

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

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DECLARATION OF ORIGINALITY

I declare that this Mini-Dissertation which is hereby submitted for the award of Magister Legum (LLM) in Extractive Industry Law in Africa in the Department of Public Law, Faculty of Law, University of Pretoria is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution. Other works referred to are accordingly acknowledged.



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DEDICATION

This work is dedicated to my family that has been of great encouragement throughout the course of my studies.

Asante Sana!

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I owe special gratitude to God Almighty who always gives me strength and wisdom beyond my natural ability.

Many thanks to my wife Beauty Ndlovu for standing beside me throughout my studies, she has been my inspiration and motivation for continuing to improve my knowledge and move my career forward.

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Lingadinwa lakusasa bakwethu!

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CHAPTER 1 – INTRODUCTION

An appropriate and modern legal and institutional framework is vital in the regulation of the exploitation of natural resources in a sustainable way to the benefit of all the country's citizens. The introduction of the KPCS in 2002 as a framework was as a result of a need for an international institution that would govern the flow of diamonds throughout the diamond supply chain. This was aimed at combating conflict diamonds that were used to fund rebel groups which had resulted in disastrous civil wars across the African continent. In June 2009 one of the core founders of the KPCS, Ian Smillie in a shocking move, announced his resignation due to what he partly called the failure of regulatory institutions in ensuring that the minimum requirements of the KPCS were met. He further claimed that the KP's refusal to evolve and address the clear links between diamonds, violence and tyranny had rendered it increasingly outdated.

In light of the above, this research shall examine the importance of the functional legal and institutional framework and how this can have an impact in the economic growth and well-being of a nation. The KPCS will be evaluated as one such institution that was established to regulate the flow of diamonds. The study will focus on the impact that the KPCS has made in influencing countries to have functional legal and institutional frameworks aimed at curbing the flow of conflict diamonds. Zimbabwe will be used as a case study regarding the impact that the KPCS has had on its diamond industry.

1.1 Aims and Objectives

- i. To critically examine the importance of a functional legal and institutional framework in the regulation of the diamond industry.
- ii. To analyse the impact of a sound legal and institutional framework in the governance of the diamond industry.
- iii. To evaluate how working institutions can positively contribute to the sustainable exploitation of diamonds to the benefit of the present and future generations.
- iv. To demonstrate how other regions have performed in setting the functional legal frameworks and institutions that have positively contributed in the economic growth due to the appropriate exploitation of diamonds.
- v. To propose the best practice and recommend the best legal framework that can ensure transparency and accountability in Zimbabwe's diamond industry.

1.2 Research Questions

- i. What is the current status of the regulatory regime that governs the exploitation of diamonds in Zimbabwe?
- ii. Do the current laws ensure the proper oversight in the exploitation of the diamonds in Zimbabwe and that the KPCS minimum requirements are met?
- iii. How effective are the current institutions in ensuring transparency and accountability in the diamond industry of Zimbabwe?

1.3 Research Methodology

An analytical study of the legal and institutional framework that govern the exploitation of diamonds in Zimbabwe. This research seeks to analyse the current legal and institutional framework in the exploitation of diamonds in Zimbabwe and further seeks to examine how the current legal and institutional framework aligns itself with the KPCS. The research is based on a qualitative approach, which consists of desk and library based research. It relies on both published and unpublished material.

This work shall add into the scholarly emphasis in having functional legal frameworks and institutions that must govern the exploitation of diamonds to the benefit of all the country's present and future generations.

1.4 Chapter Outline

The study consists of five chapters: The introductory chapter, a discussion on the KPCS, a layout on the laws governing Zimbabwe's diamond industry, an analysis of the institutional regulatory aspects in Zimbabwe and lastly conclusion and recommendations.

Chapter 1: Introduction

In this chapter, I will introduce the background and layout of this work. This will include a brief discussion on the importance of an appropriate and functional legal framework in the governance of the exploitation of natural resources. The impact of such sound legal and institutional frameworks in the governance of the exploitation of diamonds and the dealing thereof will be mentioned.

Chapter 2: Context: - Kimberly Process Certification Scheme

This chapter will deal with the KPCS in detail as an international institution that was introduced to govern the diamond industry. Its impact and effectiveness to date, where it has been properly implemented will be discussed, including some of the failures and successes of the system.

Chapter 3: Zimbabwe's Diamond Industry

This chapter will generally look at the diamond regime in Zimbabwe. Regulations that deal with the mining sector, specifically in relation to the governance of the Zimbabwean diamonds will be explored.

Chapter 4: Analysis of the institutional regulatory aspects in Zimbabwe

In this chapter, an analysis and evaluation of the impact and effectiveness of the current institutions that govern the diamond sector in Zimbabwe, in relation to the compliance with the minimum requirements of the KPCS will be made. Mention will be made on the institutions that are in other diamond mining regions and how they have performed in ensuring compliance with the KPCS minimum requirements.

Chapter 5: Conclusion and Recommendations

In this chapter, I will give concluding remarks on this work and make recommendations on the most appropriate legal and institutional framework that the Zimbabwean diamond sector has to adopt, which will ensure that the minimum requirements set by the KPCS are met.

In order for the state's present and future generations to benefit from the exploitation of its natural resources, sound legal and institutional frameworks have to be in place to regulate and ensure that such exploitation is done appropriately. For over the past decade there has been a trend whereby many countries, particularly in Africa, Asia and Latin America instituted reforms in their legal and institutional frameworks for their mining sectors to modernise the management of the sector and attract Foreign Direct Investments. This was further aimed at optimising the contribution of mining to their economies both at the local and national level.

Zimbabwe was no exception in these reforms, although the pace and processes for the reforms were rather at a very slow speed. This is evident from the draft of Mines and Minerals Amendment Bill that

was firstly gazetted by the government in 2007¹, which amongst other things aimed to achieve the following main objects:

- a) to change the composition of the Mining Affairs Board and to clarify and extend its functions;
- b) to regulate the activities of prospectors more closely, and to confine their activities to specific areas defined by grids;
- c) generally, to make the procedures under the Act more transparent and to allow aggrieved persons a right of appeal to the Administrative Court against decisions which affect their rights.²

In mid-2016, comments were called from the general public on the final Bill³ and the process for such commentaries was closed in September 2016. The Bill is yet to be passed as an Act on an unknown future date.

