral mining venture, except in the case of ASM ventures.⁴¹⁵

A foreign mining company shall be encouraged to issue participating shares to local mining companies.⁴¹⁶ The local mining company shall hold participating shares of at least ten per cent (10%).⁴¹⁷ The NMC established under the Bill will provide capital guarantees to local companies that enter into participation arrangements in accordance with the provisions of this Bill.⁴¹⁸ The Bill forces the government to focus on the fiscal regime that ensures a fair share of economic benefits to the public.

All officers of the Ministry, the mining board, the Mining Authority, the LDC, the Geological Survey Agency of Lesotho, the NMC, the District Mining Offices and any other public officer involved in any way in the mining sector, may not hold any interests in the mining industry in Lesotho, including mineral rights.⁴¹⁹

The Bill proposes that all government institutions and public corporations, and all companies involved in the mining sector, as well as all stakeholders in the mining sector, shall uphold the highest standards of transparency and accountability in all activities relating to the mining sector.⁴²⁰ The Bill stipulates that any company or individual holding any type of mineral rights as the case may be shall ensure that it does not engage in any type of corruption or corrupt practices in any way.⁴²¹ Such a company or individual is required to maintain the highest level of transparency in its or his or her activities.⁴²²

⁴¹⁴ Clause 212(1) of the Bill.
⁴¹⁵ Clause 64 of the Bill.
⁴¹⁶ Clause 202 of the Bill.
⁴¹⁷ Clause 202(1) of the Bill.
⁴¹⁸ Clause 202(3) of the Bill.
⁴¹⁹ Clause 231(1) of the Bill.
⁴²⁰ Clause 233(1) of the Bill.
⁴²¹ Clause 234(1) of the Bill.
⁴²² Clause 234(3) of the Bill.

Letuka critiqued the Bill in that the government still think, and wrongly so, that it is only foreigners who are conversant with mining.⁴²³ He avers that the Basotho are still sidelined because foreign companies have start-up finance or capital.⁴²⁴ If the Bill is serious to include Basotho individuals to participate in the mining, the provisions must not minimise or limit their potential to extract or sell the minerals as equivalent to foreign investors.⁴²⁵

However, the criticism does not mean that the proposed Bill in Lesotho will be ineffective. The developments post-2005 means that Lesotho is stepping forward in advancing transparency regulation in the mining sector especially the diamond mining sector. Review and implementation of the new mining legislation is vital, especially in areas of the legality of ASM, illegal trade of diamonds, clarity in the mining approvals and the terms of the mining agreements, proper consultation with the local communities and information disclosure of revenues and royalties.

3.5 Advancing transparency regulation through the EITI in Lesotho

When the EITI was initiated its intention was to be adopted by resource-rich states, even though it was a foreign initiative.⁴²⁶ The EITI's rules focus mostly on the revenue collection into an international standard that covers a wider governance of the extractive sector.⁴²⁷ In the light of what has already been mentioned, it should be noted that Lesotho is not a member of the EITI.⁴²⁸

This is an opportunity for the government of Lesotho, since its main produce is diamonds, to enhance transparency. As already stated in Chapter 2, the EITI requires that there must be effective multi-stakeholder oversight that includes a functioning multi-stakeholder group that involves the government, companies and full, independent active and effective participation of civil society.⁴²⁹ The mining legislation of Lesotho does not

⁴²³ Mpaki *Lesotho Times* 2.

⁴²⁴ Mpaki *Lesotho Times* 2.

⁴²⁵ Mpaki *Lesotho Times* 2.

⁴²⁶ See Para 2.3.2.2 of Chapter 2.

⁴²⁷ See Para 2.3.2.1 of Chapter 2.

⁴²⁸ See Introduction in Chapter 1.

⁴²⁹ Para 2.3.2.2 of Chapter 2.

provide an instance where all three stakeholders are involved and engaged effectively. The Bill of Lesotho, however, proposes that the Minister may create a forum of stakeholders in the mining sector, including representatives of villages or communities where mining takes place for purposes of carrying out a national dialogue about local content in the mining sector.⁴³⁰

The EITI requires that the rules of management of the extractive sector must be disclosed to all stakeholders. The stakeholders must understand the laws and procedures for the award of exploration and production rights.⁴³¹ The Lesotho Draft Policy ⁴³² suggests that information must be provided at all levels in order to promote transparency. The Bill proposes that all government institutions and public corporations and all companies involved in the mining sector shall uphold the highest standards of transparency and accountability in relation to the mining sector.⁴³³

The EITI also demands that information disclosure related to exploration and production should enable all stakeholders to understand the potential of the sector. This is not provided for in the Lesotho mining legislation. The EITI necessitates that the public should be informed about company payments and government revenues attained from the extractive sector.⁴³⁴ The mining legislation in Lesotho still does not make provision that revenues and payments can be disclosed to the public.

Subsequent to this, the EITI demands that all stakeholders must understand revenue allocation and revenue management to enable them to evaluate whether the extractive sector is leading to a desirable social economic impacts outcome.⁴³⁵ The mining legislation in Lesotho does not accommodate this.

In light of the EITI requirements discussed above and weighing the Lesotho mining legislation on transparency in the diamond mining sector, it is advisable that Lesotho must consider joining the EITI. This will enable Lesotho government to have a more

⁴³⁰ Clause 212 and 215 of the Bill.

⁴³¹ Para 2.3.2.2 of Chapter 2.

⁴³² See Para 3.4.2 of Chapter 3.

⁴³³ Clause 233(1) of the Bill.

⁴³⁴ See Para 2.3.2.2 of Chapter 2.

⁴³⁵ See Para 2.3.2.2 of Chapter 2.

interactive governance between its citizens and the mining companies, which opens dialogue about natural resources. This will also hold government officials accountable to respond to grievances from the citizens that may arise in relation to the exploration, allocation of rights or contracts, production and trade, failure to disclose information, payments and revenues from the extractive sector.

It remains a challenge for citizens to be involved in the mining sector or to access any information relating to the mining sector, as Lesotho does not have a dedicated right or legislation providing a right of access to information. This means that information relating to the exploration, production and trade of diamonds, payments and revenues from the extractive sector remains a conundrum. As a result, the possibility of having an effective multi-stakeholder oversight is rare in Lesotho. The PCEO, however, makes mention of how the citizens can be involved in governance by reporting or requesting information that must be availed, if there is any suspected corruption.

3.6 Advancing transparency regulation through the OGP in Lesotho

Lesotho is also not a member of the OGP.⁴³⁶ The OGP aims to secure concrete commitments from government to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.⁴³⁷ Although its provisions do not directly focus on the extractive sector, it is an international initiative that motivates the promotion of transparency in governance.

The OGP creates a platform where high level political leaders create a political space at the domestic level for reformers to implement open government initiative. It encourages participants to promote greater transparency at the international level.⁴³⁸ Lesotho's *Minerals and Mining Bill* as discussed above,⁴³⁹ proposes that transparency and accountability should be upheld within the mining sector.

⁴³⁶ See Introduction in Chapter 1.

⁴³⁷ Para 2.3.3.1 in Chapter 2.

⁴³⁸ Para 2.3.2.2 of Chapter 2.

⁴³⁹ Para 3.5 above.

Through its IRM, the OGP hold governments accountable for their commitments and allows stakeholders to track OGP progress in participating countries.⁴⁴⁰ Like the EITI, the OGP promotes open government by providing open dialogue between governments and its citizens. This brings civil society and governments together by driving credible action on open government reform through a unique consultation and assessment process.⁴⁴¹ The mining legislation of Lesotho also proposes in its Bill that there should be an open dialogue amongst all stakeholders.⁴⁴²

The OGP is based on the principle of the government and public sector's open government data.⁴⁴³ This proposition promotes government accountability and stronger democracy. It maintains that the success to achieve transparency results must consider an increase in citizen social control.⁴⁴⁴ Participation must go beyond the narrow circle of Civil Society Organisations (hereafter CSOs) that are currently involved in the OGP process, to include the locally based and smaller CSOs.⁴⁴⁵

The mining legislation in Lesotho does not provide a platform where CSOs can be involved in open government decisions, especially the smaller CSOs. The Bill however, proposes that the Minister may create a forum of stakeholders in the mining sector, including representatives of villages or communities where mining takes place for purposes of carrying out a national dialogue about local content in the mining sector.⁴⁴⁶

Taking consideration of the OGP requirements discussed above and weighing the Lesotho mining legislation on transparency in the diamond mining sector, it is also advisable that Lesotho must consider joining the OGP. This study deduces that if Lesotho becomes a member of the OGP, the citizens of Lesotho will be able to hold public officials accountable for their commitments through the OGP's IRM. This will also promote open dialogue between government and its citizens. Through information disclosure, the government

⁴⁴⁰ See Para 2.3.2.2 of Chapter 2.

⁴⁴¹ See Para 2.3.2.2 of Chapter 2.

⁴⁴² See Clause 212 and 215 of the Bill.

⁴⁴³ See Para 2.3.2.2 of Chapter 2.

⁴⁴⁴ See Para 2.3.2.2 of Chapter 2.

⁴⁴⁵ See Para 2.3.2.2 of Chapter 2.

