

**An assessment of the impact of Zimbabwe's mining policy, legislative and institutional  
framework on acquisition and oversight of diamond mining rights**

By

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submitted in partial fulfillment of the requirements for the degree

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**Declaration**

I, the undersigned, hereby declare that this essay submitted for the award of degree of Magister Legum (LLM) in Extractive Industry Law in Africa is my original work and has not been previously submitted for the award of a degree at this or any other university.

Signed: \_\_\_\_\_

**Selina Kudzai Zhuwarara**

## **Dedication**

This essay is dedicated to my husband Daniel and my daughter Mutsa.

## Acknowledgements

I give GOD thanks and praise for helping me finish writing this dissertation.

I would further like to acknowledge my parents Rino and Pauline Zhuwarara, my brothers Tawanda and Junior Rino, and my aunt Netty Zhuwarara for always keeping me focused towards the goal, you are my strength and joy always.

Profound appreciation goes to my study supervisor Adv. Leon Gerber, for his advice, guidance and direction. Thank you for assisting me to realize the full potential of my thoughts and ideas.

## List of legal instruments

### Zimbabwe

- Commission of Inquiry Act Chapter 10:07
- Constitution of Zimbabwe
- Indigenization Economic Empowerment Act Chapter 14:33
- Mines and Minerals Act Chapter 28:05
- Mines and Minerals Amendment Bill
- Precious Stones and Trade Act Chapter 21:06
- Zimbabwe Development Corporation Act Chapter 28:01

### Botswana

- Constitution of Botswana
- Mines and Minerals Act Chapter 19:99
- Precious and Semi-Precious Stones Act Chapter 66:03

## Directory of Cases

- Texaco v. Libyan Arab Republic reprinted in 17 ILM (1978) pp 3-37 para 59 also in 53 ILR pg 389
- Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya 276/2003; and
- Social and Economic Rights Action Center & Center for Economic and Social Rights v. Nigeria 155/96

## List of Acronyms, Abbreviations, Terms and their Meanings

DP	Diamond Policy (Zimbabwe)
ECOWAS	Economic Community of West African States
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEEA	Indigenization and Economic Empowerment Act
IMF	International Monetary Fund
KPCS	Kimberly Process Certification Scheme
MAB	Mining Affairs Board
MAMA	Mines and Minerals Act (Botswana)
MMA	Mines and Minerals Act (Zimbabwe)
MMCZA	Minerals Marketing Corporation of Zimbabwe Act
NRGI	Natural Resources Governance Institute
PSNR	Permanent Sovereignty over Natural Resources
PSTA	Precious Stones and Trade Act
RBZ - ECD-	Reserve Bank of Zimbabwe Exchange Control Directive
SADC	Southern African Development Community
SI	Statutory Instrument
SOE	State Owned Enterprise

UEMOA	<i>“Union Economique et Monetaire Ouest Africaine”</i> (West African Monetary and Economic Union)
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNGAR	United Nations General Assembly Resolution
USD	United States Dollar
ZCDC	Zimbabwe Consolidated Diamond Company
ZIM- ASSET	Zimbabwe Agenda for Sustainable Socio-Economic Transformation
ZMDC	Zimbabwe Mining Development Corporation
ZMDCA	Zimbabwe Mining Development Corporation Act



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## Abstract

Mineral resources play a significant role in many economies and the turn of the 21<sup>st</sup> century has seen a number of countries reviewing their mineral resources frameworks through various means. These reviews and amendments have been termed “resource nationalism” which can be defined as a range of measures taken by governments to assert more control over their natural resources, maximize economic benefit and improve regulation of strategic resources. Whilst resource nationalism is a topical issue in both developed and developing countries, it is undoubtedly an area which is at the core of redefining how Africa deals with and retains the value of its natural resources and how it re-positions itself for sustainable economic growth.

Natural resources are finite and resource rich countries are increasingly absorbing political, social and budget pressures which require the reorganization of resources and their management. Resource nationalism is at the top of regional agendas in Africa and even SADC and ECOWAS have made commitments towards common mineral resource policy measures. The most notable of discussions and progress in creating structured, harmonized common policy measures is found within the ECOWAS (the Economic Community of West African States) and UEMOA “*Union Economique et Monetaire Ouest Africaine*” (West African Monetary and Economic Union) blocs who are in the process of negotiating and discussing a common mineral code within its bloc.

Given the potential multiplier effect of the industry to industrialization, the mineral rights framework is closely regulated by central governments and followed intently by the international community. Following from the same, diamonds have played a significant role in Zimbabwe’s economy since the commercialization of the Marange diamond fields in its Manicaland Province from 2009 to date. However in 2016, controversy emerged in respect of transparency of revenues from the sector with the President proclaiming that the state has been prejudiced of USD15billion by companies operating in the country through theft, non remittance of taxes and under declaration of revenues. This has led to an overhaul of the rights allocation approach in Zimbabwe. The events in Zimbabwe’s diamond sector brings to the fore the importance of the allocation system of rights vis a vis the regulation and oversight of extractive industries. The allocation of rights sets the framework for the management and administration of extractive projects and ultimately determines whether the exploitation of the resources can achieve sustainable gain and development.

In order to evaluate the veracity of a rights allocation system, there is need examine how the regulation of extractive industries has developed internationally through the principle of permanent sovereignty over natural resources and also against best practice tenets that have been identified over time. Key to these principles is the elements of accountability, transparency and predictability, all which should form part of the administrative framework of rights allocation. This study seeks to evaluate the measures Zimbabwe has taken in its attempts to improve productivity and efficient harnessing of return from the diamond sector.

## CHAPTER 1 - Introduction & background

### 1.1 Introduction

An endowment of diamond resources immediately raises expectations for socio economic growth and development. Diamonds are a unique mineral in that their production volumes per mining cycle compared to other minerals are high and they also have high value returns. This allows for a steady and lucrative source of revenue for companies and Governments alike. Following high revenues, diamond mining attracts intense governance and regulation scrutiny within international and national spheres because of the potential for mismanagement and conflict. This scrutiny has resulted in international regulation through organizations such as the Kimberly Process Certification Scheme (KPCS) which guide the development of domestic governance structures.

Diamond resources, especially in developing countries unlock revenues which are pivotal for economic growth and offers tremendous potential for a multiplier effect in other sectors of the economy. Given that natural resources are finite, resource rich countries are increasingly absorbing political, social and budget pressures which require them to maximize benefits from these resources effectively.

On the 22<sup>nd</sup> of February 2016 the Ministry of Mines and Mineral Development of the Republic of Zimbabwe announced by press conference the immediate ceasure of operations of all private diamond mines to pave way for consolidation of all diamond mining companies under a government owned entity called the Zimbabwe Consolidated Diamond Company (ZCDC).<sup>1</sup> The consolidation of the diamond sector is intended to achieve transparency and accountability throughout the diamond value chain.<sup>2</sup> This policy shift from the multiple investor entity approach government initially pursued in 2009- 2011 is a consequence of the Diamond Policy (DP) which was published in 2013. Amongst other pieces of legislation in other key areas of economic policy, the DP is a key insight into the direction Zimbabwe intends to take development of its diamond resource.

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<sup>1</sup> <http://www.iol.co.za/news/africa/zimbabwe-shuts-7-diamond-companies-1988239> accessed December 8, 2016.

<sup>2</sup> 2015 Zimbabwe National Budget, Pg 32.

This study investigates the effectiveness of the framework currently supporting governments’ policy position on ownership of and acquisition of diamond mining rights in Zimbabwe. The operational framework is critical in determining whether effective and sustainable use of diamond resources will be achieved.

## 1.2 Significance of the diamond sector in Zimbabwe

Zimbabwe has been experiencing a deteriorating economic and social environment since 2000, with the climax hitting in 2008 when GDP fell by 50% and hyper inflation was at its highest.<sup>3</sup> The economy took a slight mend after introduction of the United States dollar (USD) in 2009 but economic problems have resurfaced due to significant external debt and liquidity constraints. GDP reached 11.9% in 2011 but has steadily declined to 3.4% by 2013. The national projected growth forecast for 2016 stands at 1.2% but also has been counter pegged at -0.3% by the IMF.<sup>4</sup> Consequently, leveraging full exploitation of the country’s resources and value addition is one of the key objectives of Zimbabwe’s seven years economic turnaround plan.<sup>5</sup> Amongst other strategic sector reforms, diamonds are specifically cited as a quick win sector for creating sustainable growth. Diamonds are cited under the plans’ “Value Addition and Beneficiation cluster” which sets high production targets and the creation of a beneficiation industry.

**Figure 1**

Mining	<ul style="list-style-type: none"> <li>Increased revenue from the diamonds industry</li> <li>Increased employment.</li> </ul>	<ul style="list-style-type: none"> <li>1.2 million carats polished gem diamonds produced;</li> <li>1000 jobs created;</li> <li>Value added industrial diamonds produced;</li> <li>Skilled personnel produced.</li> </ul>	<ul style="list-style-type: none"> <li>Establish Diamond Cutting &amp; Polishing centres.</li> </ul>	Ministry responsible for Mining
	<ul style="list-style-type: none"> <li>Improved planning for mineral resources development.</li> </ul>	<ul style="list-style-type: none"> <li>Data base on the country’s minerals established;</li> <li>Geological Survey Unit strengthened.</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate the country’s mineral resources.</li> </ul>	

**Extracted from ZIM ASSET objectives and goals for diamond sector**

<sup>3</sup> ZIM ASSEST Pg 8 2013.

<sup>4</sup> IMF, World Outlook Report, October 2016.

<sup>5</sup> ZIM ASSET Pg 9 2013.

The policy reforms made by Government in respect to the access of mining rights in the sector are critical in assessing whether these set goals are achievable and whether sustainable value can be derived from the sector.

The following factors make the diamond sector critical to Zimbabwe;

- I. Diamond resources are finite and it is paramount to maximize value whilst the resource is in abundance. It is also critical to correctly model how the sector will create sustainable development in the economy.
- II. The quality of diamonds mined in Zimbabwe consists largely of low grade diamonds, with only 8-20% of diamonds being gem diamonds while the rest being of the industrial grade. It is therefore important to structure a sustainable framework that takes into account how best to derive value from the predominantly low grades.
- III. Diamonds create an immediate support for liquidity because the current taxation structure<sup>6</sup> allows for government to immediately deduct statutory taxes on every sale made by diamond mining companies. Tax from the high returns can ease liquidity constraints. The diamond production cycle also allows for product to be sold regularly thereby also ensuring injection of funds regularly into the general economy.

### **1.3 Aims and objectives**

The aims and objectives of this study are as follows:

- I. Examine the impact of policy position on state ownership in respect to administration of mining rights.
- II. An examination of current policy and legislative framework's adequacy in creating sustainable development.
- III. Propose best practice policy and legislative framework recommendations, if any, for allocation of diamond mining rights.

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<sup>6</sup> RBZ, ECD RP191.

#### **1.4 Research questions**

In order to achieve the objectives set above, the study will focus on the following research questions:

- I. What are the administrative implications of the provisions of the DP's Article 5.3 in the acquisition of mineral rights?
- II. Do the current policy and legislative provisions relating to the acquisition and oversight of mining rights or exploitation of diamonds conform to best practice standards?
- III. What are the critical reforms required to ensure effective and sustainable regulation in respect to acquisition and oversight of diamond mining rights?