The cause of the delays to pass the amendments to the Mines and Minerals Act has been attributed to the disharmony between the Ministry of Mines and the Ministry of Finance regarding the proper legal framework for the exploitation of diamonds. The issue was on whether to formulate a new Diamond Act or a Diamond Revenue Act or simply passing regulations under the Precious Stones Trade Act so as to regulate trade in rough diamonds.⁴ This confusion saw the passing of a Diamond Policy earlier in May 2012 by the government through the Ministry of Mines and Mining Development. The Diamond Policy rightfully made reference to the development of a Diamond Act, but to date there is no Diamond Act in place, neither are there any approved amendments to the Bill that was firstly gazetted in 2007.

In the midst of confusion on whether to develop a new Diamond Act or a Diamond Revenue Act or simply passing regulations under the Precious Stones Trade Act so as to regulate trade in rough diamonds, the government finally introduced a Diamond Policy in 2012. Amongst other things, the purpose of the Diamond Policy is stated as, “to provide a framework for promoting the image of Zimbabwean diamonds; to promote valuation and marketing of diamonds; to protect diamonds from threats of smuggling; to account for diamonds and promote transparency; to enhance handling and transportation of diamonds and to promote security related aspects of the diamond production chain”.

¹ Zimbabwe Government *Gazette*: Friday 16th November 2007; H.B 14, 2017.

² Mines and Minerals Amendment Bill, H.B 14, 2007.

³ Website Link: <http://www.veritaszim.net/node/1778>.

⁴ M Dhlwayo and S Mtisi, Towards the development of a Diamond Act in Zimbabwe, 2012.

The above efforts by the Zimbabwean government, albeit slow all point to the fact of the need of a sound legal framework on the regulation of the exploitation of the diamonds to the benefit of the present and future generations. The above efforts are further aimed at aligning the laws that govern the diamond sector with the Kimberly Process Certification Scheme which is an international certification system aimed at curbing the smuggling of illegal rough diamonds into the clean diamond trade.

Zimbabwe's economic recovery and growth is forecasted at doing better in the diamond mining sector if properly regulated, managed and developed in an orderly and transparent manner. While the country has a long history of diamond mining dating from as early as 1903⁵, the mining of diamonds only came into limelight after the 'official discovery' of the Marange diamond fields in early 2006.⁶ Apart from the Marange diamond fields, Zimbabwe has two other known mining areas which are River Ranch in Beitbridge in the southern part of the country and Murowa Mine in Zvishavane which is in the western side of the country.⁷

In the paragraphs that shall follow, I will make an analysis of the impact of the Kimberly Process Certification Scheme on specifically the national diamond regulation regime of Zimbabwe and lightly on that of other diamond producing nations in Southern Africa. I will further make an analysis of the existing laws in the regulation of the diamond sector in Zimbabwe, such as the Mines and Minerals Act (Chapter 21:05), the Precious Stones Trade Act (Chapter 21:06), the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufactures) Regulations of 2010, the Minerals Marketing Corporation of Zimbabwe Act, the Mines and Minerals Unit Regulations, 2008 and the Zimbabwe Mining Development Corporation Act. Further, an analysis of the Diamond Policy with the aim to identify strengths, gaps and weaknesses by benchmarking it against the KPCS will be made.

Lastly, I will make recommendations on the appropriate legal and institutional framework that the Zimbabwean diamond sector has to adopt, which will ensure that the minimum requirements set by the KPCS are met. Thereafter, concluding remarks will be made on the need for the evolvement of the legal framework and institutions that govern the diamond industry to address the links between economic growth, diamonds and human rights issues.

⁵ B Cairncross, Field Guide to rocks and minerals of Southern Africa, 2004 at page 82.

⁶ *Ibid* at page 82.

⁷ A closer look at diamond mining in Zimbabwe, <http://rough-polished.com/en/expertise/81069.html>, 26 Aug 2013.

CHAPTER 2 – KIMBERLY PROCESS CERTIFICATION SCHEME

In this chapter, I will deal with the KPCS in detail as an international institution that was introduced to govern the diamond industry. Its impact and effectiveness to date, where it has been properly implemented will be discussed and this will include some of the failures and successes of the system.

2.1 Inception of the Kimberly Process

The Kimberley Process started when Southern African diamond-producing states met in Kimberley, South Africa in May 2000 to discuss ways to stop the trade in conflict diamonds and ensure that diamond purchases were not financing violence by rebel movements and their allies that were seeking to undermine legitimate governments.⁸

What followed thereafter was an unprecedented adoption of a landmark resolution by the United Nations General Assembly in December 2000 supporting the creation of an international certification scheme for rough diamonds.⁹ Negotiations between governments, the international diamond industry and civil society organisations resulted in the creation of the Kimberly Process Certification Scheme by November 2002. The KPCS Core Document sets out the requirements for controlling rough diamond production and trade.¹⁰ The KPCS finally came into force in 2003 when all its participating countries began to implement its rules.¹¹

2.2 Composition of the Kimberly Process

Currently the KP has 54 participants, representing 81 countries, with the European Union and its Member States counting as a single participant.¹² The Kimberley Process is open to all countries that are willing and able to implement its requirements. The KP members account for approximately 99.8% of the global production of rough diamonds. In addition, the World Diamond Council, representing the international diamond industry, and civil society organisations, such as Partnership-Africa Canada, participate in the KP and have played a major role since its outset.

⁸ KP Basics: <https://www.kimberleyprocess.com/en/about>.

⁹ United Nations General Assembly Resolution [55/56, 2000](#).

¹⁰ KPCS Core Document

¹¹ *Ibid* at page 4.