⁴⁴⁶ Clause 215 of the Bill.

will earn more trust from the people. The OGP will include the marginalised communities in the rural areas to always be included in decision-making.

Insomuch as the mining legislation such as the *Minerals and Mining Bill* and the Draft Policy, addresses some of the major issues regarding transparency, Lesotho's mining legislation remains with gaps in promoting transparency.⁴⁴⁷ It is still a challenge for government to publish or give access to data in its possession. It remains a challenge also for the citizens to trust public officials in power because of the lack of citizen empowerment.

Thus, it is essential for the government of Lesotho to join the EITI and OGP in order to promote transparency in the extractive sector. This will enhance also the provisions of the mining legislation in Lesotho in relation to the management and regulation of diamonds. Lesotho is only a member of the KPCS initiative, which plays a major role in eliminating the trade of illicit diamonds in the international market.

The KPCS nevertheless needs aid in promoting transparency in the extractive sector in Lesotho, because there are some clauses that exist in the EITI but not in KPCS; such as the allocation and disclosure of revenues and payments made by mining companies. The KPCS also does not entail the manner in which the extractive sector should be managed, whereas the EITI contains such provisions. The KPCS does not provide for public official's accountability whereas the OGP makes such provision. However, the PCEO provides that public official's must be held accountable.⁴⁴⁸

3.7 Conclusion

The purpose of this chapter was to evaluate the diamond mining legislation in Lesotho that promotes transparency. It evaluated how mining rights are awarded to applicants that are interested in minerals in Lesotho, especially diamonds. It also reviewed the level of public participation in the diamond mining sector. By doing this, the chapter discussed

⁴⁴⁷ See Para 3.5 above.

⁴⁴⁸ See Para 3.4.1 above.

the previous position to the *Mines and Minerals Act*, where the extractive sector was regulated by the *Mining Rights Act*.⁴⁴⁹

The chapter also reviewed the implementation of the KPCS in Lesotho, by weighing the level of compliance and non-compliance of the legislation in Lesotho. Even though not a member to the EITI and OGP, the chapter briefly weighed the mining legislation of Lesotho against these initiatives. The chapter revealed that the mining legislation in Lesotho is not enough to promote full transparency in the mining sector. As a result, there is of lack of information disclosure regarding exploration and production rights, trade of minerals and payments and revenues attained from the diamond sector.

The ambiguity in the provisions of the mining legislation also hinders clarity as to who is responsible for certain duties in the sector, such as the allocation of mining rights. It is unclear to determine what the responsibility of the Minister is versus that of the mining board. The legislation also neglects to state exactly what the mining contracts or agreements between the government and mining companies stipulate, which as a result becomes a secret of who is awarded the mining rights or how the area will be mined. Lastly, the mining legislation does not comply with some of the provisions laid down in the KPCS, EITI and OGP as guidance to regulate the sector.

The following section discusses the position in South Africa, in order to draw lessons for Lesotho.

⁴⁴⁹ See Para 3.2.1 and 3.2.2 above.

4 Transparency regulation in the diamond sector in South Africa

This chapter examines the diamond mining framework in South Africa. The discussion in this chapter indicates legal measures that constitute transparency in the diamond sector in South Africa as illustrated through the KPCS and the OGP. The chapter measures transparency in South African law with the KPCS, OGP and the EITI, in order to draw lessons for Lesotho.

4.1 Transparency regulation framework in South Africa

This section reviews South African law that relates to the diamond sector and how diamonds are regulated.⁴⁵⁰

4.1.1 *Diamond Act 56 of 1986*

The *Diamond Act 56 of 1986* establishes a board known as the South African Diamond Board (hereafter SADB).⁴⁵¹ The SADB is responsible for control over the possession, the purchase and sale, the processing and the export of diamonds; amongst others.⁴⁵² The SADB's responsibility is to ensure that the diamond resources of the Republic are exploited and developed in the best interests of the country.⁴⁵³ The SADB also promotes the sound development of the diamond undertakings in the Republic.⁴⁵⁴

⁴⁵⁰ Ndlovu *Diamond Law* 137; also see Meiring 2012 *Acta Academia*. While historical injustices and moves towards humaneness and sustainability are borne in mind, the development of diamond law applicable today has to influence transparency in all aspects including the trade of diamonds in South Africa.

⁴⁵¹ S 5 of the *Diamond Act*. "The South African Diamond Board consists of one officer of the Department of Mineral and Energy Affairs, one officer of the Department of Finance nominated by the Minister of Finance, one member of the South African Police nominated by the Commissioner of the South African Police and other public officials from other departments. The other members include, one officer of the Department of Trade and Industry nominated by the Minister of Trade and Industry and Tourism, two people who either producers or in opinion of the Minister are capable of representing the producers, one person nominated by the Diamond Trading Company (Pty), one person nominated by an associations which in the opinion of the Minister represent dealers, one person nominated by an associations which in the opinion of the Minister represent cutters, one person nominated by the Jewellery Council of South Africa, the executive officer of the board; and so many other persons as the Minister may deem necessary and who in the opinion are able to assist the Board in achieving its objects."

⁴⁵² S 3 of the *Diamond Act 56 of 1986* (hereafter the *Diamond Act*).

⁴⁵³ S 4(a) of the *Diamond Act*.

⁴⁵⁴ S 4(b) of the *Diamond Act*.

Chapter III of the Act deals with illegal acts related to diamonds. The Act provides that no person is allowed to have any unpolished diamond in their possession unless he or she is a producer who has mined or recovered that diamond from a mine in accordance with any licence, permit, lease or other authority granted to him or her.⁴⁵⁵ A person is also allowed to be in possession of an unpolished synthetic diamond if he or she has manufactured it.⁴⁵⁶

A person will only be allowed to be in possession of an unpolished diamond if he or she is a licensee or,⁴⁵⁷ if he or she is the holder of a permit to mine that specific diamond.⁴⁵⁸ Otherwise he or she must have come into possession of that diamond in a lawful manner.⁴⁵⁹

The Act prohibits sale of unpolished diamonds. It stipulates that no person shall sell any unpolished diamonds unless:

- a) He is a producer;⁴⁶⁰
- b) He has manufactured that diamond, if it is a synthetic diamond;⁴⁶¹
- c) He is a dealer;⁴⁶² or
- d) He is a holder of a permit referred to in section 40(1) (a) and (2).⁴⁶³

No person shall export any unpolished diamond from the Republic unless:

- a) He is a producer;⁴⁶⁴
- b) He has manufactured that diamond, if it is a synthetic diamond;⁴⁶⁵

⁴⁵⁵ S 18(a) of the *Diamond Act*.

⁴⁵⁶ S 18(b) of the *Diamond Act*.

⁴⁵⁷ S 18(c) of the *Diamond Act*.

⁴⁵⁸ S 18(d) of the *Diamond Act*.

⁴⁵⁹ S 18(f) of the *Diamond Act*.

⁴⁶⁰ S 19(1)(a) of the *Diamond Act*.

⁴⁶¹ S 19(1)(b) of the *Diamond Act*.

⁴⁶² S 19(1)(c) of the *Diamond Act*.

⁴⁶³ S 19(1)(d) of the *Diamond Act*: See also s 40(1)(a) "Any person may apply to the Board in writing for a permit authorising him, subject to any condition contained in the permit: (a) to deliver or sell an unpolished diamond which he has lawfully in his possession, (2) Any producer may apply to the Board in writing for a permit authorising a natural person, subject to any condition contained in the permit, or sell unpolished diamonds on behalf of that producer."

⁴⁶⁴ S 24(1)(a) of the *Diamond Act*.

⁴⁶⁵ S 24(1)(b) of the *Diamond Act*.

c) He is a dealer;⁴⁶⁶ or

d) He is a holder of a permit referred to in section 40(1)(a) or (c) or (2).⁴⁶⁷

If any person who by chance finds or picks up any unpolished diamond at any place where he or she or his or her employer is not permitted to prospect, dig or mine for diamonds in terms of the then *Minerals Act* 51 of 1991,⁴⁶⁸ may take that diamond to the nearest police station and deliver it to any member of the South African Police on duty.⁴⁶⁹

If a Commissioner or member of the South African Police Services is satisfied that the diamond in question was found or picked up in the circumstances mentioned,⁴⁷⁰ they will pay to the person who so found or picked up that diamond an amount calculated at one-third of the amount realised at the sale in terms of subsection (3).⁴⁷¹

The Act prohibits the use of any premises as a diamond exchange,⁴⁷² unless those premises are registered as a diamond exchange in terms of the Act.⁴⁷³ Any person who desires to use premises as a diamond exchange shall apply to the Board in writing for the registration of those premises as a diamond exchange.⁴⁷⁴ The producer, manufacturer of synthetic diamonds, dealer or holder of a permit shall not sell any unpolished diamond

⁴⁶⁶ S 24(1)(c) of the *Diamond Act*.

⁴⁶⁷ S 24(1)(d) of the *Diamond Act*. See also s 40(1)(a), (c) and (2) "Any person may apply to the Board in writing for a permit authorising him, subject to any condition contained in the permit: (a) to deliver or sell an unpolished diamond which he has lawfully in his possession, (c) to export an unpolished diamond, or (2) Any producer may apply to the Board in writing for a permit authorising a natural person, subject to any condition contained in the permit, or sell unpolished diamonds on behalf of that producer."