#### **1.5 Proposed methodology**

In order to effectively evaluate the current policy provisions on diamond mining rights, the research is qualitative and comparative, assessing various pieces of policy and legislative instruments from Zimbabwe and Botswana. Botswana is hailed for its management of the diamond sector and how it has managed to structure sustainable exploitation of its resources. It is against this background that the study compares key instruments from both jurisdictions and also reviews these against best practice norms for sustainable development in the allocation of mining rights.

#### **1.6 Relevance**

The state is recognized as a custodian of mineral resources on behalf of its people and policy positions indicate the framework with which they intend to exploit and account for these resources. It is trite that policy precedes legislation and acts as a good indicator of the legislative framework that will govern the mineral resources regime. The policy position of Zimbabwe for the diamond sector adds to the debate on whether commercial participation of the state in the exploitation of mineral resource sector is viable and the appropriate framework for such participation to occur. This discussion is important for the continual review of how resources are exploited on behalf of the nation. More specifically, it provides a basis of analysis of the interplay between policy and the operational framework and how it affects the creation of a sustainable framework.



## 1.7 Background

The mineral rights regime in respect of diamonds was primarily based on a licensing system pre-2006. Commercial diamond mining started in the early 90's with River Ranch<sup>7</sup> and in the early 2000's Murowa diamonds<sup>8</sup> joined the diamond sector. Licensing was regulated by the Mines and Minerals Act of Zimbabwe<sup>9</sup> and the Precious Stones Act.<sup>10</sup> With only two players in the sector the two principle Acts were not heavily interrogated in terms of adequacy on effective regulation. However when vast deposits of diamonds were discovered in the Marange and Chimanimani areas of Zimbabwe the diamond sector expanded and government had to now accentuate its direction on the industry comprehensively.

The “discovery” and commercialization of the Marange fields in 2000 ushered a blended mining rights regime which combined licensing through Special Grants and joint venture partnerships which characterize the concession system of acquisition of rights. This blend was primarily aimed at catering for the gaps in the diamond regulatory framework.

Whilst pre-2006 the two companies that had operated in Zimbabwe were purely privately owned; government took an active commercial approach with the Marange fields. All the companies mining in the area had a government shareholding structure varying from 100% - 10% in its ownership structures.<sup>11</sup> Government declared non confidence in diamond sector decisively by unilaterally implementing the consolidation of all diamond mining companies in 2016 after alleging pilferage of diamonds, non remittance of taxes and under declaration of revenues. Consequently all diamond mining is now effected through a state owned entity.

## 1.8 Chapter outline

### Chapter 1 – Introduction & Background

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<sup>7</sup> This was a commercial company mining kimberlitic diamonds in Matabeleland south.

<sup>8</sup> This was a commercial company mining previously owned by Rio Tinto mining diamonds in the Midlands province of Zimbabwe.

<sup>9</sup> Chapter 21:05.

<sup>10</sup> Chapter 21:06.

<sup>11</sup> <http://www.iol.co.za/news/africa/zimbabwe-shuts-7-diamond-companies-1988239> accessed 8 December 2016.

This Chapter looks at the objectives and relevance of the study. It also presents a brief background to the current rights regime prevailing in Zimbabwe.

**Chapter 2 – Literature Review**

This Chapter explores the development of key elements to this study such as the Permanent sovereignty to natural resources principle, ownership versus control, state owned enterprises and sustainability.

**Chapter 3 – Analysis of Zimbabwe’s policy, legislative and institutional framework on diamond mining rights**

This Chapter gives an overview of the policy, legal and institutional framework governing the acquisition of diamond mining rights in Zimbabwe.

**Chapter 4 – Analysis of Botswana’s policy, legislative and institutional framework on mining rights**

This Chapter gives an overview of the policy, legal and institutional framework governing the acquisition of diamond mining rights in Botswana.

**Chapter 5 – Evaluation and comparative analysis of Zimbabwe and Botswana’s approach to diamond mining rights**

This Chapter presents a comparative analysis of the diamond licensing regimes framework in Zimbabwe and Botswana against recommended best practices for allocation of rights.

**Chapter 6 – Conclusion and Recommendations**

This Chapter presents an overview of the adequacy of the framework governing acquisition of diamond mining rights in Zimbabwe. It also proffers recommendations on corrective action in respect of policy, legislation and institutional support in achieving sustainable diamond resource sustainability.

## CHAPTER 2 - Literature Review

### 2.1 Introduction

The acquisition of mining rights is a key element of any mineral policy and predetermines the selected framework of the exploitation of natural resources. It is the prerogative of the state to structure how mining rights are acquired and who can acquire them. In order to understand the philosophy underlying an assessment of Zimbabwe's diamond rights framework, it is important to provide a snap shot of its policy and legislative position on diamonds and the issues that arise from the same.

Legislation states all dominium in and rights to minerals are vested in the President of Zimbabwe.<sup>12</sup> In specific relation to diamonds, policy states that the state has 100% ownership of the country's placer diamond deposit, and if the state so wishes it may partner with investors but shall have a controlling stake in such venture.<sup>13</sup> What constitutes a controlling stake is defined in Article 5.36 of the DP which states that investment in the diamond sector shall be in full compliance with the country's indigenization and empowerment laws which require a 51% indigenous ownership of all commercial businesses.<sup>14</sup> Government has clarified that its 51% shareholding in all resource based businesses shall be at no cost to government in recognition of the states' sovereign ownership of the minerals being exploited or proposed to be exploited.<sup>15</sup> The Constitution is silent as regards ownership of mineral rights but states that the President is the head of state and government and executive power rests in him/her.<sup>16</sup>

Based on the foregoing, this study explores three fundamental principles which are:

- I. The state or governments dominium and rights in mineral resources;
- II. Government participation in mining projects; and
- III. Sustainability in minerals exploitation.

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<sup>12</sup> Section 2 MMAZ.

<sup>13</sup> Article 5.3 DP.

<sup>14</sup> Section 3 (1) (a) IEEA.

<sup>15</sup> Frameworks, Procedures and Guidelines for the implementing of IEEA, Pg 6, 4 January 2016. presented by Honorable Minister of Indigenization and Economic Empowerment P Zhuwawo.

<sup>16</sup> Section 88 (1) & Section 89 Constitution of Zimbabwe.

These three elements define the basis of subsequent assessment for the veracity of the rights framework and its sustainability.

## **2.2 State and government dominium and rights in mineral resources**

The acquisition of mineral rights is structured through national policy and legislation however; the historical basis of sovereignty over the use and development of mineral resources is rooted in customary international law. Specifically it has developed through the principle of permanent sovereignty over natural resources.

### **I. The principle of permanent sovereignty over natural resources**

The vesting of rights or responsibility over natural resources is traced back to the principle of permanent sovereignty over natural resources (PSNR). This principle is established in customary international law and is embodied in the United Nations General Assembly Resolution 1803 (XVIII) of 1962 (UNGAR 1803) which establishes the right of peoples and nations to permanent sovereignty and dominium over their natural wealth and resources and self determination on the exploration, development and disposition of such resources.<sup>17</sup> The rights extend to the ability to nationalize, expropriate or requisition property of nationals and foreigners alike on grounds of public utility, security or national interest.<sup>18</sup> Premised on this provision states have ultimate autonomy in developing their natural resources regime without interference from other states. Over time, the principle has opened room to the interpretation of whom the dominium and rights to the natural resources is actually being vested in between the state and its people.

In its initial form the principle mainly mediated between formerly colonized states and their colonizers in respect of the allocation, ownership and use of natural resources in areas under occupation, however as time progressed the principles' role in intrastate matters has also surfaced, especially in addressing inequality in use and benefit of the resource within society (Miranda, 2012).

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<sup>17</sup> Article 1&2 UNGAR 1803, 1962.

<sup>18</sup> Ibid.

This study is based on the interpretation that the resolution manifests the vesting of dominium and ownership of natural resources solely in the people, with the formal structures of government acting only as an agent of the people. The basis for this undertaking is that UNGAR 1803 expressly indicates that the principle of permanent sovereignty over natural resources should be exercised in the interest of national development and the well being of the people of the state concerned.<sup>19</sup>

In order to support the interpretation above, it is important to embrace the definitions of the following terms as borrowed from the field of political science; the state, sovereignty, government and society/people. A state is defined as a geographic entity that has a distinct fiscal system, constitution and is sovereign and independent from other states.<sup>20</sup> It is constituted of four distinct elements, that is, sovereignty, territory, a government and people.<sup>21</sup> A government on the other hand is the political administration of the state, governments are not permanent and do not possess sovereignty, they have no original authority but only possess derivative powers delegated by the state through its Constitution.<sup>22</sup> By vesting the PSNR on the state, UNGAR 1803 therefore establishes that natural resources should be recognized in the context of four dimensions, that is; territory, sovereignty, society (people) and the political administration of the state, with an emphasis being placed on the interest of the “peoples”.

Sovereignty is the supreme and unlimited authority of the state over itself (Willoughby, 1891) and following from the notion that governments themselves do not possess sovereignty it would suffice to say that in the management of natural resources; governments are only administrative agents of the mandate of the people who occupy the territory and also give derivative power to governments through the constitution. The term “peoples” was initially understood to mean or used synonymously with the word “state”, however as the PSNR principle evolved scholars have surmised that the term can be interpreted in relation to the following groups:

1. Those under colonial occupation;

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<sup>19</sup> Article 1 UNGAR 1803, 1962.

<sup>20</sup> <http://www.differencebetween.net/miscellaneous/politics/political-institutions/difference-between-government-and-state/> accessed December 2016.

<sup>21</sup> <https://www.globalpolicy.org/nations-a-states/what-is-a-state.html> accessed December 2016.

<sup>22</sup> <http://www.preservearticles.com/201012241588/what-is-the-difference-between-state-and-government.html> accessed December 2016.

2. A portion of the population such as indigenous peoples; and
3. The whole of a population.<sup>23</sup>

This interpretation of the term further accentuates that the full implementation of the PSNR principle also embodies the duty of care that governments need to exercise towards its populations when developing and implementing mineral resources policies.

## II. The right to economic self determination

The principle of self determination is the expressive form of the PSNR principle and is integral to the development of the principle. The right to self determination is best exemplified in the African Charter for Human and Peoples Rights (ACHPR). Articles 20 and 21 of this charter states that all peoples have the unquestionable and inalienable right to self determination and are to pursue social and economic development according to the policy they have freely chosen. In addition all peoples are to have the right to freely dispose of their wealth and natural resources and this right shall be exercised in the exclusive interest of the people. From the foregoing the following is imperative:

1. Resources are owned by the people (Farmer, 2006);
2. The people have an inalienable right to develop natural resources according to policies of their choice; and
3. The development of natural resources should be based on the exclusive interest of the people.

Given that the charter states that peoples possess a right to develop natural resources according to policies of their choice it therefore follows that people have an ongoing democratic right to participate in developing the policies that government employs for the exploitation of natural resources.<sup>24</sup> A people's ability to freely dispose of their wealth rests with ongoing access to a representative and responsive government.<sup>25</sup> This places participation as a critical element of the right to self determination.

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<sup>23</sup> James Graff, *Human Rights Peoples & Self Determination: Group Rights* (1994), Toronto; University of Toronto Press Pg 186-215 (adapted from Miranda, 2012).