¹² KP Basics: <https://www.kimberleyprocess.com/en/kp-participants-and-observers>.

2.3 Operations of the Kimberly Process Certification Scheme

The Kimberley Process Certification Scheme imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as free of conflict and prevent conflict diamonds from entering the legitimate trade. Under the terms of the Kimberley Process Certification Scheme, participating states must meet minimum requirements and must put in place national legislation and institutions and also commit to transparency and the exchange of statistical data. Participants can only legally trade with other participants who have also met the minimum requirements of the scheme, and international shipments of rough diamonds must be accompanied by a KP certificate guaranteeing that they are conflict-free.

The Kimberley Process is chaired, on a rotating basis, by participating countries. In 2016, the United Arab Emirates has been the Chair which it inherited from Angola which was the Chair in 2015. The United Arab Emirates will be succeeded by Australia which is the current Vice- Chair.¹³ The Chair oversees the implementation of the Kimberley Process Certification Scheme, the operations of the working groups and committees, and general administration. The Chair rotates annually with the Vice Chair selected at the annual plenary meeting and becoming Chair automatically the following year.¹⁴

To date, South Africa, Canada, Russia, Botswana, the European Union, India, Namibia, Israel, the Democratic Republic of the Congo, the United States of America and the Republic of China have chaired the KP. The KP participating countries, industry and civil society observers gather twice a year at intersessional and plenary meetings, as well as in working groups and committees that meet on a regular basis.¹⁵ Implementation is monitored through review visits and annual reports as well as by regular exchange and analysis of statistical data.

2.4 Impact and effectiveness of the Kimberly Process Certification Scheme

Ever since its inception, the KPCS has made some positive strides and managed to curb a greater part of the problems that were caused by the free trade in conflict diamonds which was a great threat to the stability of the legitimately elected governments. The Institution has had a positive impact in the diamond supply chain and these will be highlighted in the paragraphs below. While the KPCS has been in operation since 2003, I will focus mainly on its impact and effectiveness in the recent years.

¹³ KP Basics: <https://www.kimberleyprocess.com/en/chair>.

¹⁴ *Ibid.*

¹⁵ KP Basics: <https://www.kimberleyprocess.com/en/working-groups-and-committees>.

2.4.1 Re-admission of Bolivian Republic of Venezuela

In June 2008 the Bolivian Republic of Venezuela pulled out of the KPCS for allegedly reasons of organising their mining laws and policies. Ever since then, there has been no review mission from the KP Team to assess the readiness of the country into being re-admitted into being a KP participant. It is only in the beginning of 2016 under the KP chairmanship of UAE that the first step of getting Venezuela re-admitted into the KPCS was taken and it yielded positive results as the Venezuela government was confident of its new mining laws and expressed its readiness to be part of a global trade coalition aimed at fighting against conflict diamonds.¹⁶

The prolonged failure to facilitate the re-admission of Venezuela into the KPCS could have opened a can of worms whereby the Venezuela government would have ended up trading in its diamonds without following any minimum requirements recommended by the KPCS, thereby allowing a process of conflict diamonds getting into the clean market again. Alternatively, other participants could have followed suit in pulling out claiming re-organising their mining laws and ended up not coming back which would have been a loophole into the coming in of the conflict diamonds and the sudden collapse of the KPCS.

2.4.2 Approval of the modification of the KPCS Core Document

As one of the main causes that led to the resignation of the core founders of KPCS in 2009,¹⁷ who mentioned lack of involvement of the KPCS and regulatory institutions to ensure compliance with the minimum requirements of the KPCS, the plenary committee of the KPCS approved the modification of the KPCS Core Document.¹⁸

According to the 2016 Final Communique of the Plenary Meeting held in Dubai, UAE on the 17th of November 2016, the Plenary noted the approval of the Committee on Rules and Procedures of a version of the Kimberley Process Certification Scheme core document that reflects the changes to the core document approved in Johannesburg in 2013 under the Decision 1/2013 “Modification to the Core Document of the Kimberley Process Certification Scheme.”¹⁹

¹⁶ Kimberley Process Mid-Term Report 2016, at page 8.

¹⁷ B. Earth; Conflict diamond expert, Ian Smillie, walks away from the Kimberly Process; <http://www.brilliantearth.com/news/conflict-diamond-expert-ian-smillie-walks-away-from-the-kimberley-process/>, June 2009.

¹⁸ Decision 1/2013; Modification to the Core Document of the Kimberley Process Certification Scheme for approval by Plenary pursuant to Section VI, paras 17-19.

¹⁹ *Ibid* at page 2.

This can be seen as a good step towards the right direction as there is a need to meet up with the changes in time which calls for modifications and amendments of laws to ensure that the KPCS remains relevant in the present day. This will further assist in making sure that the causes that result in the trade and exploitation of diamonds in a way that violates human rights is combatted as a result of the provisions of the KPCS Core Document that will always be up to date.

2.4.3 Central African Republic resuming participation in the KPCS

According to the 2016 Final Communique of the Plenary Meeting, the Plenary acknowledged the progress made by the Central African Republic (CAR) with implementation of the operational framework for the resumption of exports of it's rough diamonds and welcomed the decisions of the KP Monitoring Team to declare the sub-prefectures of Berberati, Boda, Carnot and Nola 'compliant zones'.²⁰ The Plenary further encouraged the CAR's KP authorities to continue implementing the recommendations from report of the KP Monitoring Team on its field missions to Berberati, Boda, Carnot, Gadzi and Nola, and to continue implementing enhanced vigilance measures and ensure the traceability of rough diamonds from all the 'compliant zones'.²¹

The Plenary invited the KP Monitoring Team to continue ensuring a smooth inspection process as regards proposed export shipments as per its Term of Reference, and further supported the CAR's KP authorities with carrying out the envisaged forensic audit of the stockpiles.²²

This is also a great achievement by the KPCS after CAR had ceased trading in 2015 due to security concerns. After the intervention and technical assistance of the KP Team a shipment of 3 702.89 carats was made in 2016 from the compliant zone of Berberati.²³

2.4.4 Seminar on rough diamonds valuation

As one of the problems that African countries have raised as crippling the KPCS, the valuation of the rough diamonds have always been at the fore with the majority of the African rough diamond producing countries complaining of having their rough diamonds valued at low prices.