⁴⁶⁸ This Act has been repealed by the MPRDA.

⁴⁶⁹ S 25(1) of the *Diamond Act*.

⁴⁷⁰ S 25(1)(b) states that a Commissioner or member of the South African Police Services if not satisfied that such a diamond was picked shall "...cause a notice to be published in the Gazette calling upon any person who may be the owner of that diamond or entitled to be in possession thereof to prove his ownership or right of possession."

⁴⁷¹ S 25(4) of the *Diamond Act*. The Act does not make mention as where the Commissioner or member of the South African Police Services takes the diamond after paying the person who picked it. Subsection (3) however only mentions that in the "...Instance where the diamond is delivered to the station and within 21 days of being published in the Gazette there is no owner to claim it, the diamond in question shall be sold and proceeds thereof shall be paid into the State Revenue Fund."

⁴⁷² See s 1 of the *Diamond Act*. A Diamond exchange is defined as "any premises upon which any person permitted in terms of this Act to sell or purchase an unpolished diamond and may sell or purchase the unpolished diamond."

⁴⁷³ S 44 of the *Diamond Act*.

⁴⁷⁴ S 45(1) of the *Diamond Act*.

elsewhere than on the premises of a licensee or premises registered as a diamond exchange in terms of this Act.⁴⁷⁵

No exporter is allowed to export any unpolished diamond from the Republic unless that diamond has been registered⁴⁷⁶ and released for export in terms of this Act.⁴⁷⁷ Once the value of the diamond is assessed,⁴⁷⁸ the person who assessed the value of an unpolished diamond shall furnish the registering officer with the certificate specifying the value of that diamond and the name of a person who is prepared to purchase that diamond at the value so specified.⁴⁷⁹ The registering officer may examine any unpolished diamond registered for export in terms of the Act, and verify any particulars furnished in respect thereof.⁴⁸⁰

The registering officer shall not release any unpolished diamond for export unless:

- a) That diamond was registered for export in terms of the Act;⁴⁸¹
- b) Either a certificate of exemption, a certificate of deferment or a receipt for payment of export duty has been issued to the exporter in respect of that diamond in terms of this Act;⁴⁸²
- c) The registering officer is satisfied that the provisions of any other law relating to the export of that diamond have been complied with;⁴⁸³ and
- d) That diamond has been made up in a packet in such a manner as the registering officer may determine.⁴⁸⁴

⁴⁷⁵ S 48(1)(a) and (b) of the *Diamond Act*.

⁴⁷⁶ See s 61 of the *Diamond Act*. "(1) Any exporter who desires to register any unpolished diamond for export shall at a prescribed export center furnish the registering officer with a return on the prescribed form in respect of that diamond, (2) In the return furnished in terms of subsection (1) the exporter shall specify the value of the unpolished diamond and declare that the value so specified is to the best of his knowledge and belief the fair market value of that diamond, (3) a return referred to in subsection (1) shall be accompanied by the unpolished diamond in question and the prescribed documents." See also reg 6A(1) of GN R7479 in GG 24008 of 1 November 2002(hereafter 2002 Regulations).

⁴⁷⁷ S 60(1) of the *Diamond Act*; see also reg 6A(5) of the 2002 Regulations.

⁴⁷⁸ S 65(1)(b) of the *Diamond Act*.

⁴⁷⁹ S 65(2) of the *Diamond Act*.

⁴⁸⁰ S 65(1)(a) of the *Diamond Act*.

⁴⁸¹ S 69(1)(a) of the *Diamond Act*.

⁴⁸² S 69(1)(b) of the *Diamond Act*.

⁴⁸³ S 69(1)(d) of the *Diamond Act*.

⁴⁸⁴ S 69(1)(e) of the *Diamond Act*.

The Minister has control over the production of diamonds. He or she may at any time on the recommendation of the board and by notice of the *Government Gazette* determine the maximum quantity in value of unpolished diamonds which may during the period specified in the notice be disposed of or exported by any producer or a producer specified.⁴⁸⁵

The Act promotes transparency in the diamond sector by prohibiting rough diamonds from entering the market, either locally or internationally.⁴⁸⁶ The Act shields diamonds extracted in the Republic to exit without being registered or evaluated.⁴⁸⁷ Unpolished diamonds shall not be exported outside the Republic unless such diamonds are packed in a manner that satisfies the registering officer.⁴⁸⁸

4.2 Advancing transparency regulation through the KPCS

This section reviews the implementation of the KPCS in the South African diamond laws. In this section, South African laws are measured against the provisions of the KPCS, in order to determine the level of compliance with the KPCS and to determine where the South African diamond law still lacks.

4.2.1 South Africa's compliance with the KPCS

South Africa played a leading role in the creation of the KPCS, joint governments, industry, and civil society to stem the flow of conflict diamonds.⁴⁸⁹ South Africa has taken ownership of the KPCS and is contributing to a global clean diamond trade.⁴⁹⁰ Through the *Diamond Act*, its amendments and its regulations, South Africa has contributed to the fight against trade in conflict diamonds.

⁴⁸⁵ S 77(1)(a) of the *Diamond Act*.

⁴⁸⁶ Take note that the *Diamond Act* has been amended by the *Diamond Amendment Act, 29 and 30 of 2005*. One of the reasons for the amendment was to introduce some of the state sectors like the State Diamond Trader which promotes equitable access to the local beneficiation of the Republic's diamonds.

⁴⁸⁷ See s 60(1) of the *Diamond Act*.

⁴⁸⁸ See reg 6A(2)(d) of the 2002 Regulations, which stipulates that "(d) the unpolished diamond must be placed in a tamper-resistant container." See also s 61 of the *Diamond Act*.

⁴⁸⁹ See para 2.3.1.1 in Chapter 2, the establishment of the KPCS.

⁴⁹⁰ Ndlovu *Diamond Law* 65.

Ndlovu ⁴⁹¹ avers that South Africa is a constitutional state that has achieved some success in keeping its natural resources from being used to fund internal conflict. The principles highlighted above in the South Africa's diamond legal regulatory system can prevent conflict diamonds getting into the legitimate trade system.⁴⁹² This means that the Republic is a step ahead in ensuring that the core values of accountability, good corporate governance, sufficient policing and reporting and transparency are upheld in order to eliminate opportunities of corruption.⁴⁹³

The KPCS requires participants to establish proper export and import regimes. The 2002 Regulations were amended in 2007.⁴⁹⁴ The 2007 Regulations stipulates methods that establishes a proper channel to export and import rough diamonds out of and into the Republic.⁴⁹⁵ The application for a permit entitling a person to sell, export or import unpolished diamond must contain:

- a) In the case of a natural person, the name, surname and identity number of the applicant; ⁴⁹⁶
- b) In the case of a company, close corporation, partnership or joint venture –
⁴⁹⁷
 - i. The name and registration number of the company, close corporation;
 - ii. The name and identity number of the managing director or member of the company close corporation, partnership or joint venture;
 - iii. The name and identity number of every director, and,
 - iv. Particulars of an interest held (%) in the juristic person and the name of the holder of the controlling interest;
- c) The source from which the unpolished diamond was acquired; ⁴⁹⁸
- d) The characteristics, mass and value of the unpolished diamond; ⁴⁹⁹

⁴⁹¹ Ndlovu *An analytical study of regulation of South African diamond trade* 74.

⁴⁹² Ndlovu *An analytical study of regulation of South African diamond trade* 74.

⁴⁹³ Ndlovu *An analytical study of regulation of South African diamond trade* 74.

⁴⁹⁴ GN R8713 in GG 30061 of 9 July 2007 (hereafter 2007 Regulations)

⁴⁹⁵ Reg 2V (1) 2007 Regulations.

⁴⁹⁶ Reg 2V (1)(a) 2007 Regulations; see para 4.3.1 below.

⁴⁹⁷ Reg 2V (1), (i), (ii), (iii) and (iv) 2007 Regulations; see para 4.3.1 below.

⁴⁹⁸ Reg 2V (1)(b) 2007 Regulations; see para 4.3.1 below.

⁴⁹⁹ Reg 2V (1)(c) 2007 Regulations; see para 4.3.1 below.

- e) In the case of an application being lodged for obtaining a permit to export, the reasons for not beneficiating such unpolished diamond;⁵⁰⁰
- f) Particulars of the target market and the market requirement in respect of that unpolished diamond;⁵⁰¹ and
- g) Particulars of any criminal record, if applicable.⁵⁰²

This enables the state to be informed of the person's identity, either exporting or importing, and the value of unpolished diamonds sold in a market. It allows buyers and sellers to be transparent in the transactions performed in the trade of the diamonds. The above-mentioned provisions also determine the target market that the diamonds should be sold into. This complies with the KPCS requirements set out in Chapter 2.⁵⁰³

The KPCS hinged on two forms of regulation: internal and external diamond control mechanisms. The internal control mechanism is the domestic regulation of diamond trading mainly by national laws such as the *Diamonds Act*.⁵⁰⁴ In terms of the principal Act the registering officer shall not release any unpolished diamond for export unless the prescribed certificate, which certifies that the unpolished diamond for export or import has been handled in a manner that meets the minimum requirements of the KPCS; and that the unpolished diamond has been made up in a parcel in such as the manner as the registering officer may determine.⁵⁰⁵

Participants of the KPCS are required also to submit statistics on their rough diamond trade and production in order to identify any possible trade in illicit production.⁵⁰⁶ South Africa comply with this provision, as discussed above,⁵⁰⁷ as the Minister monitors the quantity of unpolished diamonds extracted.