<sup>24</sup> A. Farmer, *Towards a Meaningful Rebirth Of Economic Self-Determination: Human Rights Realization In Resource-Rich Countries* (1998) 39, *NYU Journal of International Law and Politics*, pp 417.

<sup>25</sup> *Ibid* 417.

Whilst the PSNR right has evolved to emphasize the rights accruing to states in international law from an interstate position, it is also important to look at the duties that also come with the rights (Schrijver, 1997). Whilst the PSNR principle confers a state with exclusive competence to organize, through constitutionally authorized authorities, its economic and social structures as it so wishes,<sup>26</sup> there is a correlative duty to exercise the PSNR right in the interest of national development.

In exploring other resolutions of the UN such as the UNDRIP<sup>27</sup>, ICCPR<sup>28</sup> and the ICESCR<sup>29</sup> some cursory guidelines are found as to how international law has tried to accentuate the duties of states to its people *vis a vis* in the preservation of human rights. These UN Resolutions all emphasize the duty of consultation and participation of peoples. It is accepted that development of the human rights agenda in natural resources has ushered an understanding of the rights of peoples in their interaction with governments. The human rights discourse supports the extended interpretation of the PSNR beyond interstate relations to include intrastate relations and further challenges the states unfettered autonomy on regulation of natural resources.<sup>30</sup> An example of this position is expressed in the UNDRIP which creates parameters that guide domestic policies, legislation and action in relation to the protection of indigenous people. The declaration establishes procedural rights of free and informed prior consent and active participation and consultation in projects affecting and exploiting land, territories and resources connected to indigenous people. This exemplifies the limitation of rights of the state in domestic implementation of the PSNR principle. These principles have also been fortified in the African Commission for Human and Peoples Rights (ACHPR) determinations in the cases of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya 276/2003 and the Social and Economic Rights Action Center & Center for Economic and Social Rights v. Nigeria 155/96. Left unfettered, government control of natural resources has potential to infringe human rights.

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<sup>26</sup> Texaco v. Libyan Arab Republic reprinted in 17 ILM (1978) 3-37 para 59; 53 ILR pg 389.

<sup>27</sup> UN Declaration on the rights of Indigenous People 65/295.

<sup>28</sup> International Covenant on Civil and Political Rights.

<sup>29</sup> International Covenant on Economic, Social and Cultural Rights.

<sup>30</sup> S. James Anaya & Robert A. Williams, Jr., The Protection of Indigenous People's Rights over Lands and Natural Resources under the Inter-American Human Rights System, (2001) 14 HARV. HUM. RTS. J. 33, 36.

The intervention of human rights in the development of ownership, allocation and use of natural resources has led to two distinct schools of thought in relation to the intrastate implementation of the PSNR principle. These distinct models are the state based model of ownership and regulation and the human rights based model which confers ownership of resources in the people (Miranda). The two models have two different results as regards the level of self determination by peoples in mineral policies and developmental direction.

The human rights approach to the PSNR principle and self determination provides an adequate framework which promotes a people based ownership model which position ensures that when states exercise their sovereignty over natural resources is done with the consent, consultation and accountability towards the people (Cambou & Smis, 2013).<sup>31</sup>

From the discussion above it is clear that the principle of PSNR is closely tied to the right of economic self determination<sup>32</sup> and as jurisprudence on the principle continues attention is increasing towards the duty of the state in allowing adequate and continued participation of the people when crafting mining policies. This study views the duty of participation and inclusion of peoples in determining mineral resources policies as one of the most under emphasized yet critical elements of building sustainable mineral policies and legislative frameworks as it keeps the needs of the people in the fore and minimizes benefit or political capture by politicians and a few elite.

### **III. Ownership vs. control**

The human rights approach and state approach to the PSNR right highlights an intricate difference between the concepts of ownership and control. It is critical to determine the legal implications of the state owing natural resources versus it controlling resources.

Ownership is defined as a bundle of rights allowing use and management of a property; one can convey or pass it to others. It implies the right to possess a thing regardless of any constructive

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<sup>31</sup> Cambou & Smis, PSNR from a Human Rights perspective (2013).

<sup>32</sup> F Visser, PSNR Nationalization of Foreign Interests (2009).



control and such rights are permanent and heritable.<sup>33</sup> Control on the other hand can be defined as power or authority to merely direct, manage or oversee.<sup>34</sup> Following from the same it can be seen that there is a difference between vesting ownership of mineral resources in a government from vesting only control. The right of ownership affords the government a significant degree of free play in determining use and disposal of natural resources. The danger is captured well by Oloka-Onyango who notes that states in modern times serve less to facilitate self determination than they serve to impede it, their function appears to be as direct competitor with their own peoples for the resources they govern and in some instances this has led states to invest and expand upon their monopoly over the means of violence.<sup>35</sup> This potential of political capture further supports advocates for a position where only control of natural resources is vested in government so as to keep the agency relationship at the fore.

The vesting of mineral ownership in peoples is not without its critics and some scholars have noted that there are practical and legal constraints to the implementation of such an approach. In particular it has been noted that no matter the nature of political structures of a state or government, a minority, of whatever description, will always take decisions on behalf of the majority.<sup>36</sup> Whilst the skepticism invokes a real dilemma for the popular sovereignty approach, this study posits that the first step of sustainable development is in the creation of enabling structures for the participation of and accountability to the people in respect of mineral resources.

### **2.3 State participation in mining projects**

The involvement of the state in extractive resource projects is a norm in both developed and developing states. As governments seek to maximize benefits from mining operations they have increasingly assumed an active role in the ownership, administration and management of companies formed to

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<sup>33</sup> Adapted from Blacks Legal Dictionary 8<sup>th</sup> ed 1999.

<sup>34</sup> Ibid 353.

<sup>35</sup> J. Oloka-Onyango, Heretical Reflections on the Right to Self-determination: Prospects and Problems for a Democratic Global Future in the New Millennium (1999) 15 AM. U. Int Law Review. 151.

<sup>36</sup> Zongwe, Dunia P, The Legal Justifications for a People-Based Approach to the Control of Mineral Resources in the DRC, (2008) CLS IUGSCP Paper 12. [http://scholarship.law.cornell.edu/lps\\_clacp/12](http://scholarship.law.cornell.edu/lps_clacp/12).

undertake resource exploitation projects. This form of direct participation comes in different structures such as:

- I. Sole/ exclusive ownership – 100% government owned; and
- II. Joint venture – that is shareholding split between government and an investor with government either a minority shareholder, equal share holder or majority shareholder. Equity is shared based on different structures such as production sharing, paid up shares, free carry shares or nominal value shares.

Despite the mix involved all these entities are referred to and described as State owned Enterprises (SOE's). The intended benefits of SOE's are presumably:

- I. Capacity building – enabling the state to develop human, technological and economic capacity and lessen dependency on foreign investors;
- II. Financial benefits - on top of taxes the government can derive dividends and has direct access to profits and/or gross revenue of the corporate; and
- III. Enhanced monitoring – by being a shareholder government has the opportunity to improve oversight into the sector and regulate development of the same.<sup>37</sup>

The rationale of creating SOE's is found in two traditional intentions, which are to correct market inefficiencies or as a strategic repositioning of productive assets (Cazzura et al, 2013).<sup>38</sup> The first premise is therefore that SOE's are created in the furtherance of the interests of or for the common good of the people.

Most studies posit that governance is the primary determining factor in the performance of a firm. The governance structures in SOE's are explored through various theories which include the resource based theory<sup>39</sup>, agency theory<sup>40</sup>, stewardship theory<sup>41</sup>, public choice theory<sup>42</sup> and the stakeholder theory<sup>43</sup>

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<sup>37</sup> State Participation and State – owned Enterprises (Roles, benefits and challenges), Natural Resource Governance Institute (March 2015).

<sup>38</sup> Cazzura, Inkpen, Mussachio & Ramaswamy, Gvts as Owners: SOMC, (2014) JIBS.

<sup>39</sup> Hamel & Prahalad (1994).

<sup>40</sup> Eisenhardt, AMR, (1989) Vol 14 No.1.

<sup>41</sup> Donaldson & Preston, The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications, The Academy of Management Review (1995) Vol. 20, No. 1, Pp. 65-91.

amongst the many. This study examines the agency and the public choice theories which reveal two important complexities that exist in SOE's.

The agency theory in its original form looks at the relationship between the agent and the principal and the focus of the theory is determining the most efficient contract which achieves alignment of goals between the principal and actions of the agent and also oversight and accountability of the agent to principal.<sup>44</sup> The identification of the principal and agent presents the first complexity in SOE's. When this theory is viewed in the SOE scenario, scholars identified that it is difficult to determine who the principal is and who the agent is between the state, central government, local government, general public or bureaucrats. Without a clear distinction on who the principal is and who the agent is it is very difficult to determine the optimal contract between the two.

In a case where ownership is vested in the state, the likely principal becomes central government and agent becomes the management of the SOE with management pursuing the interests of central government. In a scenario where ownership of resources is in the people, the people become the principal and the state i.e. central government becomes the agent. The two positions result in different outcomes where accountability and participation of people's is concerned. Whilst it is common cause that government assumes power on behalf of the people, the political needs of central government may at times clash with the best interests of the generality of the people. Mbo and Ajasi<sup>45</sup> contend that central government is always in most cases the dominant player in SOE's thus there is potential for its interests cloud the objectives of SOE's.

The public choice theory reveals yet another potential complexity of state control. The theory is based on the assumption that people in the market place are driven by self interest, notwithstanding their ability to also act towards the needs of others, their dominant motive is towards the self.<sup>46</sup> This brings out yet another challenge existing in SOE's. While the state is presumed to represent the interests of the people, its persona is run by politicians and in accordance with the public choice theory the clashing of

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<sup>42</sup> Shaw, Public Choice Theory' The concise encyclopedia of Economics (2008)

<http://www.econlib.org/library/Enc/PublicChoiceTheory.html>.

<sup>43</sup> Freeman 'The Politics of Stakeholder theory: Some future directions' (1994) BEQ, Vol 4(4), Pp 409 - 421

<sup>44</sup> Cazzura, Inkpen, Mussachio & Ramaswamy, Gvts as Owners: SOMC, JIBS, 2014.

<sup>45</sup> M Mbo & C Ajasi, DOP: SOEP, Biennial conference of the Economic Society of SA, UFS, South Africa, 25-27 September 2.

<sup>46</sup> J S Shaw (2008).

self interest of politicians and best interests of the business and people they represent is a real factor that affects the performance of these entities. It has been observed that the political influence in SOE's in the form of adverse political directives at times overrides good governance principles and objective business rationale.<sup>47</sup> It is suggested that one of the ways to neutralize this political influence is to establish an independent regulator, established under law and not subject to further government approvals as an oversight watchdog for SOE's. The empirical findings of Mbo and Ajasi come to the conclusion that government influence and political control will manifest itself where SOE's operate in an environment without independent regulation and this often leads to poor performance.<sup>48</sup>

In an analysis on failure of corporate governance in Kenyan SOE's, it was noted that allowing parliament to participate in selection of boards in parastatals and oversight of ministerial directives could facilitate;

- I. Selection of competent candidates;
- II. Adoption and adherence to corporate governance practices; and
- III. Increasing standard of care from board of directors.<sup>49</sup>

The extent of political and economic power created by running SOE's is also best illustrated in how China has modeled state enterprises as the center of political rule and economic development. In investigating the logic of corporate governance in SOE's in China, it was noted that the control of SOE's in China is at the heart of legitimizing the power of the party state, overseeing the economic development of China, distribution of wealth internally and economic foreign policy.<sup>50</sup> This is an illustration of how SOE's can also become political machinery for central government.