²⁰ Minutes of the final 2016 Plenary Meeting.

²¹ *Ibid* at page 3.

²² *Ibid* at page 4.

²³ *Supra* n. 17 at 8.

In order to address this concern, the KP undertook holding a Valuation Seminar in collaboration with the Organisation for Economic Cooperation and Development attended by over 250 delegates from various countries and had wide media coverage. It was hailed as a success and it can also be viewed as a good step towards the right direction in ensuring that fairness prevails throughout the diamond supply chain.²⁴

2.4.5 Africa Initiative

The hands-on presence initiative in the diamond producing nations to help in the facilitation of the KP compliance, fulfilment of KP mandates and to 'give Africa a voice' has been another recent success story that can be linked to the involvement of the KP in a bid to ensure that participants do not struggle with the implementation of the KPCS requirements.²⁵ This can be seen in the swift move of re-admission of Venezuela in the KP and also the facilitation of CAR's export of its rough diamonds.

2.4.6 Increased participation in the Review of the Certification System

According to the minutes of the Final 2016 Plenary Meeting held in Dubai, the Plenary took note of reports on the review visits conducted in Armenia, the Republic of Congo, Lesotho, Tanzania and Belarus. The Plenary also took note of reports on the preliminary findings and observations on the review visits conducted in Côte d'Ivoire, the European Union, the United Arab Emirates (UAE), the Democratic Republic of Congo (DRC), the Central African Republic, Sierra Leone and Turkey and requested the respective review visit and review mission teams to finalise their reports before the end of the year.²⁶

Furthermore, the Plenary took note of implementation of the recommendations from review visit reports by Swaziland and Mexico, and requested these two Participants to reflect this follow-up in their next Annual Report.²⁷ The Plenary also welcomed the expressions of interest for hosting a review visit from Cameroon, India, Norway, Togo, Ghana and Panama as well as Brazil, Botswana, Namibia, the Lao People's Democratic Republic (PDR), Mauritius. The Plenary welcomed the commitment made by those countries to continuously open their certification

²⁴ *Supra* n. 17 at page 14.

²⁵ *Supra* n. 20 at page 3.

²⁶ *Ibid.*

²⁷ *Ibid.*

systems to review and improvements, and called upon other Participants to continue inviting review visits under the KP Peer Review System.²⁸

The above willingness to participate in the peer review system by the various participants is a reflection on the commitment to the effective implementation of the KPCS. Such willingness to participate has increased compared to the position in the previous years as the participants seek to validate that their source of diamonds and the trade thereof is clean thereby increasing chances of economic growth through the purchase of their diamonds which are considered as coming from compliant zones.

2.4.7 Close monitoring of participants

The KPCS has been hailed in recent years in ensuring that compliance with the KP mandate and the process of meeting with the KPCS minimum requirements is not left as a burden to the participants. This can be seen in the intervention of the KP Monitoring Team in the Central African Republic (CAR) where great progress was made resulting in the resumption of exports of rough diamonds from the CAR. The KP Monitoring Team further took decisions to declare the sub-prefectures of Berberati, Boda, Carnot and Nola in CAR as compliant zones.²⁹

Venezuela was also re-admitted into the KPCS in 2016 after almost 8 years of being out of the system.³⁰ All these efforts came to fruition due to the close monitoring and guidance that came from the KP Team in ensuring that the participants and those who had suspended themselves like Venezuela were assisted into complying with the minimum requirements of the KPCS.

2.4.8 Regional Integration

According to the 2016 Final Plenary Meeting Minutes, an initiative was taken by the CAR and its neighbouring KP Participants (Cameroon, DRC and the Republic of Congo) to ensure cooperation on the KPCS compliance issues with a regional dimension. The CAR and the KP Monitoring Team were encouraged to continue working closely together with relevant United Nations actors - notably MINUSCA and the UN Panel of Experts, as well as the international community.³¹

²⁸ *Ibid.*

²⁹ *Supra* n. 17 at page 9.

³⁰ *Ibid.*

³¹ Minutes of the final 2016 Plenary Meeting; Item 56 – 57.

The Plenary took note of further steps taken by the Mano River Union (MRU) countries (Côte d'Ivoire, Guinea, Liberia and Sierra Leone) to implement the Regional Approach initiative as highlighted by the UN Security Council in Resolution 2153 (2014), which lifted the embargo on the export of rough diamonds from Côte d'Ivoire. The Plenary further welcomed the continuous support to the MRU countries provided by the WGM Technical Team and the "Friends of MRU" group, in particular ongoing efforts to formalize the role of the MRU Secretariat and involve other implementing partners and/or technical assistance providers.³²

The above is a reflection of the positive steps based on the foundations and provisions of the KPCS in advocating for the trade of rough diamonds only with KPCS compliant countries. Such provisions have led to regional integration whereby the above mentioned countries have formed a coalition and a union to make sure that the minimum requirements of the KPCS are met thereby increasing efforts of clean trade of diamonds throughout the region.

2.4.9 Suspension of trade in areas reported to have had abuse of human rights

In November 2009, the KPCS considered rough diamond mining in Marange Diamond Fields in Zimbabwe to be non-compliant with basic minimum requirements of the KPCS.³³ This decision was reached after publication of well documented reports of state-sponsored involvement in illegal mining, smuggling and human rights abuses in the Marange diamond fields. Between 2007 and 2010 many informal miners and villagers were either abused or coerced into illegal mining and smuggling syndicates with soldiers and the police. Diamonds were also reportedly being smuggled from Marange into Mozambique and South Africa.³⁴

Following these problems, the KPCS together with Zimbabwe agreed on a Joint Work Plan (JWP) that was adopted in 2009 at Swakopmund in Namibia to try and ensure that Zimbabwe complies with KPCS minimum requirements and enable the government to address the problems. The JWP was adopted following the recommendations of the KPCS Review Mission that visited Zimbabwe in 2009 and adjudged that Zimbabwe was not compliant with KPCS minimum requirements.³⁵

³² *Ibid* at page 13.