Ndlovu⁵⁰⁸ contends that the fact that the *Diamonds Act* prioritises equitable access to diamonds means that methods are incorporated in the Act to ensure that mining licences

⁵⁰⁰ Reg 2V(1)(d) 2007 Regulations; see para 4.3.1 below.

⁵⁰¹ Reg 2V(1)(e) 2007 Regulations; see para 4.3.1 below.

⁵⁰² Reg 2V (1)(f) 2007 Regulations; see para 4.3.1 below.

⁵⁰³ See Para 2.3.1 of Chapter 2; also see Annexure I attached in the study.

⁵⁰⁴ Ndlovu *Diamond Law* 75.

⁵⁰⁵ Ss 69(1)(e), (f) and 69B (1)(e), (f) of the *Diamond Act*.

⁵⁰⁶ S IV of the KPCS 2003.

⁵⁰⁷ See Para 4.2.1 above; also see S 77(1)(a) of the *Diamond Act*.

⁵⁰⁸ Ndlovu *Diamond Law* 75.

are distributed in a manner that will assist all South Africans who qualify to participate meaningfully in diamond production and trade.

4.2.2 *South Africa's non-compliance with the KPCS*

It is important to mention at this stage that concerning small-scale diamond mining or ASM as it is commonly known, the *Diamond Act* does not specifically mention the term small-scale mining in relation to diamonds.⁵⁰⁹ The KPCS demands that the participant states must encourage ASM miners to move into the formal economy.⁵¹⁰

Ledwaba⁵¹¹ argues that the key challenges facing the ASM sector in South Africa can be grouped into five main themes namely: access to mineral rights, access to capital, access to markets, technology and skills, and institutional support.⁵¹² South Africa's gap in complying with the KPCS is not huge. Most of the provisions or requirements that are laid down in the KPCS core document,⁵¹³ are incorporated in the South African diamond mining legislation.

In view of what has been discussed in this section, South Africa in comparison to Lesotho, is more compliant with the provisions of the KPCS. This does not mean that South Africa in its diamond regulation is necessarily without flaws. However, South Africa through its laws and regulations to meet the KPCS standard has and appears to practically deter the proliferation of conflict diamonds by insisting on strict compliance with the regulations of the KPCS.

The following section reviews the adherence of South African diamond mining legislation with the OGP. It also briefly discusses the non-compliance of the South African government in regard to the OGP requirements or provisions.

⁵⁰⁹ Ndlovu *Diamond Law* 75.

⁵¹⁰ See Para 2.3.1.2; see also the Preamble of the KPCS 2003.

⁵¹¹ Ledwaba 2017 *J S Afr Inst Min Metall* 34.

⁵¹² For further reading of the themes please see Ledwaba 2017 *J S Afr Inst Min Metall* 34.

⁵¹³ See Para 2.3.1 of Chapter 2.

4.3 Advancing transparency regulation through the OGP

This section reviews how the implementation of the OGP affected the South African diamond laws. In this section, South African laws are measured against the OGP, in order to determine the level of compliance and non-compliance with the OGP.

4.3.1 South Africa's compliance with the OGP

Whereas transparency and accountability are not new concepts, particularly in South Africa, their formalisation into the OGP has certainly gathered considerable momentum.⁵¹⁴ South Africa has been a founding member of the OGP since 2011,⁵¹⁵ and has successfully submitted three NAPs.⁵¹⁶ The steps followed in the preparation of South Africa's OGP third NAP involved an extensive participatory and consultative process that ensured that all stakeholders involved in the programme were active drivers of the process and owners of its end-product.⁵¹⁷ The OGP creates a platform where high level political leaders create a political space at the domestic level for reformers to implement open government initiatives and, at the international level, to encourage each other to promote greater transparency.⁵¹⁸

The *Constitution* enunciate the same principles as the OGP.⁵¹⁹ The Constitution stipulates that the principles under which the public service must operate are as follows:

- a) High standard of professional ethics.
- b) Public administration must be development oriented.

⁵¹⁴ The *3rd South African OGP NAP 2015-2017* 3: "Over the past decade, the global bilateral and multi-lateral system has been increasingly taking center stage in addressing the governance and development challenges facing humanity. In this regard South Africa is often called upon to cooperate with other nations in pushing back the frontiers of underdevelopment and human rights deprivation. This call for cooperation is made in the context of South Africa's own democratization experience which has been hailed as a good model for other emerging democracies to emulate. Within the latitude provided by this strategic recognition, and the democratic governance imperatives of the Constitution of the Republic, South Africa endorsed the Open Government Partnership (OGP). South Africa submitted the first NAP in 2011, and in 2013 it submitted a self-assessment report which looked at the progress on the implementation of the OGP domestically. The second NAP was submitted in 2013 and the third in 2015."

⁵¹⁵ See Para 2.3.3 of Chapter 2.

⁵¹⁶ See Para 2.3.3.1 of Chapter 2.

⁵¹⁷ The *3rd South African OGP NAP 2015-2017* 18.

⁵¹⁸ See Para 2.3.3.2 in Chapter 2.

⁵¹⁹ See s 195(1) of the *Constitution of the Republic of South Africa*.

- c) People's needs must be responded to and the public must be encouraged to participate in policy making.
- d) Public administration must be accountable.
- e) Transparency must be fostered by providing the public with truly, accessible and accurate information.⁵²⁰

Subsequent to this, the OGP promotes open government by ensuring that all activities in a state are for the satisfaction of the citizens.⁵²¹ The *Diamond Act* in this regard provides that the SADB's responsibility is to ensure that the diamond resources of the Republic are exploited and developed in the best interests of the country.⁵²² The SADB also promotes the sound development of the diamond undertakings in the Republic.⁵²³

4.3.2 South Africa's non-compliance with the OGP

Although South Africa is an active member of the OGP, there are still gaps that exists. The most obvious in South Africa is the lack of coordination of different departments in advancing open data.⁵²⁴ Razzano ⁵²⁵ argues that the problem with coordination in the public sector is that it is potentially complicated by the powerful social and political forces at play, which influence how specific groups coordinate.⁵²⁶ As a result to this, South

⁵²⁰ For further readings see OGP South Africa <http://www.ogp.gov.za> accessed 12 September 2018. South African government through its national legislation enacted the PAIA, which also promotes fundamental human rights encapsulated in the Constitution. The PAIA together with Constitution as mentioned in Chapter 1 fortify transparency and accountability. The PAIA also advocates for access of information held by the government to the citizens. However, PAIA's provisions does not focus much on the information relating to the extractive sector and for purposes of this mini-dissertation it will not be discussed.

⁵²¹ See Para 2.3.3.2 of chapter 2.

⁵²² See Para 4.1.1 above; S 4(a) of the *Diamond Act*.

⁵²³ See Para 4.1.1 above; S 4(b) of the *Diamond Act*.

⁵²⁴ Razzano 2016 *Open Democracy Advice Centre* 2. At its simplest, inter-departmental coordination aims to coordinate different agencies towards achieving common goals. "Looking at the current OGP environment for inter-departmental coordination, governments typically elect a lead agency to coordinate the OGP process, and individual lead agencies to implement specific commitments. Looking at South Africa as an example, the lead agency for the OGP is the Department of Public Services and Administration (DPSA). When a commitment is drafted in the required OGP template, other departments with which the lead agency will need to work with must be specified. In practice, however, this step does not aid coordination, given the cursory manner in which it is undertaken by drafters."

⁵²⁵ Razzano 2016 *Open Democracy Advice Centre* 8.

⁵²⁶ Razzano 2016 *Open Democracy Advice Centre* 8: "Many of the problems stem from the very nature or organizations themselves and have been rooted to be: Each agency seeks to preserve its autonomy and independence; Organizational routines and procedures are difficult to synchronize and coordinate; Organizational goals differ among collaborating agencies and Constituents bring different expectation and pressure to bear on each agency. However political leadership is needed

Africa's good open data at times is not possible because the departments that are supposed to provide the data cannot work together to generate and provide it.⁵²⁷

Subsequent to this, where there is lack of coordination between the government and the public sector, the purpose of the OGP which is to promote government accountability and transparency, will be defeated.⁵²⁸ This hurdle can also open possibilities of corruption by availing fabricated information to the public.

4.4 Advancing transparency regulation through the EITI

Although South Africa is not a member of the EITI,⁵²⁹ this section briefly reviews the South African diamond mining laws as measured against the EITI, in order to determine the level of compliance and non-compliance with the EITI.⁵³⁰

4.4.1 South Africa's compliance with the EITI

As already stated in Chapter 2, the EITI requires that there must there be disclosure of information related to exploration and production.⁵³¹ The CER⁵³² maintains that it is important that affected communities get involved as early as possible in a mining process and not wait for mining to start before taking action.

to drive cooperation in government, and also to provide authority for decision-making in coordination structures when they exist."