## 2.4 Sustainable development in mining projects

Fundamental to the discourse on mineral resources is the issue of sustainability. Mineral resources are finite and it is generally agreed that the nature of exploitation, use and development of these resources

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<sup>47</sup> S Berg, Best Practices in Regulating State Owned Enterprises and Municipal Water Utilities (2013).

<sup>48</sup> Mbo & Ajasi Pg 23.

<sup>49</sup> K Mwaura (2007), FILJ, Vol 31, Pg 74.

<sup>50</sup> J Wang, CILJ, Vol 47, Pg 662, 2013.

in the present day is key to our continued access to these resources in the future<sup>51</sup>. Consequently there is global consensus that the policies and legislation adopted at international and national level should incorporate elements of sustainability so as to ensure that the benefit from mineral resources is sustainable. The international forum has set global economic development goals currently articulated by the seventeen UNDP Sustainable development goals targets for the period 2016 to 2030. Governments are urged to incorporate measures that support these goals in their domestic policies and legislation.

**Figure 2**



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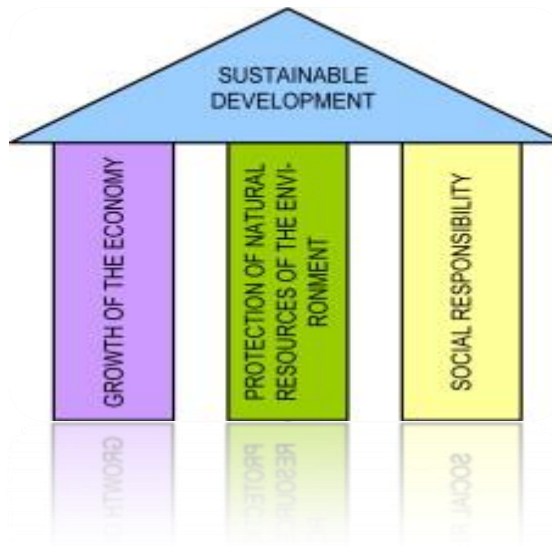
The essence of the seventeen goals can be summarized into three main elements as illustrated below.<sup>53</sup>

<sup>51</sup> Brundtland Commission Report UN 1987.

<sup>52</sup> Adopted from <http://www.un.org/sustainabledevelopment/news/communications-material/>.

<sup>53</sup> J Dubinski, JSM, Vol 12, Pg 1, 2013.

Figure 3



These three elements of sustainability can equally be applied in the mineral resources sector given its potential and footprint on the economy, society and environment. Whilst significant attention is given to social responsibility and environmental aspects of sustainability in mining projects, the growth of the economy is also a critical outcome of mineral resources projects. Sustainable development is closely linked to governments' overall strategic planning for growth, performance and compliance in the mining sector.<sup>54</sup>

It is therefore generally acceptable that sustainable development is achieved where there is a robust legal and policy framework with distinct and clear property rights. The access to mineral rights, economic model of regulation and redistribution wealth are important in constructing strong mineral resources frameworks. Frameworks supporting sustainable development have to ensure that mineral resources development is, commercially viable, meets market demand for minerals, is environmentally responsible, benefits social interests of citizens, assures economic growth and supports effective governance.<sup>55</sup> It is suggested that a policy and legislative framework that achieves these elements can be achieved by paying close attention to the following issues:

<sup>54</sup> <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/05/mining-risk-assurance-v5.pdf> accessed December 2016.

<sup>55</sup> F Cawood & O Oshokoya, JSAIMM, Vol 113, 2013: <http://www.scielo.org.za/> accessed October 28, 2016.

**ELEMENT**

**DESCRIPTION**

1. Nature and quality of resource;

Taking into account the grade and quality of the resource dispels perceived value of resources with real value. It assists to direct suitable investment and marketing strategies and also cost of extraction. Potential diversification into beneficiation is also determined by quality and reserves of mineral.<sup>56</sup>

2. resource reserve;

The collation of geological data is critical in structuring development and investment policies and strategies, these impact costs of extraction, viability and expected revenue from resources.<sup>57</sup>

3. access to rights;

The rights acquisition structure determines the extent to which a resource can attract quality investment. The nature of rights acquired and process of acquisition plays a critical part in investment confidence.

4. state of capital;

Accessibility and readiness of local capital is critical in mining. An assessment into the access to and cost of acquisition of capital is important. Governments also gain indicators on appropriate incentives to support investment.<sup>58</sup>

5. state of labour;

Mineral resources require skilled labour especially in areas of processing, marketing and

<sup>56</sup> G Davis, Trade in Mineral Resources, CSM, Pg 10, 2009.

<sup>57</sup> Ibid, 45.

<sup>58</sup> du Plessis, S. (2013). Nationalizing South African mines: an economic assessment, Journal of the Southern African Institute of Mining and Metallurgy, 113 (1), 2013 31-38. Retrieved October 29, 2016, from [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S0038-223X2013000100007&lng=en&tlng=en](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0038-223X2013000100007&lng=en&tlng=en).

6. capacity for regulation;

beneficiation. A skills gap assessment allows governments to model holistic and practical policies.

Effective regulation ensures stability of policies based on clear and legislated laws and institutions that offer internal and independent oversight.<sup>59</sup>

7. state of research and technological advancement; and

The level of technological advancement has a direct bearing on the efficiency of mining, extraction and processing of minerals.<sup>60</sup> An assessment of industry specific technologies and promotion of new technologies is important in policy considerations.

8. State of service and support industries.

Mining is supported by complimentary service industries such as transport, energy water etc the state and maturity of these services is also critical in structuring development strategies.<sup>61</sup>

Governments need to implement comprehensive analysis of country capacity for effective and viable extraction of mineral resource policies. Regulatory institutions must be able to adapt to changes, needs and gaps so as to create responsive and adaptive management on (Dietz, 2003).<sup>62</sup> Policies and legislative frameworks framed on pursuing only revenue generation instead of needs are not sustainable in the long run.

It is upon this background that it is suggested that policies and legal frameworks are tailor made to a country's needs and state of industrial and economic capacity. The demise of many African mineral policy regimes has been to adopt law and policies from other jurisdictions that are not suitable or

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<sup>59</sup> Dietz, Ostrom & Ster, Science, Vol 302, 2003 Pg 1908.

<sup>60</sup> B Dhar, Mining policy initiatives, APH Publishing, Pg 41, 2001.

<sup>61</sup> Dietz, 1908, 2003.

<sup>62</sup> Dietz, 1909, 2003.



appropriate for the state of economy and regulatory maturity or by simply retaining legal frameworks that prevailed during colonial times which are no longer compatible with the needs of the country.

## **2.5 Conclusion**

Every state derives its authority over its natural resources from an agreed international consensus that every nation has a sovereign right to determine the exploitation, use and development of its wealth. As expressed above, whilst the state is at the heart of managing these resources on behalf of its people where there are no structured avenues of oversight, participation and accountability, it is easy for central government to prioritize its interests above the people's interests.

Increasingly the development of international law through the human rights ambit is prioritizing the duty of the state to its people in the exploitation, use and development of natural resources. Concepts of ownership and management have come under intense scrutiny especially in relation to sustainable development. The tenets discussed in this chapter are critical in establishing the framework of best practice tenements necessary for creating sustainable development in relation to mineral resources policies, legislation and oversight mechanisms.

## **CHAPTER 3 - Analysis of Zimbabwe's policy, legislative and institutional framework on diamond mining rights**

### **3.1 Introduction**

The framework governing diamond mining in Zimbabwe had not seen much development until 2009 when government opened up the Marange and Chimanimani diamond fields for commercialization. After 2009 policy was broadened in an attempt to regulate the sector effectively. Prior to 2009 the diamond sector had only two commercial players and was regulated by the Precious Stones Act (PSTA) and the Mines and Minerals Act (MMA). The inadequacy of this framework was highlighted with the advent of mining in the Marange- Chimanimani areas. This Chapter explores aspects of the subsisting diamond policy, legislation and institutional framework governing the issuance of diamond mining rights in Zimbabwe.

### **3.2 Diamond policy framework**

The Diamond Policy (DP) was published in November 2012 and sets the platform for the regulatory framework of the diamond sector. The DP notes that regulation of the sector shall be directed legislatively through the Precious Stones and Trade Act (PSTA), Mines and Mineral Corporation of Zimbabwe Act (MMCZA) and the Mines and Minerals Act (MMA). The DP states that its objectives are establishing sustainable development of the diamond industry by fostering best international practices, promoting the image of Zimbabwean diamonds, improving security within the value chain, promoting valuation and marketing of diamonds, promoting transparency and attracting both local and international investment.<sup>63</sup>

Article 5 of the DP embodies the position on acquisition of rights, it states the following:

- i. All mineral rights are vested in the state;
- ii. Acquisition of diamond mineral rights shall be dealt with according to the MMA as shall be amended;
- iii. The state shall have 100% ownership of the country's placer diamond deposit and if it so wishes, may partner with investors but shall have a controlling stake in such venture. Article 5.36 further

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<sup>63</sup> Article 4 DP.

posits that investment in the diamond sector shall be in full compliance with the country's indigenization and empowerment laws which require 51% ownership of shareholding by indigenous Zimbabweans in any business entity; and

- iv. The right to mine shall be linked to the value of the concession.<sup>64</sup>

The Articles entrench the following key issues in acquisition of rights:

- i. Nationalization of diamonds through 100% ownership of the resource by the state;<sup>65</sup>
- ii. Acquisition of licensing by investors for diamond mining shall be on a concessionary basis where government sees fit, such partnership shall be on a joint venture basis in line with the requirement for a majority controlling stake of government. The import of this article is that only two types of business entities are allowable in the sector that is 100% SOE or government partnered joint ventures;
- iii. Geological information shall play a central role in assessing the value of acquisition of mining rights.<sup>66</sup>
- iv. Mining title shall be issued solely in accordance with the MMA<sup>67</sup> and not any other Act. The PSTA, MMCZA & ZMDCA are likely to be amended to enable to implement the administrative provisions set forth in the DP.

Another important aspect introduced by the DP flows from the pronouncement of state ownership of geological data. The DP states that all exploration data and information shall belong to the state.<sup>68</sup> The import of the article signifies a move beyond mandatory reporting of geological data to vesting of proprietary rights of such data in the state. Thus any acquired mining rights shall be devoid of proprietary rights to exploration and geological data acquired.

The DP also establishes two new bodies in the sector that are likely to influence issuance of rights, these are:

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<sup>65</sup> Article 5.3 DP.

<sup>66</sup> Article 5.4 DP.

<sup>67</sup> Article 5.11 DP.

<sup>68</sup> Article 5.5 DP.