³³ Partnership Africa Canada; Diamonds and Clubs: The Militarised Control of Diamonds and Power in Zimbabwe; June 2010.

³⁴ *Ibid* at page 4.

³⁵ *Ibid* at page 6.

Some of the elements of the JWP included the immediate cessation of exports and the creation of a Supervised Export Mechanism by which future exports will be assessed and monitored by a KP appointed Monitor. In addition, JWP also required Zimbabwe to identify diamond resource areas within Marange, select and engage investors, install modern processing equipment and adequate security structures, install physical security systems and internal controls at mining sites and the phased withdrawal of the military from Marange.³⁶

The efforts yielded positive results as the ban of export and import of rough diamonds was later lifted following implementation of the recommendations and actions that were suggested by the JWP.³⁷ The above can be seen as some of the successes achieved by the KPCS in an attempt to curb the trade in rough diamonds from areas that are reported to have engaged in illegal activities and the abuse of human rights.

2.5 Failures and areas of improvement for the KPCS

While it is recognizable that the system has to a greater extent succeeded in reducing the trade of conflict diamonds, the KPCS is not without its flaws. Some of its failures and areas of improvement will be dealt with in the paragraphs below.

2.5.1 Slow pace in the evolvement of the KPCS

Global Witness, an independent and not-for-profit organisation which works with partners around the world in its fight for justice by exposing the hidden links between demand for natural resources, corruption, armed conflict and environmental destruction, officially announced its withdrawal from the KPCS in December 2011. The official withdrawal of Global Witness from the KPCS is one great indication of the alleged failure of the system.

Many of the world's worst environmental and human rights abuses are reportedly driven by the exploitation of natural resources and corruption in the global political and economic system.³⁸ Global Witness had been campaigning to end this in the extractive sector and mainly in the diamond industry. In 2011, Global witness called it quits stating that the Kimberley Process' refusal to evolve and address the clear links between diamonds, violence and tyranny

³⁶ *Supra* n. 4 at 17.

³⁷ KP: Zimbabwe Diamond exports approved <http://www.bbc.com/news/world-africa-15554609>.

³⁸ Global Witness Statement: <https://www.globalwitness.org/en/about-us/>.

had rendered it increasingly outdated.³⁹ It further stated that despite intensive efforts over many years by a coalition of NGOs, the scheme's main flaws and loopholes had not been fixed and most of the governments that ran the scheme continued to show no interest in reform.⁴⁰

The withdrawal of Global Witness was a great blow to the KPCS as it is one of the organisations that was greatly involved in the formation of the KPCS, after it first exposed the problem of blood diamonds in 1998 and played a key role in the establishment of the Kimberly Process and initiated a bid to clean up the diamond trade which was subsequently launched in 2003.

2.5.2 Resignation of some of the experts and founders of the KPCS

The withdrawal of Global Witness was preceded by the resignation of Ian Smillie in 2009 who was one of the leading conflict diamond experts and key architect of the Kimberley Process.⁴¹ In the midst of frustration, Ian Smillie, declared his resignation to the Kimberley Process declaring the process ineffective. In a well-penned letter Smillie stated, "*when regulators fail to regulate, the systems they were designed to protect collapse.*"⁴² He further went on to say, "*I feel that I can no longer in good faith contribute to a pretense that failure is success, or to the kind of debates we have been reduced to.*"⁴³

The above comments in Ian Smillie's resignation and later withdrawal of Global Witness from the KP came as a result of the following reasons, which have been mentioned as the main grey areas of the KPCS:

- a) alleged failure of the KP to deal with conflict diamond trade in Cote d'Ivoire⁴⁴ ;
- b) taking no serious action when Venezuela blatantly and repeatedly breached KPCS rules⁴⁵;
and
- c) the KPCS' failure to swiftly and timely halt the human rights violations and violent atrocities that were occurring in Zimbabwe's Marange diamond fields at the time.⁴⁶

³⁹ Global Witness Press Release; [Global Witness leaves Kimberly Process, calls for the diamond industry to be held accountable](#); December 2, 2011

⁴⁰ *Ibid* at page 1.

⁴¹ Conflict diamond expert, Ian Smillie, walks away from the Kimberly Process: <http://www.brilliantearth.com/news/conflict-diamond-expert-ian-smillie-walks-away-from-the-kimberley-process/>.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ The diamond embargo was put in place in 2005, following a period of civil war.

⁴⁵ Diamond smuggling in lawless Amazon mocks international pact: <http://www.reuters.com/article/venezuela-mining-idUSL1E8N126M20121206>.

Overall, the discussion above has shown how the KPCS was formulated and how it has greatly achieved its main objectives of curbing the trade in conflict diamonds. While the system has been successful, there are minor grey areas and loose ends to be tied in order for it to continue being relevant and serving as an inspiration in the regulation of diamond regimes in different countries.

⁴⁶ Rampant abuses in Marange Diamond Fields: <https://www.hrw.org/news/2011/08/30/zimbabwe-rampant-abuses-marange-diamond-fields>.

CHAPTER 3 – ZIMBABWE’S DIAMOND INDUSTRY

Zimbabwe has a plethora of laws that regulate and control diamond mining, marketing, sales and exports.⁴⁷ These laws include the Mines and Minerals Act, Precious Stones Trade Act, the Minerals Marketing Corporation of Zimbabwe Act, the Income Tax Act, and Minerals Marketing Corporation of Zimbabwe Act and the Mines and Minerals Regulations among others.

The Diamond Policy forms part of the policy framework that provides the aspirational objectives of the country. Each one of the provisions of these pieces of legislation will be briefly discussed in the paragraphs below. A detailed analysis of each one of the legislation as well as its compatibility with the current best international practices specifically the KPCS, will be given in the next chapter.