⁵²⁷ Razzano 2016 *Open Democracy Advice Centre* 10. "Open government data is not a 'rigid government IT specification,' but rather demands productive dialogue among data providers, users, and developers. In other words, the technical conundrum is also a human one; and open data portal will require very specific conversation, by very specific communities, in a coordinated matter."

⁵²⁸ See Para 2.3.3.2 of chapter 2.

⁵²⁹ See Introduction in chapter 1.

⁵³⁰ See Para 2.3.2 in chapter 2. The EITI focuses on the extractive sector in general and not only in the diamond mining sector.

⁵³¹ Para 2.3.2.2 of Chapter 2.

⁵³² CER 2013 "Mining and Your Community: Know Your Environmental Rights" <https://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> accessed 20 June 2018. This may mean taking action in response to an application for prospecting right.

The EITI also requires that all stakeholders must be engaged in dialogue about natural resources.⁵³³ In the light of the above-mentioned paragraph, by involving the community in the mining decisions South Africa is also fulfilling this requirement.⁵³⁴

South Africa also fulfils the EITI's requirement of disclosure of information of the extractive sector to a certain extent. Through the MPRDA, South Africa provides that there must be data or information regarding to the extractive sector that must be disclosed in order to give effect to the right of access to information contemplated in section 32 of the Constitution.⁵³⁵ This right, however, is limited to information or data supplied in confidence by the supplier of information or data.⁵³⁶

4.4.2 South Africa's non-compliance with the EITI

The EITI requires disclosure of information related to rules for how the extractive sector is managed.⁵³⁷ Although South Africa's legislation provides for disclosure of information,⁵³⁸ and is committed to initiatives such as the OGP⁵³⁹ to provide open data, the legislation still does not cater for full transparency in the extractive sector. However, South Africa's transparency legislation is extensive, and Lesotho can learn from it.

4.5 Conclusion

This section explored the *Diamonds Act* as part of the South African Republic's statutory effort and contribution to the fight against trade in conflict diamonds. This was done by considering some of the specific legal requirements in the diamond mining laws and regulations attached therein promoting transparency. It weighed the diamond mining

⁵³³ Para 2.3.2.2 of Chapter 2.

⁵³⁴ In this regard see s 10 (1) of the MPRDA, which connotes that all interested and all affected persons by the mining process, should submit their comments based on the granting of prospecting rights, mining rights and mining permits in respect of the land in question. It should be noted that this provision applies even to the prospecting and mining of diamonds.

⁵³⁵ See s 30(1)(b) of the MPRDA; see also Introduction in Chapter 1.

⁵³⁶ See s 30(2), (3) and (4) of the MPRDA.

⁵³⁷ See Para 2.3.2.2 of para chapter 2.

⁵³⁸ For further readings see OGP South Africa <http://www.ogp.gov.za> accessed 12 September 2018. South African government through its national legislation enacted the PAIA, which also promotes fundamental human rights encapsulated in the Constitution. The PAIA also advocates for access of information held by the government to the citizens. However, PAIA's provisions does not focus much on the information relating to the extractive sector.

⁵³⁹ See Para 4.3.1 above; see also PAIA and MPRDA.

legislation against the KPCS, OGP and the EITI.⁵⁴⁰ South Africa's legislation pertaining to access to information ensures that there is indeed transparency regulation in the Republic's diamond industry.

The purpose of this chapter was to propose learning points to the Lesotho diamond mining sector. The lessons can be summarised as follows: South Africa's SADB that is responsible to ensure that the diamond resources of the Republic are exploited and developed in the best interests of the country, may provide an example for Lesotho to establish a similar body.

The South African *Diamond Act* prohibits the use of any premises as a diamond exchange, unless those premises are registered as a diamond exchange in terms of the Act. Lesotho could consider to establish diamond exchange premises in order to prevent illegal dealings in diamonds.

The Minister in Lesotho must also have control over the production of diamonds. The *Diamonds Act* in South Africa prioritises equitable access to diamonds, in theory at least ensuring that mining licences are distributed in a manner to assist all South Africans who qualify to participate meaningfully in diamond production and trade. Lesotho could consider adopting a similar provision to enable the Basotho Nation to be involved in the mining sector. However, such measures should be realised in practice.

By being part of the OGP, South Africa has incorporated some of the principles of the OGP in its Constitution, which stipulates the manner in which a public service must operate to benefit the public. Lesotho can consider to become a member of the OGP or any similar initiative to advance open government in the country.

The EITI requires that there must be disclosure of information relating to exploration and production. In South Africa the CER maintains that it is important that affected communities get involved as early as possible in a mining process and not wait for mining

⁵⁴⁰ See Para 2.1 of chapter 2. On a brief overview as to how conflict diamond emerged and how countries struggled with the eradication of corruption concerning illicit diamonds, South Africa is an illustration of how important it is to enact laws that advance transparency in the diamond sector in order to eradicate the corruption that may emerge.

to start before taking action. The government of Lesotho, through its channels of environmental law protection must also put the affected communities' interests at the forefront, and should consider becoming a member of the EITI. South Africa is still not a member, however, it fulfils the EITI's requirement of disclosure of information of the extractive sector to a certain extent. The MPRDA requires that data or information regarding to the extractive sector must be disclosed in order to give effect to the right of access to information contemplated in section 32 of the Constitution. The Lesotho government could consider to incorporate in its mining legislation a provision that requires the disclosure of data and information of the extractive sector to the public.

5 Conclusion and recommendations

5.1 Conclusion

The aim of the study was to discuss the mining legislation in Lesotho in relation to transparency that enables local communities to participate in the diamond mining sector taking lessons from South Africa, in order to make recommendations for the *Minerals and Mining Bill*.

The mining legislation in Lesotho and South Africa is based on the premise that all natural resources in the country belong to the nation. Both these countries have Constitutions and a mining legislation framework that provide for the regulation of diamonds in the mining sector. The mining legislation in these two countries contain provisions and clauses that hinder any possible acts of corruption that may occur in the diamond mining sector.

Corruption for the purpose of this study was defined as a governance challenge whereby there is misuse of authority by a public official, through improper behaviour of corruptly receiving or giving of money or assets from the government for private gain, through rewards and the allocation of contracts or rights. Corruption is linked to governance in that good governance is sometimes seen as the absence of corruption.⁵⁴¹

The study indicated that corruption in the mining sector can only be eliminated when the laws that regulate the diamond mining sector are transparent. The purpose of transparency in the extractive sector is to build trust between the state and the public and to promote the accountability of the state entities and private sector to members of the public, who should be the actual beneficiaries of the states' natural resources.⁵⁴²

In light of the historical overview of corruption in Africa, there is a need for transparency.⁵⁴³ The need for transparency include, amongst others, the eradication of

⁵⁴¹ See Para 2.1.1 of Chapter 2.

⁵⁴² See Para 2.1.4 of chapter 2; see also Ako and Uddin "Good governance and resource management in Africa" 21-48; See also Para 2.1 above.

⁵⁴³ See Para 2.1 in Chapter 2.

corruption, good governance, democracy, public participation, accountability and transparency.

The study revealed that challenges the extractive industry faces in its regulation are various. Lack of transparency in the diamond mining sector occurs where mining approval decisions do not put the public interest at the forefront. TI framed seven questions to help identify where and how an approval regime is vulnerable. The first question is who benefits from the mining approval decisions? This question included decisions on whether to approve a particular mining project. The second question is how ethical and fair is the process for allocating land for mining? The third is how fair and transparent is the licencing processing? A fair and transparent licencing process has clear rules and an effective licencing authority, with a complete and accurate register of licences. The fourth is who gets the right to mine? The fifth is how accountable are companies for their environmental and social impacts? This means including communities in mining approval decisions that affect their environment. The sixth is where does the minerals go after extraction? The last is related to the sixth, does the country receive revenue?

Lack of transparency may occur where illicit diamonds are traded in, and outside of the country without proper procedures stipulated in a country's mining legislation.⁵⁴⁴ The Lesotho legislation does not necessarily comply with all of these questions.

The study used discussed three initiatives, namely the KPCS, EITI and the OGP as a benchmark to determine whether Lesotho's and South Africa's legislation comply with its measures and how they can be used to improve Lesotho's legislation. The initiatives have the following in common:

- They stipulate that it is essential for government officials to be held accountable to the ones governed, the citizens.
- They encourage open dialogue amongst all stakeholders, that being the government and its people.
- They encourage the significance of participation from all stakeholders in government especially the public.

⁵⁴⁴ See Para 2.2 of Chapter 2.

- They promote unity in the public-private sector by allowing both sectors to be open with one another.
- They encourage for transparency at all levels of governance.

The EITI in addition provides for the openness of revenues collected from the mining sector. It stipulates that there should be disclosure of information relating to exploration and production. It enables all stakeholders to understand the potential of the sector by engaging all stakeholders in dialogue about natural resources. The stakeholders must be informed about the outcomes and impact of natural resource revenue management. The EITI standard came into being as one of the practical steps to guide resource-rich countries out of the “resource curse.”⁵⁴⁵ Lesotho and South Africa are not participants of the EITI.