- I. **The Diamond Board**<sup>69</sup> - The Board is established for the purpose of advising the Minister of Mines on all issues relating to the diamond industry. The Board shall be part of the Ministry of Mines internal bodies and shall be chaired by the Secretary of Mines. The Board shall have the mandate to advise the Minister on the development of regulation, policy and legislative issues of the sector.
- II. **Commissioner of Precious Stones**<sup>70</sup> - This office is to be created under the PSTA and shall be responsible for governing all precious stones. According to the DP the Commissioner's function shall be to oversee the implementation of the PSTA and shall also be an ex-officio member of the Diamond Board. The PSTA is administered under the auspices of the MMA.

### **3.3 Legislative and Institutional Framework**

#### **3.3.1 Constitution**

The Constitution embodies the rights of Zimbabweans to ecologically sustainable development and use of natural resources while promoting economic and social development.<sup>71</sup> The state is mandated to enact and implement reasonable legislative measures, within the limits of the resources available to it in order for it to achieve the rights set forth in section 73. The import of this provision to acquisition of mining rights is that the state has the obligation to develop systems of acquisition which promote sustainable use of resources and promote economic and social development.

Section 89 of the Constitution as read with the ownership vesting rights in the MMA is significant to the acquisition of mining rights. Section 89 sets the President as the head of state and government. However as will be seen in the MMA the head of state also plays a critical role in the acquisition of rights as all dominium and rights in mineral resources are vested in the president. This position in relation to diamonds denotes a passing of ownership of diamonds which had been vested in the state by the DP to the President. This gives the President real rights over mineral wealth and administrative power in the mineral development value chain.

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<sup>69</sup> Article 6.4 DP.

<sup>70</sup> Article 6.5 DP.

<sup>71</sup> Section 73 (1) (b) (iii).

Another important provision from the Constitution relates to the negotiation of government joint venture partnerships, Section 315 (2) (a) and (c) provides for the enactment of legislation that guides the negotiation and framework of contracting for government joint venture agreements and in the concession of minerals. The purpose of the instrument is so as to ensure transparency, honesty, cost-effectiveness and competitiveness. This provision attempts to legislatively guide the negotiation of mineral rights concession agreements.

### 3.3.2 Mines and Minerals Act Chapter 28:05

As highlighted above the office of the president plays a critical role in the acquisition of mining rights. Section 2 of the MMA vests the dominium in and rights of searching, mining and disposing of mineral resources in the President. This vesting allows for administrative participation of the President in matters relating to acquisition and development of mineral rights.

The MMA is the principal Act for acquisition of rights and diamonds are provided for under the general term “precious stones” in the MMA<sup>72</sup> together with other stones such as emeralds and any other stones so designated as “precious” under the Act. The MMA asserts its role as the only instrument (Act) under which the acquisition of rights to minerals can be acquired.<sup>73</sup>

Currently diamond mining rights under the MMA can be acquired in the following primary ways:

Mode of Acquisition	Nature	Description
<b>1. Graduating from prospecting rights to mining rights</b>	Primary mode of acquisition	Prospecting license is acquired from Mining Commissioner and holder of license eventually acquires mining rights after fulfilling all required processes of pegging, registration and application for mining rights.

<sup>72</sup> Section 5 MMA.

<sup>73</sup> Section 3 MMA.

<p><b>2. Mining lease, special mining lease or special grant</b></p>	<p>Primary mode of acquisition</p>	<p><b>Mining lease</b> – holder of registered block applies for mining rights.</p> <p><b>Special lease</b>- holder of mining block applies for mining rights for a development worth over USD100 million with product mainly primed for export. The Mining Affairs Board (MAB) can also recommend issue of special lease where it seems fit.</p> <p><b>Special grant</b> – Permanent Secretary of Mines issues any person special grant to mine on a reserved area or for specific minerals.</p>
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The application for and approval for rights is initiated in the office of the Mining Commissioner and Secretary of Mines, the applications are then further presented to the MAB for consideration and recommendations, depending on the nature of rights requested, either the MAB approves the application or presents recommendations to the Minister. The Minister either approves at that stage or further seeks the approval of the President thereafter.

The Minister however has the discretion to negotiate agreements outside the framework of the Act. Section 167 allows the Minister with the approval of the President to enter into an agreement not consistent with the Act regarding the issuance of a special mining lease. The section specifies that this discretion extends to selection of the contracting partner, the agreements’ renewal, any terms and conditions of the lease, any liabilities and obligations of that person/entity including payments of royalties, rents and fees or any other matter connected to the special mining lease. This creates a parallel rights structure where the Minister has authority to deviate from the guidelines of the Act and

to enter into agreements, review terms and conditions previously agreed, set statutory fees or any other matter concerning the lease, with approval from only the President.

### **3.3.3 Mines and Minerals Amendment Bill**

An amendment bill has currently been tabled before Parliament and is still under consideration. It is critical to note that the amendment bill does not table significant change to the acquisition of mineral rights and to diamond rights specifically. However it is noted that the amendment proposes a provision relating to the legal nature of rights one can acquire under the Act. The Bill states that prospecting, exploration or mining rights granted in terms of the act are limited rights thus no real rights will be ascribed to participants in the sector; an indication of greater state control of mineral resources<sup>74</sup> and lesser legal rights for those investing in the sector.

Another important proposal is the addition of an express definition of the term “mining right”, the amendment proposes that mining rights are specifically defined to only refer to certificates of registration of blocks, special mining lease, mining lease and special grants. Secondary rights such as tributes and transfers of title may no longer be recognized, a factor that affects transferability of rights.

### **3.3.4 Precious Stones Act Chapter 21:06**

The Act does not provide for acquisition of mining rights. The Act acknowledges holders of mining rights as issued under the MMA and administers only the acquisition of licenses and permits in respect of possession, (posses, dispose acquire precious stones for purposes other than trade), and dealing in precious stones. The act is administered by the Minister of Mines and the Secretary of Mines with the help of the Mining Commissioner where delegated or where inspections are required. No amendments or regulations have been tabled to augment the diamond rights acquisition and regulation system.

### **3.3.5 Zimbabwe Mining Development Corporation (ZMDC) Act Chapter. 28:01**

The ZMDC plays a critical role in the mining industry. It is the commercial vehicle for all mining activities on behalf of government. One of its critical roles is cited as investing in the mining industry on behalf of

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<sup>74</sup> Section 2A.

the state and to plan, coordinate and implement mining development projects on behalf of the state.<sup>75</sup> As an institute it also plays a critical role of direct oversight in the industry through its participation in the sector and also as the implementer of mining policies.<sup>76</sup>

- i. The ZMDC represents government interest by either holding government shareholding in joint venture entities or actually running and managing mining projects in 100% government owned entities. The corporation is run and administered by a board which is appointed by the Minister of Mines after consultation with the president and in accordance with any directions that the president may issue to him.<sup>77</sup> The board in turn appoints a General Manager who runs the day to day affairs of the corporation and reports to board. The appointment is subject to the approval of the Minister.<sup>78</sup> The Corporation tenders reports directly to the Minister however, the Minister is not mandated to lay performance reports before Parliament but has the option to tender such reports.<sup>79</sup>
- ii. In addition to the duties specified by the Act, the Minister also has additional authority, after consultation with the board, to give additional directions of a general nature to the corporation in respect to its exercise of its functions, duties and power as may appear necessary and requisite to national interest.<sup>80</sup> Once such additional instructions are issued the corporation is mandated to comply with the directions.<sup>81</sup>
- iii. Section 42 gives the Minister the power to cause an investigation into the affairs of the corporation and appoint persons to implement such investigation. The individuals appointed have the same power as commissioners' appointed by the president under the Commissions of Inquiry Act (Chapter 10:07) with exception to the power to order detention of individuals.<sup>82</sup> This provision provides for closed circuit oversight within the Ministry of Mines.

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<sup>75</sup> Section 20 (a) & (b).

<sup>76</sup> Section 23.

<sup>77</sup> Section 5.

<sup>78</sup> Section 24 (1).

<sup>79</sup> Section 21.

<sup>80</sup> Section 25 (1).

<sup>81</sup> Section 25 (2).

<sup>82</sup> Section 42 (1) & (2).



### **3.4 Conclusion**

The framework managing the acquisition of rights in Zimbabwe is conceptually guided by the DP and legislatively provided for by the MMA as read with other key Acts such as the ZMDC and PSTA. However provisions of the DP have not been embedded/amended into subsisting legislation thus leaving uncertainty as regards the implementation of provisions set forth in the policy.

## CHAPTER 4 - Analysis of Botswana's policy, legislative and institutional framework on mining rights

### 4.1 Introduction

Botswana has been hailed as one of the few African countries that have been able to create a sustainable framework for the development of their diamond resources. Botswana has a 50/50% joint venture with DeBeers which is operationalized through the commercial vehicle Debaswana, also operational are seven other private companies mining diamonds from which the government receives royalties and taxes. The country has even gone further to acquire 15% shareholding in DeBeers so as to diversify its dependence on direct revenues and also as a way to influence the development of the diamond value chain. The union between DeBeers and Botswana has seen Botswana develop a full value chain from prospecting to jewelry manufacturing and retail.<sup>83</sup> Botswana tops as one of the highest producers of diamonds in the world and has high gem quality diamonds; one of the largest diamonds in the world was discovered in Botswana's Karowe mine and is a 1,111 carat stone.<sup>84</sup> Whilst the quantity and quality of diamonds between Zimbabwe and Botswana is different, the countries exist of the same demographic and economic territory and both have a resource that they have developed in unique ways. This Chapter singles aspects of the subsisting mineral policy, legislation and institutional framework currently governing the issuance of diamond mining rights in Botswana.

### 4.2 Diamond Policy & Legislative Framework

Botswana has encompassed its policy position clearly in its Mines and Minerals Act which is also fully explained in its various investment promotion documents.

#### 4.2.1 Mines and Minerals Act No. 17 of 1999

The Act generally establishes a dual system for acquisition of rights, that is licensing and concession acquisition. The ownership of minerals is vested in the republic (state) and the Minister responsible for minerals is entrusted to act in public interest when developing a framework for exploitation of mineral

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<sup>83</sup> M C Brook, The journey of Botswana diamonds 2012.

[http://www.dtcb.co.bw/docs/dtcb\\_the\\_journey\\_of\\_botswanas\\_diamonds.pdf](http://www.dtcb.co.bw/docs/dtcb_the_journey_of_botswanas_diamonds.pdf) accessed 10 November 2016.

<sup>84</sup> BBC News online, Worlds second largest diamond found in Botswana, 19 November 2015 <http://www.bbc.com/news/world-africa-34867929> accessed 10 November 2016.

resources.<sup>85</sup> The Act is also the only instrument that governs acquisition of mining rights.<sup>86</sup> The eligibility for acquisition of mining rights is set as residence in the country at least for a period of not less than 4 years for non citizens and for corporate entities the requirement is incorporation in the country and domicillium in the country. The statute also specifies the criterion for eligibility of prospecting and the considerations of the Minister in assessing the application thus minimizing the administrative discretion of the Minister. This assessment takes into account aspects of experience, financial, technical, environmental, none compliance and also non conflicting interest with other licenses.<sup>87</sup>

Mining rights are issued either as mining licenses for large scale projects and mining permits for small scale projects. No permits are issued for diamond mining.<sup>88</sup> A small scale project is any project processing less than 50 000 tonnes of raw ore per annum and whose investment does not exceed one million Pula.<sup>89</sup>

Section 51 governs the acquisition of mining licenses for diamonds, unlike other minerals; diamonds are acquired only by concession. An applicant is mandated to negotiate with government the terms and conditions of the license, the agreement consequently covers all technical financial and commercial aspects of the proposed project inclusive of the extent of government participation if any.<sup>90</sup> The negotiations should be finalized or bear progress within a period of 6 months, or an extended period as the Minister may allow or else the application will be deemed as failed.<sup>91</sup> After successful negotiations the Minister shall issue a mining license reflecting the terms of the agreement.<sup>92</sup> The provisions set forth however do allow for transferability and renewal of the license subject to negotiation and agreement with government.<sup>93</sup> All mining licenses are for a period of 25 years, renewable, which the statute holds

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<sup>85</sup>MAMA Section 3.