3.1 Mines and Minerals Act (Chapter 21:05)

The Mines and Minerals Act is the principal legislation that regulates the acquisition of mining rights in Zimbabwe. It applies to all minerals in Zimbabwe including diamonds. In terms of Section 2 of the Mines and Minerals Act, all rights to minerals are vested in the President. In this case the Act states that the dominium in and the right of searching and mining for and disposing of all minerals is vested in the President.⁴⁸

For one to prospect, explore and mine mineral resources in Zimbabwe, they need to apply for a mining title or licence. There are different types of mining rights or licences that are issued in terms of the Mines and Minerals Act. These include a prospecting licence which gives the holder the right to prospect and search for any minerals on land open for prospecting, mining leases, special mining leases or special grants. Therefore, in accordance with the Mines and Minerals Act, it is illegal for anyone to prospect, explore or mine minerals including diamonds without a valid licence.⁴⁹

3.2 Mines and Minerals Regulations of 2008

The Mines and Minerals Regulations came into force in 2008 and they were specifically introduced to establish a Minerals Unit which is supposed to be a crack unit composing of officers from the Ministry of

⁴⁷ *Supra* n. 4 at 18.

⁴⁸ *Ibid.*

⁴⁹ A Bill was introduced in 2015 to amend the Mines and Minerals Act. The Bill is aimed at aligning the Act with the international best practices when it comes to the exploitation of natural resources in Zimbabwe. The Bill has undergone public participation and is yet to be taken back for final debate at the parliament before it can be signed into law by the President of the Republic of Zimbabwe.

Mines, the police and the Reserve Bank of Zimbabwe.⁵⁰ Further, the Act authorizes the Minerals Unit to station one or more of its members at premises of any registered mining locations or at any port of entry or exit to curb smuggling or theft of minerals. To a large extent, the Regulations are an important piece of legislation in the fight against smuggling and theft of minerals, especially in the diamond mining sector.

3.3 Precious Stones Trade Act (Chapter 21:06)

The Precious Stones Trade Act regulates possession and dealing in rough diamonds and other precious stones in Zimbabwe. The Act was passed in 1978 and has undergone various amendments since its inception. The Act defines precious stones as rough or uncut diamonds or rough or uncut emeralds or other stones which may be declared to be precious stones. The Act broadly defines dealing in precious stones as including; buying, selling, barter, pledge, exchange, give or receive, or offer or expose for sale, barter, pledge or exchange or any other dealings or transactions.

In order to curb illegal dealing, the Precious Stones Trade Act makes it an offence for anyone to deal in or possess precious stones unless one is a licenced dealer, holder of a mining location or an employee or an agent of a licenced dealer, permit holder or the holder of a mining location.⁵¹ Any person found guilty of unlawfully dealing and possession of precious stones will be sentenced to imprisonment for a period of not less than five years and be liable to a fine of any amount up to or not exceeding level 14.⁵²

3.4 Minerals Marketing Corporation of Zimbabwe Act (Chapter 21:04)

The Minerals Marketing Corporation of Zimbabwe Act also provides for the control and regulation of the export, sale and stockpiling of minerals, including diamonds. The Act establishes the Minerals Marketing Corporation of Zimbabwe (MMCZ). According to section 20 of the Act, the key functions of the MMCZ include acting as the sole marketing and selling agent for all minerals, investigating market conditions and encouraging local beneficiation and use of minerals.

⁵⁰ According to Regulation 4 and 5, the functions of the Minerals Unit are stated as; assisting miners in preventing the theft of minerals from mining locations, preventing smuggling of minerals outside Zimbabwe and safeguarding the mineral resources of Zimbabwe. The Minerals Unit has power to inspect, enter any mining location, examine or inspect mining operations, examine books, accounts vouchers, documents, maps and records. In addition, the Minerals Unit has power to examine security systems at mining locations. In this regard, the Minerals Unit is empowered to give direction to any miner to improve security of mining locations to prevent theft of minerals.

⁵¹ Section 3(1) (a)-(d).

⁵² The Standard Scale of Fines was revised in terms of section 50(1) (f) of Finance Act 3 of 2009 and at the moment a level 14 fine is about US\$5000.

The Act prohibits the sale or export of minerals by anyone else except the corporation or in terms of a contract negotiated by the corporation on behalf of sellers or when someone is authorized to do so by the corporation.⁵³ For negotiating or authorizing contracts for the sale of minerals, the MMCZ is empowered to levy commission which is fixed as a percentage of the price at which the minerals were sold.⁵⁴ On revenue from the sale of minerals the Act in Section 44 (2) (a) gives power to MMCZ to receive payment or the purchase price from the sale of minerals in situations where the MMCZ would have negotiated or authorized a contract for the selling of minerals. This position is further restated in Section 47(1) which also gives power to MMCZ to receive proceeds from the sale of minerals in situations where the MMCZ would have authorized the sale or negotiated a contract for the sale of minerals whether inside or outside Zimbabwe.

3.5 Zimbabwe Mining Development Corporation Act (Chapter 21:08)

The Zimbabwe Mining Development Corporation Act is another piece of legislation with great implications on diamond mining and production in Zimbabwe. The Act establishes the Zimbabwe Mining Development Corporation (ZMDC) which is the government's investment arm in the mining sector. This position is confirmed in section 20(a) and (c) which outlines the functions of ZMDC.⁵⁵ The ZMDC is wholly owned by the government and in terms of Section 33 it is required to pay dividends to the government.

3.6 Mining Taxation (Income Tax Act, Finance Act and Mines and Minerals Act)

Taxation in the Zimbabwean mining sector provides scope for government to receive revenue and payments from the mining industry. There are various forms of taxes and charges that are paid by mining companies including diamond mining companies. These taxes and charges include royalties, income tax (corporate tax), Pay As You Earn (PAYE), non-residents tax, Additional Profit Tax, Value Added Tax (VAT), marketing commission, customs duty, presumptive tax for small scale miners, capital gains tax, withholding tax, licencing fees, environmental charges and in some cases charges by local authorities among others.