In addition, the KPCS provides for the elimination of illicit diamonds in the market area. All diamonds imported into and exported outside a country are required to be accompanied by the KPCS certificate. The Core Document of the KPCS also requires that each participant should establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipment of rough diamonds imported and exported from its territory. Information about relevant laws, regulations, rules, procedures and practices, should also be availed to other participants and it should be updated as required.⁵⁴⁶ Lesotho and South Africa are both participants of the KPCS.

The OGP’s provisions do not explicitly refer to the extractive sector, however, it states that government information should be availed to the public in general. The OGP also creates a podium where mid-level government officials collaborate with civil society organisations at the domestic level, and network with their peers at the international level to implement ambitious open government reforms.⁵⁴⁷ The OGP’s IRM⁵⁴⁸ holds governments accountable for their commitments and allows stakeholders to track OGP

⁵⁴⁵ See Para 2.3.1.2 of chapter 2.

⁵⁴⁶ See Para 2.3.1.2 of chapter 2.

⁵⁴⁷ See Para 4.3.1 of chapter 4, where the steps followed in the preparation of South Africa’s OGP third NAP involved an extensive participatory and consultative process that ensured that all stakeholders involved in the programme were active drivers of the process and owners of its end-product.

⁵⁴⁸ See Para 2.3.3.2 of Chapter 2.

progress in participating countries by producing thorough impartial reports that track progress of every NAP.⁵⁴⁹

The basic principles entailed in the mining sector to ensure that there is transparency in its regulation must be the openness in governance, this includes the managerial precepts that regulate the sector. There must be accountability of public officials, disclosure of information relating to the exploration and production of diamonds. There must also be background checks on the mining companies applying for mining rights to eliminate possible unethical trade of diamonds. There must be clear guidelines in the trade of illicit diamonds being imported into and exported outside of the country. This includes registration of diamonds before trade. There must be open data on the payments made by mining companies and revenues received by the government. There must be meaningful consultation of communities in the mining areas and effective public participation.⁵⁵⁰ There must also be implementation of international transparency initiatives such as the KPCS, EITI and the OGP.⁵⁵¹ Lesotho and South Africa's mining legislation respond to the transparency principles mentioned, although Lesotho as highlighted still falls short of some principles.⁵⁵²

Chapter three discussed the discrepancies in the mining legislation of Lesotho and the steps that have been taken by the government to amend the existing laws in the transparency regulation of diamonds. The chapter discussed the shortfalls in the legislation, that includes the fairness in the awarding of mining rights, unclear procedures followed in the trade of illicit diamonds, limited access to information regarding the sector, unestablished bodies of government that have to deal with the diamond sector on its own, putting the affected communities' interests at the forefront, adopting provisions that will enable the Basotho nation to be involved in the mining sector, and the prohibition of the use of any premises that exchange diamonds and lead to illegal dealings of diamonds.

⁵⁴⁹ See Para 2.3.3.2 of Chapter 2.

⁵⁵⁰ See Para 2.2 of chapter 2.

⁵⁵¹ See Para 2.3 of chapter 2.

⁵⁵² See Para 3.7 of chapter 3.

Chapter four explored the diamond mining legislation in South Africa, from the first implemented laws to the existing laws that are in place for the regulation of diamonds, to formulate learning points for Lesotho. The learning points as framed by Chapter 4 are as follows: Lesotho must have an established body that only focuses on the diamond industry. In order to avoid illegal dealings in diamonds the legislation of Lesotho must incorporate a provision that states the premises in which diamonds must be exchanged. The Minister in Lesotho must also have control over the production of diamonds. The legislation must prioritise equitable access to diamonds in Lesotho, to ensure that mining licences are distributed in a manner that will assist all the Basotho nation who qualify to participate meaningfully in diamond production and trade.

Lesotho must consider to become a member of the OGP or any initiative that will advance open government in the country. The government of Lesotho, through its channels of environmental law protection must also put the affected communities' interests at the forefront. The Lesotho government must also incorporate in its mining legislation a provision that demands the disclosure of data and information of the extractive sector to the public. These learning points from Chapter 4 are also encouraging transparency to be advanced at all means within the diamond mining sector.

5.2 Recommendations

Based on the measures of the KPCS, EITI and OGP, and the learning points from South Africa, it is recommended that Lesotho's legislation should expand its *Mineral and Mining Bill*, by:

- a) Stipulating comprehensively who has a right or entitlement of acquisition of mineral rights titles.⁵⁵³
- b) Stating whether the Minister of Minerals and Mines at any stage may overrule a decision of another body.⁵⁵⁴

⁵⁵³ See Para 3.2.3.

⁵⁵⁴ See Para 3.2.3.

- c) Include clauses that provide for openness in mining agreements between the government and the mining companies to enable communities to fully participate in the agreements.⁵⁵⁵
- d) Establish a body similar to the South African SADB to prevent illegal trade in diamonds.⁵⁵⁶
- e) Include an institutional and regulatory framework for ASM that would enhance economic democracy. This will ensure that ASM is not underplayed and would encourage artisanal miners to move towards legal mining.⁵⁵⁷
- f) Establish a provision on the diamond exchange premises.⁵⁵⁸
- g) Stating the requirements necessary to obtain a mining licence and to start a company which accommodates the Basotho nation, even those who are in the area where mines would be established.⁵⁵⁹
- h) Providing for a negotiation process regarding the mining process between the community, the mining companies and the government.⁵⁶⁰
- i) Providing clearly how Lesotho's diamonds should be traded legitimately to avoid unethical behaviour and illegal trade.⁵⁶¹
- j) Providing sections for information disclosure about the diamonds traded and this must include revenues and all payments made to the government due to the trade of diamonds.⁵⁶²

⁵⁵⁵ See Para 3.2.3.

⁵⁵⁶ See Para 4.5.

⁵⁵⁷ See Para 3.2.3.

⁵⁵⁸ See Para 4.5.

⁵⁵⁹ See Para 3.2.3.

⁵⁶⁰ See Para 2.2.3.

⁵⁶¹ See Para 3.3.1.1.

⁵⁶² See Para 3.4.1.

- k) Include transparency measures whereby mining companies must provide their backgrounds and credentials, and that this should be investigated before a mining licence or permit is issued.⁵⁶³
- l) Including internal controls to meet the requirements of the KPCS regarding transparency of the importing and exporting authority's records in a structured manner as well as the provision of all details of rough diamonds.⁵⁶⁴
- m) Including the EITI principle of providing for an effective multi-stakeholder oversight that includes a functioning multi-stakeholder group consisting of the government, companies and the full, independent, active and effective participation of civil society.⁵⁶⁵
- n) Including the EITI principle of information disclosure related to exploration and production to enable all stakeholders to understand the potential of the sector.⁵⁶⁶
- o) Including the EITI principle that enables all stakeholders to understand revenue allocation and revenue management to enable them to evaluate whether the extractive sector is leading to a desirable social economic impacts outcome.⁵⁶⁷
- p) Providing for the OGP principle that holds government accountable for their commitments in open governance.⁵⁶⁸
- q) Including the OGP principle that advocates for open data which will maintain success achievement of transparency results which will increase the citizen social control.⁵⁶⁹

⁵⁶³ See Para 3.3.1.1.

⁵⁶⁴ See Para 2.3.1.2.

⁵⁶⁵ See Para 2.3.2.2.

⁵⁶⁶ See Para 2.3.2.2.

⁵⁶⁷ See Para 2.3.2.2.

⁵⁶⁸ See Para 2.3.3.2.

⁵⁶⁹ See Para 2.3.3.2.

ANNEXURE I-KPCS CERTIFICATES

Certificates⁵⁷⁰

A. Minimum requirements for Certificates

A Certificate is to meet the following minimum requirements:

- Each Certificate should bear the title "Kimberley Process Certificate" and the following statement: "The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds."
- Country of origin for shipment of parcels of unmixed (i.e. from the same) origin.
- Certificates may be issued in any language, provided that an English translation is incorporated.
- Unique numbering with the alpha 2 country code, according to ISO 3166-1.
- Tamper and forgery resistant.
- Date of issuance.
- Date of expiry.
- Issuing authority.
- Identification of exporter and importer.
- Carat weight/mass.
- Value in US\$.
- Number of parcels in shipment.

⁵⁷⁰ See Para 2.3.1.2 of Chapter 2. As long as the requirements in Annexure I are met, participants to the KPCS may at their discretion establish additional characteristics for their own Certificates, for example, in relation to form, additional data or security elements. For purposes of validation, each participant should ensure that it notifies all other participants through the Chair of their features of its Certificate as specified in this Annexure.

- Relevant Harmonised Commodity Description and Coding System.
- Validation of Certificate by the Exporting Authority.

B. Optional Certificate Elements

A Certificate may include the following optional features:

- Characteristics of a Certificate (for example as to form, additional data or security elements).
- Quality characteristics of the rough diamonds in the shipment.
- A recommended import confirmation part should have the following elements:
 - Country of destination.
 - Identification of importer.
 - Carat/weight and value in US\$.
 - Relevant Harmonised Commodity Description and Coding System.
 - Date of receipt by Importing Authority.
 - Authentication by Importing Authority.

c. Optional Procedures

Rough diamonds may be shipped in transparent security bags. The unique Certificate number may be replicated on the container.