<sup>86</sup> MAMA Section 5.

<sup>87</sup> MAMA Section 14.

<sup>88</sup>MAMA Section 52 (7).

<sup>89</sup> Part I (1).

<sup>90</sup> MAMA Section 51 (1).

<sup>91</sup> MAMA Section 51 (2).

<sup>92</sup> MAMA Section 51 (3).

<sup>93</sup> MAMA Section 51 (1).

to be reasonable for the full execution of a mining project.<sup>94</sup> Licenses may only be renewed for further periods not exceeding 25 years.<sup>95</sup>

The government carries an option to participate in all mining projects by acquiring a paid up 15% shareholding in the project.<sup>96</sup> The option is not negotiated and can be executed on projects the government is interested in. The statute further indicates that the government is obliged to contribute to the working capital of the project as other shareholders.<sup>97</sup> The applicant is notified on issuance of the license whether government is exercising its option.<sup>98</sup>

In the event of competing applications for mining licenses, section 39 (4) provides that the Minister shall grant the license to the applicant whose programme offers more beneficial use of the mineral.

#### **4.2.2 Precious and Semi-precious Stones Act Chapter 66:03**

The Act does not deal with the issuance of mineral licenses and deals with licensing dealing in precious stones. The Act is administered by the Minister responsible for minerals, energy and water resources, and falls solely under the ambit of the Ministry of Mines.

#### **4.3 Independent Oversight and Regulation of Industry**

Outside the Ministry of Mines, Botswana does not have independent regulatory bodies overseeing the diamonds industry and *vis a vis* the negotiations of government in respect to diamond projects. The Natural Resource Governance Institute (NRGI) makes an observation that there is a general lack of oversight in the sector notably that,

“There is no legislative review of the licensing process, and commercial confidentiality regulations prohibit parliamentary committees from overseeing negotiations between the Mines Ministry and diamond companies. There is no legal mechanism for appealing licensing decisions”.<sup>99</sup>

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<sup>94</sup> MAMA Section 41 (1).

<sup>95</sup> MAMA Section 42 (6).

<sup>96</sup> MAMA Section 40 (1).

<sup>97</sup> MAMA Section 40 (1)(b) (i) & (ii).

<sup>98</sup> MAMA Section 40 (2).

<sup>99</sup> <http://www.resourcegovernance.org/our-work/country/botswana> accessed 12 November 2016.

This reflects a closed concessionary system of the award of diamond mining rights where the Ministers discretion is only guided by the requirements of the Mines and Minerals Act and not subject to external review.

Botswana subscribes to the requirements of the Kimberly Process Certification Scheme (KPCS) and has entrenched these requirements in its rough diamond export and import regulations.<sup>100</sup>

#### **4.4 Conclusion**

The Botswana system of acquisition of rights is concise and laid clearly for prospective investors to decipher. It specifies the method of acquisition in respect to diamonds within the Act, showing the importance the sector plays in the mining industry. The Mines and Minerals Act places the mandate of issuance of rights by concession on the Minister responsible for minerals, energy and water. The system is allows for both government participation in diamond mining projects as joint ventures and also issuing of licenses to private entities. The indigenization regulations allows for an initial an initial stake of 15% participation, however due to the nature of concessionary acquisition of rights, negotiations allow for the stake to be increased albeit in the Botswana case; as paid up shares and with contribution to working capital.

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<sup>100</sup> Exports & Imports of Rough Diamonds Regulations, SI 24 of 2004.

## **CHAPTER 5 - Evaluation and comparative analysis of Zimbabwe and Botswana's approach to diamond mining rights**

### **4.1 Introduction**

This chapter reviews the legislative, policy and institutional frameworks of Zimbabwe and Botswana against best practice tenets and evaluates whether the systems established in both jurisdictions create conditions that foster sustainability of the diamond resources. The two countries embrace direct government administration of diamond resources albeit at different levels of maturity of the sectors.

### **4.2 Policy Comparison**

Zimbabwe has a policy dedicated to diamonds given the strategic status ascribed to the resource. The policy is intended to direct significant changes to subsisting legislation and improve the administration of the diamond sector. As highlighted in the previous Chapter, the DP brings 3 important pointers to acquisition of rights. These are:

- i. State ownership of the diamond resource;
- ii. Preference of state to 100 SOE's in diamond sector; and
- iii. Optional co-opting of investors based on indigenization laws, which are based on 51/49% shareholding partnerships with government as the majority.

This is a strong policy statement on the centralization of the sector to government control and oversight. This position is in line with the need to maximize returns and accountability on the resource. Botswana also takes a very active and centralized approach to the management of diamond resources. However Botswana does not have a dedicated policy for diamonds but its Mineral Investment Promotion<sup>101</sup> document indicates that the drive of government is to promote diverse private investment into prospecting and mining of diamonds. The pro- investment policies differ from Zimbabwe's approach in that whilst all mineral rights are vested in the state the state has not made a drive towards 100% SOE approach and their indigenization drive starts at 15% government participation which can be negotiated upwards as the circumstances may allow.

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<sup>101</sup> <http://www.gov.bw/Global/MMWER/Botswana%20Mineral%20Investment%20Promotion.pdf> accessed 16 November 2016.

Article 5.3 of Zimbabwe's DP vests the ownership of rights over the diamond resource in the state. This provision looks progressive until it is read in conjunction with the Constitution and the MMA of Zimbabwe. The head of state who is the President has the rights and ownership of minerals divested to him though the Mines and Minerals Act. The administrative implications of this are that the President considerable power in determining the acquisition and regulation of all minerals and in this case diamonds. It enables a scenario where the office of the president may issue direct instructions or influence as regards the adjudication of mineral rights and consequent allocation of those rights.

As highlighted from the development of PSNR principle there is a fundamental difference between vesting mineral ownership in the state and in the people. The PSNR principle is moving from a predominantly interstate approach of the principle to encouraging the development of intra state duties and responsibilities of governments to its people. The critical message being that it is the people and not central government that owns natural resources and that governments merely act as an agent to its people therefore are accountable for how they develop mineral resources. Taking from this school of thought, the legislative vesting of ownership rights in minerals in Zimbabwe is fundamentally flawed as it places this inalienable right in a political office and thus subject to the influence of the same. Without adherence to the Constitutional provision for the enactment of legislation governing the negotiation of concessions for minerals, there is no forum available for participation or oversight of negotiations of critical government contracts or the powers of the President in the mining sector.

Zimbabwe's diamond policy and current legislative framework are not coherent. The objectives set forth in the DP have not been complimented by the necessary institutional and legislative amendments. Save for the pronouncement on ownership which allows an investor to decipher the extent of participation they can take on; the policy does not enunciate further guidelines on the principles guiding the acquisition of diamond mining rights in particular.

Botswana's diamond policy is enunciated in its various investment instruments, which details how diamond mining rights can be applied for, the investment instruments reflect what legislation encompasses. There is clarity between policy and legislation as to how diamond mining rights are acquired in Botswana.

### **4.3 Legislative and Institutional Comparison**

In order to fully analyze legislative and institutional comparisons this study assesses some agreed best practice tenets on allocation of rights and how they are treated in both jurisdictions.

#### **4.3.1 Clarity on legal authority for allocation of rights and turnaround time for issuance of license**

The legislation in Zimbabwe asserts a multi-player structure in the consideration of applications for mining rights. Prospective applicants submit an application to the Mining Commissioner, who when satisfied, forwards the application to the MAB, the MAB assesses the application and makes recommendations to the Minister who in turn seeks the consideration and approval of the President. The Act does not give guidance on the turnaround time for this process which position allows for inefficiency in processing and finalizing the outcomes of applications. In Botswana an application made directly to the Minister after which negotiations ensue between the applicant and government. Legislation further mandates that where no agreement has been reached in 6 months, and no extension to negotiations has been issued, the application will be considered as failed.

#### **4.3.2 Transparency;**

The acquisition of rights in both jurisdictions is highly centralized. The negotiations and resultant agreements vesting mining rights are the preserve of the allocating authority and are not subject to review to consultation outside of the party's and designated government officials. The process does not have Parliamentary or independent oversight in both jurisdictions. In Zimbabwe the Minister is not compelled to report to Parliament on the process or the contents of the agreements, and as stated in section 167, can actually negotiate outside the direction of the provisions of the Act without submitting his negotiations and results thereof to the MAB. The commercial vehicle for mining projects on behalf of government, the ZMDC, does not report to Parliament or any other independent regulatory Board, it reports to its principal the Minister. Investigations are conducted through the Minister of Mines. This closed circuit approach does not encourage transparency or accountability. The Constitution provides for an Act to be promulgated to guide the negotiations and finalization of mineral concessions among other things but this Act is yet to be initiated.



#### **4.3.3 Clear licensing requirements;**

Concessionary allocation of rights allows for the spectrum of licensing requirements to be malleable. This allows for governments to leverage what is most important to them at the time of negotiations. This on one hand can allow for progressive development of licensing requirements built on experience from previous projects. On the other hand it can create space for political capture of projects where the best interests of the people are not prioritized.

Licensing requirements should be built within a framework for predictability and consistency. Both jurisdictions compared in this study have general guidelines for the submission requirements of applications but also allow for significant discretion from administrative authorities in the content and scope of negotiations. Botswana allows for two scenarios of issuance of rights, outright licensing to private entities and joint venture projects wherein government participates as a paid up shareholder. Both are subject to the conditions set forth by government at the time of negotiation. The discretion in the Botswana system is tacit in the silence regarding the scope and nature of the negotiations.

Zimbabwean legislation provides for an anomaly where the Minister, with direction from the President, can issue directions on any provisions of the agreement which may not be consistent with the Act.<sup>102</sup> Section 167 actually allows the Minister to deviate from the guidance and structure of the Act. The section allows the Minister with the approval of the President to enter into agreements not consistent with the Act. In specific, discretion is given regarding the acceptance of the prospective applicant, renewal of the agreement, terms and conditions of the lease, liabilities and obligations of the applicant, including payments of royalties, rents and fees or any other matter connected to the special mining lease. This provision short circuits the safeguards and structures provided for by the Act and provides for unfettered and unregulated discretion in the setting of terms and conditions of rights and issuance of mining rights.

#### **4.3.4 Tenure of mining rights;**

Botswana has a clear legislative position on mining rights; mining concessions are issued for a period of 25 years, which period is renewable for a further period not exceeding 25 years. Given the nature and

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<sup>102</sup> Section 164 (5) MMA.

extent of capital required in mining projects this period can be deemed adequate for the sustainable implementation of a project. Zimbabwe also provides that special mining leases are issued for periods of 25 years and may be renewed for periods not exceeding 10 years thereafter.<sup>103</sup> However in Zimbabwe's case this is subject to the discretionary powers of the Minister to enter into agreements that may not be consistent with the Act in instances he may determine necessary and with the approval of the President.