⁵³ Section 42.

⁵⁴ Section 48.

⁵⁵ The functions of the ZMDC include investing in the mining industry on behalf of the state and engaging in prospecting, exploration, mining and mineral beneficiation. The ZMDC is also required to pursue its mandate in the mining sector in the national interest and strictly within government economic policy.

Among the pieces of legislation that require mining companies to pay taxes are the Mines and Minerals Act, the Income Tax Act and the Finance Act. Section 244 of the Mines and Minerals Act provides for the payment of royalties by mining companies. The Act requires the miner of a registered mining location to pay royalty on all minerals disposed whether within or outside Zimbabwe. Different rates of royalties are charged depending on the mineral type.⁵⁶ For diamonds the royalty is pegged at 15%. The other type of tax diamond mining companies are also expected to pay in terms of the Income Tax Act is income tax which is commonly known as corporate tax.

3.7 The Zimbabwe Diamond Policy of 2012

A Diamond Policy was developed in 2012 by the Ministry of Mines and Development in an attempt to address the policy gaps and weaknesses that existed in the diamond supply chain related to diamond exploration, licencing, protection of diamonds from smuggling and theft, valuation, value addition, marketing and export of rough diamonds.

In terms of the structure, the draft Diamond Policy is divided into various sections and issues that include; principles, objectives, ownership, storage and transportation, marketing, valuation, beneficiation and regulation. These are some of the issues that will be analysed in the next chapter in order to determine if the policy measures up to regional and international best practices and whether it gives a solid basis for the development of a specific legal framework to regulate diamond production, management, marketing and export in Zimbabwe.

As a summary, it can be said that Zimbabwe has quite a number of laws that regulate the mining industry. These laws are found in different statutes which make the implementation thereof to be difficult. In the next chapter, I will delve into some of the key provisions of each of these statutes with regards to the regulation of the diamond industry and seek to find out whether they are well aligned to the provisions of the KPCS as an international body that regulates the flow of diamonds.

⁵⁶ Section 37 of the Finance Act.

CHAPTER 4 – ANALYSIS OF THE LEGAL FRAMEWORK AND INSTITUTIONAL REGULATORY ASPECTS IN ZIMBABWE

In this Chapter, an analysis and evaluation of the impact and effectiveness of the legal framework and regulatory institutions that govern the diamond sector in Zimbabwe, as mentioned in the preceding chapter, will be made in detail. This will be done in relation to the compliance with the minimum requirements of the KPCS. A brief discussion will also be made on the legal framework and the regulatory institutions that are in other diamond mining regions and how they have performed in ensuring compliance with the KPCS minimum requirements.

4.1 Mines and Minerals Act (Chapter 21:05)

Prior to the revocation of their mining grants in the beginning of 2015,⁵⁷ companies that explored and mined for diamonds in Marange had acquired exploration and mining rights from the Zimbabwe Mining Development Corporation (ZMDC). ZMDC being a wholly owned government entity, held a Special Grant in Marange. The companies acquired the rights by entering into Joint Ventures with Marange Resources which is a subsidiary and investment arm of ZMDC in Marange. While the private investors brought in capital, ZMDC brought in the special grant and the diamond resources on behalf of the Zimbabwean government.⁵⁸ The following companies were other Joint Ventures between government and private investors; Mbada and Diamond Mining Corporation (DMC). It is not clear if ZMDC through Marange Resources was part of Anjin which was allegedly controlled by the Chinese and the military.⁵⁹ The third Joint Venture company called Sino Zimbabwe ceased operations while another one called Canadile was taken over by Marange Resources and currently is fully owned by government.⁶⁰

According to Section 379 of the Mines and Minerals Act, any person who breaks or removes any mineral from any mining location or deposit with the intent to deprive the owner or licence holder thereof shall be guilty of theft and liable to prosecution and shall be punished accordingly. Since the Mines and Minerals Act makes it an offence to mine for any mineral without a licence, the activities of organized syndicates including soldiers, police, informal miners and dealers who used to participate in

⁵⁷ The Zimbabwean government recalled and revoked some of the mining grants of the companies that were operating in the Marange Diamond Fields in 2015 and cited lack of accountability and benefits from the operations as the reason for the revocation of licences.

⁵⁸ Diamond Mining in Zimbabwe – The Chininga Report: <http://nehandaradio.com/2013/06/25/diamond-mining-in-zimbabwe-the-chininga-report/>, 2013.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

unauthorized mining inside and outside fenced mining sites in 2007-2011 were purely illegal and contrary to the Mines and Minerals Act and the KPCS minimum requirements.⁶¹

In terms of acquisition and negotiation of mining rights and contracts, the Mines and Minerals Act establishes a Mining Affairs Board whose functions include considering applications for acquisition of mining rights and making recommendations to the Minister on applicants that should be granted mining rights. In turn the Minister will also make recommendations to the President. However, it is not clear what role the Board played in the selection of investors in Marange. Most of mining companies operating in Marange were engaged without following the procurement procedures⁶² and some of them allegedly misrepresented their financial position in order to get mining rights.⁶³

Also related to the acquisition of mining rights, currently the contracts that are signed with foreign or local investors in the Zimbabwean mining sector are not made public or disclosed for public scrutiny. This is aggravated by the fact that the Mines and Minerals Act have very limited provisions that may be used to promote access to information on applications for mining rights. For example Section 138 that deals with mining leases provides for the publication of an application for a mining lease in the government gazette so that members of the public can lodge objections if any. Objections are rarely lodged by members of the public.

However, once a mining contract has been signed the contract is never disclosed or made public. Nevertheless, one may try to access and demand for the disclosure of mining contracts by using the Access to Information and Protection of Privacy Act (Chapter 10:27). The Access to Information and Protection of Privacy Act provides every person the right to access information. It states that every person has a right of access to any record that is in the custody or under the control of a public body. The person will be required to make a written application to the public body.⁶⁴

Despite the provisions of the Access to Information and Protection of Privacy Act, the problem with this Act lies with the set of claw-back clauses or restrictions that are stated in Part III of the Act.⁶⁵ Classes of

⁶¹ The problem in Marange at the height of the diamond rush was lack of enforcement of the laws since the same people who were supposed to enforce the law were the ones who facilitated illegal diamond mining.