BIBLIOGRAPHY

Literature

Adam Mail and Guardian

Adam F "Break free from a corrupt mining sector" *Mail and Guardian* 22 April 2016

22

Adeleke and Humby Open Society Foundations for South Africa (OSF-SA)

Adeleke O and Humby T "The Promotion of Access to Information Act and Mining-Related Disclosure Practices in the Public and Private Sectors" (*Open Society Foundation for South Africa (OSF-SA)* 2016)

Ako and Uddin "Good governance and resource management in Africa"

Ako R and Uddin N "Good governance and resource management in Africa" in Botchway F (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar Cheltenham UK 2011) 21-48

Ataputtu "International Environmental Law and Soft Law: A New Direction or a Contradiction?"

Ataputtu S "International Environmental Law and Soft Law: A New Direction or a Contradiction?" in Bailliet C (ed) *Non-State, Soft Law and Protective Regimes: From the Margins* (Cambridge University Press Cambridge 2012) 200-226

Attard et al 2015 *Government Information Quarterly*

Attard J *et al* "A systematic review of open government data initiatives" 2015
Government Information Quarterly 399-418

Ball 2009 *Public Integrity*

Ball J "What is Transparency" 2009 *Public Integrity* 293-308

Blanco and Razzaque *Globalisation and Natural Resources Law: Challenges, Key Issues
and Perspectives*

Blanco E and Razzaque J *Globalisation and Natural Resources Law: Challenges,
Key Issues and Perspectives* (Edward Elgar Cheltenham 2011)

Botchway "Introduction"

Botchway F "Introduction" in Botchway F (ed) *Natural Resource Investment and
Africa's Development* (Edward Elgar Cheltenham 2011) 1-15

Bryan and Hofmann *Transparency and Accountability in Africa's Extractive Industries:
The Role of the Legislature*

Bryan S and Hofmann B *Transparency and Accountability in Africa's Extractive
Industries: The Role of the Legislature* (National Democratic Institute for
International Affairs (NDI) Washington DC 2007)

Budiardjo *et al* *The International Comparative Legal Guide to Mining Law*

Budiardjo A *et al* (eds) *The International Comparative Legal Guide to Mining Law*
4th ed (Global Legal Group London 2017)

Caripis 2017 *Transparency International*

Caripis L "Combatting Corruption in Mining Approvals" 2017 *Transparency International* 1-100

Chawani *Towards the adoption of the Extractive Industries Transparency Code and the Implications for Transparency in Malawi's Mining Sector*

Chawani C *Towards the adoption of the Extractive Industries Transparency Code and the Implications for Transparency in Malawi's Mining Sector* (LLM Dissertation University of Pretoria 2014)

Compaore' 2013 *SAIIA*

Compaore' N "Towards Understanding South Africa's Differing Attitudes to the Extractive Industries Transparency Initiative and Open Governance Partnership" 2013 *SAIIA* 1-13

Corrigan 2014 *Resources Policy*

Corrigan C "Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative" 2014 *Resources Policy* 17-30

Cullen 2013 *Macquarie Law Journal*

Cullen H "Is there a future for the Kimberley Process Certification Scheme for Conflict Diamonds?" 2013 *Macquarie Law Journal* 61-79

Davies and Bawa "The Promises and Perils of Open Government Data JCI"

<http://cijournal.net/index.php/ciej/article/view/929/926>

Davies T and Bawa Z "The Promises and Perils of Open Government Data JCI"

<http://cijournal.net/index.php/ciej/article/view/929/926> Accessed

12 February 2018

Dawes *et al* 2016 *Government Information Quarterly*

Dawes S *et al* "Planning and designing open government data programs: An ecosystem approach" 2016 *Government Information Quarterly* 15-27

Downing *Avoiding New Poverty: Mining-Induced Displaced and Resettlement*

Downing T *Avoiding New Poverty: Mining-Induced Displaced and Resettlement*
(International Institute for Environment and Development London UK 2002)

Duarte *Business Report*

Duarte J "Opinion: Is South Africa benefiting enough from extraction of its resources?" *Business Report* (18 September 2017) 1

Fjeldstad *et al Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa*

Fjeldstad O *et al* (eds) *Lifting the Veil of Secrecy: Perspectives on International Taxation and Capital Flight from Africa* (Chr. Michelsen Institute Bergen 2017)

Goldsmith 2007 *Governance: An International Journal of Policy, Administration, and Institutions*

Goldsmith A "Is Governance Reform a Catalyst for Development?" 2007
Governance: An International Journal of Policy, Administration, and Institutions
165-186

Guzman and Timothy 2010 *Journal of Legal Analysis*

Guzman A and Timothy L "International Soft Law" 2010 *Journal of Legal Analysis*
171-225.

Howard 2016 *Wash U Global Stud L Rev*

Howard A "Blood Diamonds: The Successes and Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe" 2016 *Wash U Global Stud L Rev* 137-159

Hale 2008 *Global Governance*

Hale T "Transparency, Accountability and Global Governance" 2008 *Global Governance* 73-94

Haufler 2010 *Massachusetts Institute of Technology Press Journal*

Haufler V "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World" 2010
Massachusetts Institute of Technology Press Journal 53-73

Johnston 1991 *Journal of Democracy*

Johnston M "Good Governance, Rule of Law, Transparency and Accountability" 1991
Journal of Democracy 48-60

Kabemba 2009 *SARW*

Kabemba C "Kimberley Process Certification Scheme: Compliance and Limitations in Southern Africa" 2008 *SARW* 1-16

Kanyeihamba *Kanyeihamba's Commentaries on Law, Politics and Governance*

Kanyeihamba G *Kanyeihamba's Commentaries on Law, Politics and Governance*
2nd ed (LawAfrica Uganda 2006)

Kolstad and Soreide 2009 *Resource Policy*

Kolstad I and Soreide T "Corruption in natural resource management: Implications for policy makers" 2009 *Resource Policy* 214-226

Kolstad and Wiig 2009 *World Development*

Kolstad I and Wiig A "Is Transparency the Key to Reduction Corruption in Resource-Rich Countries?" 2009 *World Development* 521-532

Kruger 2010 *PELJ*

Kruger R "The South African Constitutional Court and The Rule of Law: The Masethla Judgement, A Cause for Concern?" 2010 *PELJ* 468-508

Langseth "Prevention: An effective Tool to Reduce Corruption"

Langseth P "Prevention: An effective Tool to Reduce Corruption" Unpublished contribution at the Global Programme Against Corruption Conferences (December 1999 Vienna)

Ledwaba 2017 *J S Afr Inst Min Metall*

Ledwaba P "The status of artisanal and small-scale mining sector in South Africa: tracking progress" 2017 *J S Afr Inst Min Metall* 33-40

Lekomte *The Kimberley Process, a new actor on the conflict resolution scene?*

Lekomte V *The Kimberley Process, a new actor on the conflict resolution scene?*
(LLM dissertation Lund University 2014)

Makhetha *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho*

Makhetha E *Small Scale Artisanal Diamond Mining and Rural Livelihood Diversification in Lesotho* (PhD Thesis University of Pretoria 2016)

McFerson 2010 *International Studies Perspectives*

McFerson H "Extractive Industries and African Democracy: Can the 'resource curse' be exorcised?" 2010 *International Studies Perspectives* 11 335–35

Meiring 2012 *Acta Academia*

Meiring B "South African identity as reflected by its toponymic tapestry" 2012 *Acta Academia* 25-51

MNN Centre for Investigative Journalism *Daily Maverick*

MNN Centre for Investigative Journalism "Lesotho Mining: 'Endless broken promises' as families live with cracked houses" *Daily Maverick* (17 August 2017) 1

Monyane *The Kingdom of Lesotho: An Assessment of Problems in Democratic Consolidation*

Monyane C *The Kingdom of Lesotho: An Assessment of Problems in Democratic Consolidation* (LLD-dissertation Stellenbosch University 2009)

Mophethe "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho"

Mophethe K "Mining Laws and Regulations; Promoting or Hindering Mining in Lesotho" in IBP Inc *Lesotho Mining Laws and Regulations Handbook: Strategic Information and Basic Laws* (International Business Publications, Washington DC 2008) 48-57

Mpaki *Lesotho Times*

Mpaki B "Lesotho: Mining Bill Falls Short-Lawyer" *Lesotho Times* (12 January 2018)
1

Munemu *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo*

Munemu D *Assessing the effectiveness of the Kimberley Process in Zimbabwe and Democratic Republic of Congo* (Master in Arts in International Relations University of the Witwatersrand 2013)

Nabatchi *Public participation for 21st century democracy*

Nabatchi T *Public participation for 21st century democracy* (John Wiley New Jersey 2015)

Naicker *The use of soft law in international legal system in the context of global governance*

Naicker M *The use of soft law in international legal system in the context of global governance* (LLM Dissertation University of Pretoria 2013)

Newman *The Mineral Industries of Lesotho and Swaziland Minerals Yearbook Area Reports: International*

Newman H *The Mineral Industries of Lesotho and Swaziland Minerals Yearbook Area Reports: International* (United States Government Printing Office, Washington 2013)