#### **4.3.5 Transferability of rights;**

Legislation in Botswana allows for the transfer of diamond mining rights and an application of this nature is dealt with by way of good faith negotiations with government. In Zimbabwe mining leases may be transferred subject to the approval of the Minister however it would seem that rights acquired under a special mining lease are not transferable as no provision has been made for such. It is also important to note that under the previous joint venture agreements between government and investors, the mining title (special grant) was held and retained by the ZMDC therefore it is was not transferable.

#### **4.3.6 Guided discretionary rights;**

What is clear in both jurisdictions is that the Ministers have administrative discretion in negotiation of agreements for diamond mining rights. Whilst elements relating to general application requirements are laid out in legislation, the Acts are silent on the actual form and criteria of eligibility and this allows for discretion to be applied. The Zimbabwean system goes further to enable the Minister to negotiate and enter into agreements outside the provisions of the Act. This allows significant discretion which may be subject to undue influence, corruption and maladministration.

#### **4.3.7 Clear uniform position on Government participation**

Government participation is an agenda set forth in both the Zimbabwean and Botswana jurisdictions, what differs is the initial extent of participation. In Botswana the general rule regarding mining licenses is that government has an automatic discretion to participate in any mining project up to a paid up share capital of 15%. Participation in the diamond industry is an open issue and is one of the issues set for negotiation, a position which allows government to acquire more than 15%. In Zimbabwe government participation in the diamond sector is either 100% or is guided by the IEEA which stipulates a 51% free

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<sup>103</sup> MMA Section 164 (4).

carry shareholding to government. According to explanatory pronouncements on the indigenization policy it is clear that in resource based projects the governments' contribution in any partnership is the resource itself, therefore no capital is contributed by government. The lack of capital participation by the government means lone capital contribution by investors who on the other hand also have less shareholding. This is an element which may make investment unattractive. Botswana has managed to establish a more sustainable position by opting on equity partnership with its investors.

#### **4.4 Overview of Zimbabwe and Botswana rights acquisition system**

The system and framework regulating the acquisition of rights is key in determining whether a mineral policy is sustainable or not. The rights acquisition process is the first step to exploitation of minerals and if done in a manner that embraces best practice tenets it will attract investors that bring value and also entrench accountability measures that eventually bring benefit to present and future generations. As discussed in the foregoing, the rights acquisition system in Zimbabwe has elements driving towards maximization of value but its policy, legislation and institutional framework has not developed in line with the vision it has set out for the diamond sector. Following from the same, it is the view of this study that the following critical reforms are required in order to achieve sustainable development of the diamond resource. Critically, the provisions of the DP have not been complimented by the requisite amendments required on key legislation, wide discretionary powers given to the Minister in the main legislative instruments does not foster an environment for predictability, accountability and transparency. It is also apparent that the current institutional framework does not afford independent oversight of the rights acquisition process. Institutions such as the ZMDC and MAB are fully under the control of the Minister of Mines and thus cannot offer wholly independent participation. Following from the same, there is a significant potential to disable the new state owned entity ZCDC from implementing good governance measures as its independence is compromised by the current administrative structure of governance.

Parliament may through its committees investigate into issues relating to the mining sector but this measure in itself is reactionary and normally ensues after the fact. In 2013 Parliament through its Parliamentary Portfolio Committee on Mines presented a report on diamond mining which highly criticized the shrouded selection of investors in the Marange diamond fields and transparency of

negotiated agreements and operations.<sup>104</sup> The report investigated and questioned aspects of due diligence in the selection of investors, powers of the Minister in relation to selection of investors and also control of the joint venture arrangements in the sector. Recommendations from the report noted the need for accountability and transparency in the rights allocation system and advocated for extensive legislative amendments to improve administration of this sector. What is critical to note is that the committee hearing system is retrospective; in the event of maladministration the damage would have been done. There is a clear gap that exists in independent oversight of the sector.

Botswana has been hailed as one of the few African countries that have managed to create sustainable diamond wealth and from the foregoing it is clear that it has a clear policy and legislative framework as regards its diamond sector. Its approach has derived consistent economic returns from the diamond sector. Botswana has been able to attain significant geological information on its reserves through a vigorous open investment policy on prospecting. This has propelled development of the sector and provided the government with adequate knowledge of its resources. Private investment has also enabled the country to exploit its resources and establish diamonds as its largest export commodity. The country has successfully leveraged its resource.

However it is important to note that there are also areas that need to improve when the framework is considered in relation to best practice in issuance of rights. These areas include transparency and independent oversight on government agreements. These concepts are central in the application of the PSNR principle today, particularly the people's right to participation and information about critical government transactions regarding their natural resources. Both jurisdictions allow considerable discretion as to the players that are privy to negotiations yet it is critical to have a clear understanding of whether the appropriate stakeholders are being included in the process.

#### **4.5 Conclusion**

Sustainability depends on the relevance of policies and legislature to meeting the needs of present and future generations. Without regulatory oversight and accountability in the allocation of diamond rights it is difficult to meet these needs adequately. This is a position that both the governments of Botswana and Zimbabwe need to look at in order to fully harness value for future generations. It is clear that sustainability goes beyond successful exploitation of the resource and includes good governance

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<sup>104</sup> Diamond Mining in Zimbabwe, Chingwa report Parliament of Zimbabwe, S.C.4 2012, presented June 2013.

systems. It embraces the participation of the intended beneficiaries in key issues affecting the exploitation of the resource.

## **CHAPTER 6 - Conclusion and Recommendations**

### **6.1 Introduction**

This chapter presents the findings of the study relative to the analysis of the current policy, legislative and institutional framework governing the acquisition of diamond mining rights in Zimbabwe. Critical to this evaluation and analysis are the research questions set forth at the inception of the study.

### **6.2 What are the administrative implications of the provisions of Article 5.3 in the vesting of mineral rights?**

Article 5.3 of the DP vests the ownership of diamond mineral rights in the state and in recognition of the President being Head of state the MMA divests its ownership to the President. The current position gives real rights of ownership in minerals and administrative rights to the President thus giving him/her direct authority in the management of mineral resources. Whilst the office of the President represents the elected majority, it is a political office that can be usurped by the political needs of either the executive or the ideology of a select portion of the general populace. It is against the risk that it is not considered a best practice principle to place the ownership of natural resources in a potentially polarized entity. The definition of the term “state” as discussed in Chapter 2 identifies 4 components which require representation, which are; sovereignty, territory, society and government. These tenets provide a basis for wider participation of players in the administration of mineral rights which goes beyond the government. The definition requires society to also be allowed space for participation and oversight of natural wealth.

### **6.3 Do the current policy and legislative provisions relating to the acquisition and oversight of mining rights or exploitation of diamonds conform to best practice standards?**

The examination in Chapter 5 reveals an inherent inadequacy between current policy, legislative and institutional mechanism in the issuance of diamond mining rights in Zimbabwe.

The DP’s approach to mining rights introduces a closed system of rights of participation. The policy posits nationalization of the sector with optional integration of investors albeit in a joint venture arrangement with government. This approach has tenets of government centralization of the industry

which requires comprehensive legislative regulation. Legislation has not yet been amended or promulgated to adequately cater for regulation of nationalization of the sector or legislation guiding concessionary issuance of mining rights. Without legislative reforms which integrate the provisions of the DP the current framework still provides for an open system of acquisition of licenses and it allows for significant discretion in the issuance of rights to the Minister and the office of President in allocation or development of mining rights. The presence of special Boards involved in the issuance of rights such as the MAB, Office of Commissioner of Mines, the proposed Diamond Board and Office of the Precious Stones Commissioner are not adequate measures of independence and adjudication because they can be undermined by legislative powers of discretion of the Minister and President. The ZMDC requires additional independent oversight in respect of the implementation and accountability of its role as the main vehicle of diamond mining projects.

Outside the current oversight of the Ministry of Mines, the framework of issuance of diamond mining rights does not afford participation from other key stakeholders within government structures itself e.g. the Zimbabwe Investment Authority, a body mandated with overseeing and providing frameworks for projects involving investments in projects, other critical government ministries such as, but not limited to, that of environment, water, industry and commerce and energy and civic society and affected communities. Whilst it is agreed that the process of allocating rights is administrative and cannot be subjected to participation of a general form from all interested stakeholders, it is important that constitutional requirements such as enactment of legislations that guide government in negotiation of mineral rights materialize as this creates an platform that such stakeholders' can contribute. It also creates a platform of predictability, harnessing of discretionary rights and an avenue for parliamentary oversight.

#### **6.4 What are the critical reforms required to ensure effective and sustainable regulation in respect to acquisition and oversight of diamond mining rights?**

From the foregoing, the following recommendations are made in respect of aligning the policy, legislative and institutional framework in a manner that fosters sustainability and progressive development in allocation of mineral rights generally and also specifically to diamonds.

#### **6.4.1 Vesting of mineral rights**

The development of the PSNR principle to encourage accountability of governments to its peoples in the administration of natural resources rights should encourage Zimbabwe to re-look at its ownership and vesting clauses in the mineral sector. A purposeful amendment needs to be made to move ownership rights from the political office of the President to the people. It is trite that the current structure of ownership allows for wide discretionary powers and also opens the system of allocation of rights to political influence.

#### **6.4.2 Removal of unfettered administrative powers in MMA and ZMDCA**

The wide discretionary powers on allocation of rights provided for in the MMA should be removed as they allow for a parallel system of allocation of rights which can circumvent normal structures. Matters relating to development of mineral resources should be guided by clear principles of adjudication, accountability and transparency. The current position allows the Minister to deviate from the provisions of the Act without oversight or recourse to the decisions made under these provisions. The Ministers discretion to also recommend actions to the Board of the ZMDC which may not form part of their normal mandate but which the Minister may see a necessary for public interest should also be removed. Any discretion empowered within the Act should be guided and not open ended.

Given that discretion of the Minister is also extended to the running of the ZMDC, This recommendation is also critical to the success of the newly created consolidated company to effectively perform in the sector. The entity needs to have structures that allow for independence from arbitrary administrative instructions from the Ministry and should also have structures that accommodate reporting and accountability to independent entities.

#### **6.4.3 A clear framework detailing acquisition system**

At present the DP suggests that there will be a specific system for acquisition of diamond mining rights which system will require amendments to be made to key legislative instruments such as the MMA, MMCZA, and PSTA. However these amendments are yet to be made. Clarity as regards the rights acquisition and adjudication system is critical in order to ensure a transparent and predictable



framework of allocation of rights. Legislation should be enacted regulating and guiding nationalization of the resource and as per provisions of the Constitution, legislation should also be enacted guiding the concessionary issuance of mineral rights by government.

#### **6.4.4 Enactment of Diamond Board and Precious Stones Commissioner**

Following from the above more light needs to be shed in respect of the constitution, function and accountability of the proposed Diamond Board and Precious Stones Commissioner and how they fit into the diamond value chain. A purely advisory function for the Diamond Board does not yield enough administrative oversight and authority within the value chain. This is more so in light of the discretion available to the Minister. The constitution of the Board and the function of the Precious Stones Commissioner if carefully considered can bring structural change to the adjudication of acquisition of rights that integrates beset tenets for allocation of rights. It is suggested that the diamond board be mandated to consult key stakeholders from other relevant ministries, representatives of civic society, affected communities and ZIA prior to finalization of their recommendations as regards prospective rights applications to the Minister. Coupled with the removal of the Ministers discretionary powers the board can become an effective administrative body for issuance of rights.