Ndlovu *An analysis of the impact of the Kimberley Process Certification Scheme (KPCS) on national diamond regulation regimes: The case of Zimbabwe*

Ndlovu B *An analysis of the impact of the Kimberley Process Certification Scheme (KPCS) on national diamond regulation regimes: The case of Zimbabwe* (LLM Dissertation University of Pretoria 2017)

Ndlovu *Diamond Law*

Ndlovu P *Diamond Law* (Juta Cape Town 2012)

Oshionebo "Fiscal regimes for natural resource extraction: implications for Africa"

Oshionebo E "Fiscal regimes for natural resource extraction: implications for Africa" in Botchway F (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar Cheltenham 2011) 200-246

Pring "The public participation "revolution" in natural resources management: Joe Bloggs has a voice"

Pring G "The public participation "revolution" in natural resources management: Joe Bloggs has a voice" in Daya-Winterbottom T (ed) *Frontiers of Resource Management Law* (Brookers Wellington 2012) 349-367

Pring and Noe "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development"

Pring G and Noe S "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development" in Zillman D *et al* (eds) *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press New York 2002) 11-76

Razzano 2016 *Open Democracy Advice Centre*

Razzano G "The coordination challenge for the open government partnership in SA" 2016 *Open Democracy Advice Centre* 1-41

Rustad *et al* 2017 *Resources Policy*

Rustad S *et al* "Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals" 2017 *Resource Policy* 151-162

Santho "The Socio-economic and Political Impact of mining in Lesotho"

Santho S "The Socio-economic and Political Impact of mining in Lesotho" in *Lesotho Mineral, Mining Sector Investment and Business Guide; Strategic Information and Regulations*, (USA International Business Publications, USA Washington DC 2007)

Shaik-Peremanov 2014 *PELJ*

Shaik-Peremanov N "Ten Years on, The Kimberley Process Certification Scheme and Zimbabwe's Marange and Conflict Diamonds: Lessons to be learnt" 2014 *PELJ* 328-366

Smith and Rosenblum 2011 *Revenue Watch Institute*

Smith E and Rosenblum P "Government and Citizen Oversight of Mining: Enforcing the Rules" 2011 *Revenue Watch Institute* 1-76

Solomons *Mining Weekly* 1

Solomons I "Lesotho aiming to be major diamond producer in next few years" *Mining Weekly* (6th May 2016) 1

Sovacool *et al* 2016 *World Development*

Sovacool K *et al* "Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)" 2016 *World Development* 179–192

Talane *Corruption Watch* 1

Talane V "Little Efforts by SA to Prosecute Acts of Foreign Bribery" *Corruption Watch* (25 March 2014) 1

Thabane 2003 *J South Afr His*

Thabane M "Technical Skills, Technology and Innovation among Individual Diamond Diggers at the Letseng-la-Terae and Kao Diamond Mines of Lesotho, 1960–1970" 2003 *South Afr His* 147-161

Van der Plank *et al* 2016 *Resource Policy*

Van der Plank S *et al* "The expected impacts of mining: Stakeholders perceptions of a proposed mineral sands mine in rural Australia" 2016 *Resource Policy* 129-139

Van Straaten *Partners, not adversaries: Adopting the EITI toward effective collective governance to improve the extractive industry in South Africa*

Van Straaten T *Partners, not adversaries: Adopting the EITI toward effective collective governance to improve the extractive industry in South Africa* (LLM Dissertation University of Pretoria 2017)

Verma *Corruption and Human Rights*

Verma S *Corruption and Human Rights* (Venus Books New Delhi 2014)

Weiss and Kammel *The Changing Landscape of Global Financial Governance and the Role of Soft Law*

Weiss F and Kammel A (eds) *The Changing Landscape of Global Financial Governance and the Role of Soft Law* (Brill Leiden 2015)

Case Law

Lesotho

R v Molefe (CRI/A/18/82) (CRI/A/18/82) [1882] LSHC 55 (06 October 1882)

S v Sephumula (CR.142/84) (NULL) [1984] LSHC 46 (23 May 1984)

South Africa

Masethla v President of South Africa 2008 1 BCLR 1 (CC)

National Director of Public Prosecutions v Bank of Baroda and others (unreported) case number 168/2018 of 09 March 2018

PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd [2012] ZACC 21

Constitutions and Legislation

Lesotho

Constitution of Lesotho 5 of 1993

Draft Mining and Minerals Policy 2014

Minerals and Mining Bill 2017

Mines and Minerals Act 4 of 2005

Mining Rights Act 43 of 1967

Precious Stones Order 1970

Prevention of Corruption and Economic Offences Act 5 of 1999

Prevention of Corruption and Economic Offences (Amendment) Act 2006

South Africa

Companies' Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Diamond Act 56 of 1986

Income Tax Act 58 of 1962

Mineral and Petroleum Resources Development Act 28 of 2000

Promotion of Access to Information Act 2 of 2000

Preferential Procurement Policy Framework Act 5 of 2000

Prevention of Organised Crime Act 121 of 1998

Prevention and Combatting of Corrupt Activities Act 12 of 2004

Uganda

Uganda Prevention of Corruption Act 1970

International instruments

Kimberley Process Certification Scheme (2003)

Resolution on the role of diamonds in fueling conflict: breaking the link between the illicit

Transactions of rough diamonds and armed conflict as a contribution to prevention and

Settlements of conflicts GA Res 55/56 UN Doc A55/56 (2000)

Extractive Industries Transparency Initiative Standard (2016)

Open Government Partnership (2011)

Universal Declaration of Human Right (1948)

Resolution on the United Nations Convention against Corruption GA Res 58/4, UN Doc

A58/4 (2003)

Government publications

Lesotho

Legal Notice No 66 of 2003

Leg Notice 160 of 2004

South Africa

GN R7479 in GG 24008 of 1 November 2002

GN R8713 in GG 30061 of 9 July 2007

Internet sources

Africa IOA 2014 <http://www.polity.org.za>

Africa IOA 2014 <http://www.polity.org.za> accessed 26 September 2017

Beausang "Open Government Partnership Business Case Brief"

<http://www.per.gov.ie/wp-content/uploads/OGP-Business-Case-031212.pdf>

Beausang "Open Government Partnership Business Case Brief"

<http://www.per.gov.ie/wp-content/uploads/OGP-Business-Case-031212.pdf>

accessed on the 12 February 2018

Dube 2008 'The Law and Legal Research in Lesotho'

<http://www.nyulawglobal.org/globallex/Lesotho.html>

Dube 2008 'The Law and Legal Research in Lesotho'

<http://www.nyulawglobal.org/globallex/Lesotho.html> accessed 29 August 2018

Jamasmie 2017 'Gem Diamonds finds another huge diamond at Lesotho mine'
mining.com <http://www.mining.com/gem-diamonds-finds-another-huge-diamond-at-lesotho-mine/>

Jamasmie 2017 'Gem Diamonds finds another huge diamond at Lesotho mine'
mining.com <http://www.mining.com/gem-diamonds-finds-another-huge-diamond-at-lesotho-mine/> accessed 26 September 2017

KPCS 2005 *Improving Internal Controls over Alluvial Diamond Production – Declaration Adopted by the Moscow Plenary Meeting of the Kimberley Process*

KPCS 2005 *Improving Internal Controls over Alluvial Diamond Production – Declaration Adopted by the Moscow Plenary Meeting of the Kimberley Process*

https://www.kimberleyprocess.com/en/system/files/documents/2006%20Administrative%20Decision%20on%20Internal%20Controls_0.pdf accessed

07 April 2018

Mahlo 2017 *Lesotho's Mining Legal Reforms are in Progress* Press Release on 30th November, Ministry of Mining available at <http://www.lesothotradeportal.org.ls>

Mahlo 2017 *Lesotho's Mining Legal Reforms are in Progress* Press Release on 30th November, Ministry of Mining available at <http://www.lesothotradeportal.org.ls> accessed on the 25th April 2018

EITI 2018 *History of the EITI* available at <https://eiti.org/history>

EITI 2018 *History of the EITI* available at <https://eiti.org/history> accessed on the 30th January 2018

OGP *What is the Open Government Partnership?* available at <https://www.opengovpartnership.org/about/about-ogp>

OGP *What is the Open Government Partnership?* available at <https://www.opengovpartnership.org/about/about-ogp> Accessed on the 12 February 2018

AFP 2018 *World's fifth largest diamond discovered in Lesotho*
<https://www.news24.com/Africa/News/worlds-fifth-largest-diamond-discovered-in-lesotho-20180115-2>

AFP 2018 *World's fifth largest diamond discovered in Lesotho*
<https://www.news24.com/Africa/News/worlds-fifth-largest-diamond-discovered-in-lesotho-20180115-2> accessed on the 24 February 2018

The World Bank Helping Countries to Combat Corruption: The Role of the World Bank. Poverty Reduction and Economic Management Network September 1997

The World Bank Helping Countries to Combat Corruption: The Role of the World Bank. Poverty Reduction and Economic Management Network September 1997 available at www1.worldbank.org/publicsector/anticorrupt/corrupt/corrptn.pdf

Universal Declaration of Human Right (1948) available at
http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

Universal Declaration of Human Right (1948) available at
http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf accessed on the
7 April 2018