#### **6.4.5 Integration of participation from key stakeholders in diamond sector**

A platform is required to allow insight and participation of stakeholders in the acquisition of rights process. This is fundamental in ensuring that the needs and concerns of these stakeholders are taken into account from the instance and not integrated into running projects. This participation needs to occur at the point of negotiation of joint venture agreements, or during initial application procedures. This study posits that sustainability is dependent on the relevance of the provisions initially set agreed at the point of acquisition of rights to the needs of present and future generations. In order for projects to be relevant they need to address the concerns of present stakeholders and the needs of future generations and this can only be achieved by participation from key stakeholders from onset of negotiation of rights or of project feasibility study in the case of SOE's. Participation can come in the form of deliberate project needs analysis and impact assessments done prior to finalization of acquisition of rights.

#### 6.4.6 Integration of Parliamentary oversight

Studies have shown that Parliament is uniquely placed to play a central role in the extractive industries sector. Its ability to have oversight on executive functions, its legislative function and also its representative capacity allows it to play an enhanced role of oversight. The Zimbabwean Parliament has in instance used its various tools to interrogate the policies and framework for allocation of diamond rights i.e. the Chininga Report which cited concerns over how the Marange diamonds fields were administered.<sup>105</sup> However Parliament can play a more proactive role of oversight and for such a system to be effective, Parliamentary functions have to be robust, efficient and proactive in their approach. The Parliamentary committee system provides the right to bring executive decisions under scrutiny through hearings. Given this right, Committees established to oversee the extractive industries can be integrated in the rights allocation system by being allowed access to information and proposed agreement structures during the negotiation of agreements or concessions made by government. Such participation allows for scrutiny of proposed agreements and for the issues and concerns of constituents of the affected areas and national interest to be incorporated. The participation of parliament in this manner does not usurp the executives role of decision making but allows a consultative platform through which Parliament exercises its role to have oversight in executive decisions proactively and not only in a reactive manner.

Another manner in which Parliament can play a proactive role is by allowing increased rights of access to information from SOE's on their operations through a direct periodic reporting requirement. Currently the ZMDC is required to report to its line ministry and the Minister thereof may if he so decides, table a report to Parliament or not. Legislature should be amended to mandate the Minister to table full performance and financial reports periodically to Parliament to allow for real time review of operationalization of agreements.

Such increased participation and oversight from Parliament dilutes political capture of executive decisions in the negotiation and allocation of diamond mining rights.

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<sup>105</sup> Chininga Parliamentary Report 2013.

## 6.5 Conclusion

The allocation of diamond mining rights is central to whether sustainable development of the resource can be attained. Chapter 2 looked at the founding principles of sovereignty over mineral resources and it was established that the people occupy an active role in the governance of mineral resources policies which role requires continued interaction with government on current and future needs for sustainability to be achieved. Based on the foregoing Chapter 3 and 4 examined the current legislative, policy and institutional frameworks in Zimbabwe and Botswana and revealed the significant administrative and executive discretion in both jurisdictions in the rights allocation system.

The implications of the various legislative and policy provisions currently prevailing in Zimbabwe and Botswana were analyzed in Chapter 5. The analysis established that whilst clarity on the allocation of rights creates a secure investment policy that attracts foreign direct investment as seen in Botswana, transparency and accountability are lacking components in both jurisdictions. It was further established that rights allocation systems that are shrouded by considerable administrative and executive discretion make it difficult to assess sustainability of policies and legislation or whether the best interests of the people are being catered for in the negotiation of rights contracts and licensing.

The final conclusion is therefore that significant amendments and reviews have to be made to improve coherence between policy and legislative provisions prevailing in Zimbabwe in respect to acquisition of diamond mining rights. In addition legislative review is necessary to cull administrative and executive discretion in the allocation of these rights so as to foster transparency and accountability in the system. The consultation, inclusion of and accountability to the people is also important in ensuring that the direction taken by policy and legislation is sustainable.

## References

2015 National Budget Zimbabwe, Government Printers Pg 32

A. Farmer *Towards a Meaningful Rebirth Of Economic Self-Determination: Human Rights Realization In Resource-Rich Countries* (1998) 39, NYU Journal of International Law and Politics, pp 417

B. Dhar, *Mining policy initiatives* (2001) APH Publishing, Pg 41

BBC News online, Worlds second largest diamond found in Botswana, 19 November 2015

<http://www.bbc.com/news/world-africa-34867929> accessed 10 November 2016.

C. Prahalad, and G. Hamel, Gary, *Strategy as a Field of Study: Why Search for a New Paradigm?* (1994) Strategic Management Journal, Vol. 15, Special Issue, 5-16

Cambou & Smis, *Permanent Sovereignty over Natural Resources from a Human Rights perspective: Natural Resources exploitation and Indigenous peoples rights in the Arctic* 2013 Michigan State International Law Review, Volume 22:1 348-376

Cazzura, Inkpen, Mussachio & Ramaswamy, *Governments' as Owners: State Owned Multinational Companies*, Journal of International Business Studies, 2014

Diamond Mining in Zimbabwe, the Chininga report, S.C.4 2012, presented June 2013.

Donaldson & Preston *'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications'* The Academy of Management Review (1995) Vol. 20, No. 1, Pp. 65-91

F. Cawood & Oshokoya, *Resource Nationalism in the South African Mineral Sector: Sanity through Stability*, Journal of the Southern African Institute of Mining and Metallurgy (2013) Vol 113:  
<http://www.scielo.org.za/> accessed October 28, 2016

Fritz Visser, *The Principle of Permanent Sovereignty over Natural Resources and the Nationalization of Foreign Interests* (1988) 21, Institute of Foreign & Comparative and International Law Journal South Africa. 76

G. Davis & L. Arturo Vásquez Cordano, *Trade in Mineral Resources* (2009) Colorado School of Mines, Pg 10

<http://www.differencebetween.net/miscellaneous/politics/political-institutions/difference-between-government-and-state/> accessed December 2016

<http://www.gov.bw/Global/MMWER/Botswana%20Mineral%20Investment%20Promotion.pdf> accessed 16 November 2016.

<http://www.iol.co.za/news/africa/zimbabwe-shuts-7-diamond-companies-1988239> accessed 8 December 2016

<http://www.iol.co.za/news/africa/zimbabwe-shuts-7-diamond-companies-1988239> accessed December 8, 2016

<http://www.preservearticles.com/201012241588/what-is-the-difference-between-state-and-government.html> accessed December 2016

<http://www.resourcegovernance.org/our-work/country/botswana> accessed 12 November 2016.

<http://www.un.org/sustainabledevelopment/news/communications-material/>

<https://assets.kpmg.com/content/dam/kpmg/pdf/2014/05/mining-risk-assurance-v5.pdf> accessed December 2016.

International Monetary Fund, World Outlook Report, October 2016

J. S Shaw, *Public Choice Theory* The Concise Encyclopedia of Economics (Library of Economics and Liberty, 1993) <http://www.econlib.org/library/Enc1/PublicChoiceTheory.html>

J Wang , *The Political Logic of corporate Governance in China's State Owned Enterprises* (2013) Cornell International Law Journal, Vol 47, Article 5, Pg 662

J. Oloka-Onyango, *Heretical Reflections on the Right to Self-determination: Prospects and Problems for a Democratic Global Future in the New Millennium* (1999) 15 AM. U. INT'L L REV. 151, 206

J. Shaw (2008) '*Public Choice Theory*' The concise encyclopedia of Economics, <http://www.econlib.org/library/Enc/PublicChoiceTheory.html>

James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous People's Rights over Lands and Natural Resources under the Inter-American Human Rights System* (2001) 14 HARV. HUM. RTS. J. 33, 36

James Graff, *Human Rights Peoples & Self Determination: Group Rights* (1994), Toronto; University of Toronto Press Pg 186-215

Jozef Dubinski, *Sustainable Development of Mining Mineral Resources* (2013) Journal of Sustainable Mining, Volume 12, No. 1, Pg 1-6

K. Eisenhardt, *The Agency Theory: An Assessment and Review* (1989) Academy of Management Review, Vol 14, No.1 Pg 57-74

Kiari Mwaura, *The Failure of Corporate Governance in State Owned Enterprises and the need for Restructured Governance in fully and partially Privatized Enterprises: The case of Kenya* (2007) Fordham International Law Journal, Vol 31, Article 1, Pg 74

L Miranda, *The role of International Law in interstate natural resource allocation: Sovereignty, Human Resources and people based development* (2012) Pg 45 Vanderbilt Journal of Transitional Law, 785

M. C Brook, *The journey of Botswana diamonds* (2012)  
[http://www.dtcb.co.bw/docs/dtcb\\_the\\_journey\\_of\\_botswanas\\_diamonds.pdf](http://www.dtcb.co.bw/docs/dtcb_the_journey_of_botswanas_diamonds.pdf) accessed 10 November 2016

M Mbo & C Ajasi, *Drivers of Organizational Performance: State Owned Enterprises Perspective*, Biennial conference of the Economic Society of SA, UFS, South Africa, 25-27 September 2013

Natural Resource Governance Institute, *State Participation and State – owned Enterprises* (Roles, benefits and challenges) March 2015 Parliamentary Brief

P Zhuwawo, *Frameworks, Procedures and Guidelines for the implementing of Indigenization Economic Empowerment Act* (4 January 2016) Presented by Honorable Minister of Indigenization and Economic Empowerment, Government of Zimbabwe

R Pereira & O Gough, *Permanent Sovereignty over Natural Resources in the 21<sup>st</sup> Century, Natural Resource Governance and the right to self determination of Indigenous peoples under International Law* (2014) Melbourne Journal of International Law, Volume 14 Pg 452-494

R. Freeman. *'The Politics of Stakeholder theory: Some future directions'* (1994) *Business Ethics Quarterly*, Vol 4(4), Pp 409 - 421

Reserve Bank of Zimbabwe, Export Control Directive RP191

S. Berg, *Best Practices in Regulating State Owned Enterprises and Municipal Water Utilities* (2013) Project document for Economic Commission for Latin America and the Caribbean (ECLAC) Pg. 25

S. Du Plessis, *Nationalizing South African mines: an economic assessment* (2013) *Journal of the Southern African Institute of Mining and Metallurgy* 113 (1), 31-38

[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S00382223X2013000100007&lng=en&tlng=en](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S00382223X2013000100007&lng=en&tlng=en) accessed 29 October 2016.

T. Dietz, E. Ostrom & P Stern, *The Struggle to govern Commons*, *Science, New Series* Vol 302, No. 5652 (2003) Pg 1908

United Nations, Brundtland Commission Report 1987

Zongwe, P. Dunia , *The Legal Justifications for a People-Based Approach to the Control of Mineral Resources in the DRC* (2008); CLS IUGSCP Paper 12.[http://scholarship.law.cornell.edu/lps\\_clacp/12](http://scholarship.law.cornell.edu/lps_clacp/12).