⁶² The Procurement Act (Chapter 22:14) sets out the tender procedures that should be followed by state entities when they are engaging service providers.

⁶³ An example is Canadile whose agreement with ZMDC was terminated by government after it had allegedly misrepresented its financial position to enter into a Joint Venture with the ZMDC through Marange Resources to explore and mine for diamonds.

⁶⁴ Section 5(1) of Access to Information and Protection of Privacy Act.

⁶⁵ Part III deals with protected information.

protected information include deliberations of cabinet, information whose disclosure will be harmful to law enforcement process and national security, information relating to the financial or economic interests of public bodies or the State and information relating to public safety, security and defence.

Using the above restrictions some government officials have reportedly claimed that information about the contracts signed with diamond mining companies and revenue therefrom is protected information and cannot be disclosed to the public.⁶⁶ Government officials also claim that the information falls within the realm of state security and defence and cannot be publicised. The general public, therefore, ends up relying on unconfirmed and unreliable sources to get snippets of what the diamond mining contracts provide for in terms of diamond revenue sharing arrangements.⁶⁷

4.2 Mines and Minerals (Minerals Unit) Regulations of 2008

As mentioned above, the Mines and Minerals Regulations are to a larger extent an important piece of legislation in the fight against smuggling and theft of minerals, especially in the diamond mining sector. Theoretically, the regulations are arguably a good attempt by the country to try and create internal control and security measures to prevent smuggling as contemplated in Section IV of the KPCS Core Document.⁶⁸

The regulations are also essential in that they provide a scope for accountability and law enforcement since they empower the Minerals Unit to inspect records, documents and books. In addition, the fact that the Minerals Unit may examine the security systems at mining sites is critical in the security aspects of diamond production. In this case the provision is in line with KPCS requirements on the need for member countries to ensure that mining companies put in place security measures to curb smuggling and theft of diamonds.

The examination of security systems at mining sites will enable mining companies to improve their systems. In Marange diamond fields, this means the Minerals Unit may look closely at all the security procedures and systems adopted by mining companies such as the security cameras, security guards,

⁶⁶ In 2011 Zimbabwean Environmental Lawyers Association (ZELA) applied for access to mining contracts signed with diamond mining companies in Marange to the Ministry of Mines and ZMDC using the procedures laid out in the Access to Information and Protection of Privacy Act. There was no immediate response leading the organization to appeal to the Zimbabwe Media Commission in order to have access to the information that is meant to be easily accessible to the public.

⁶⁷ *Supra* n. 4 at 21.

⁶⁸ Each Participant should establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory.

patrols and the hands-free systems. The deployment of members of the Minerals Unit at mining sites and ports of entries or borders is another important issue that is in line with KPCS requirements. The KP requires countries to secure borders to prevent conflict diamonds entering or exiting. However, while these regulations are progressive and may be useful in the diamond mining sector, what has been lacking is rapid and effective implementation and enforcement of the law.

Reports of smuggling and leakages have always been observed by civil society organisations in Marange.⁶⁹ In addition, the Minerals Unit may be powerless if it is not provided with adequate training and resources in detecting cases of theft and smuggling of diamonds. In some cases the situation in Marange may have compromised the work of the Minerals Unit as some of the counterparts of the police force and the military were involved in facilitating illegal digging and smuggling of diamonds through syndicates.⁷⁰

4.3 Precious Stones Trade Act (Chapter 21:06)

The Precious Stones Trade Act deals with rough diamonds and does not regulate polished diamonds that may be exported from or imported into Zimbabwe. This means diamonds that are exported after being cut or polished are not subject to the provisions of this Act. This gap also exists in the KPCS which has partly been criticised for its failure to play an oversight role and require statistics on polished diamonds.⁷¹ The KPCS has only confined itself to rough diamonds. The exclusion of the cutting and polishing industry from the KP system creates a vacuum between the production of rough diamonds and the trading system and retailers and consumers.

The provisions in the Precious Stones Trade Act makes it clear that any person found guilty of unlawfully dealing or possession of rough diamonds shall be sentenced to imprisonment for a period of not less than five years and be liable to a fine not exceeding level 14 which is pegged at US\$5000.⁷² This is not deterrent when compared to countries like Namibia where the prison term is 20 years. The US\$5000 fine can be easily paid and this means that the Zimbabwean legal system is not adequate to deter and punish offenders or those who go against the KPCS requirements.

⁶⁹ Where is Zimbabwe's diamond money going: <https://www.globalwitness.org/en/blog/where-zimbabwes-diamond-money-going/>, 2014.

⁷⁰ *Ibid.*

⁷¹ Loopholes in the Kimberly Process, Global Witness, 2007.

⁷² Section 5 (1).

Section IV of the Kimberly Process Core Document requires participants to maintain dissuasive and proportional penalties for transgressions that relate to trade in conflict diamonds. This means member countries are encouraged to adopt criminal measures or sanctions against offenders and these measures are supposed to be deterrent and proportional to the crime committed. The issue of penalties is a critical issue in the Kimberley Process Certification Scheme.

The Precious Stones Trade Act also contains legal provisions that may be interpreted as intended to promote accountability in the trade and selling of rough diamonds. Section 6 of the Act provides for the keeping of registers and returns by dealers and holders of mining locations. The registers shall include the following details; the amount of precious stones recovered and the amount held at the end of the preceding month. In the same vein, licenced dealers are required to keep registers and within 24 hours of any transaction they are required to enter the date of transaction, name and address of the other party to the transaction, particulars of licence, the nature and mass of precious stones and the price paid or received.⁷³

The other issue of concern is that the Precious Stones Act does not contain provisions that may provide scope for transparency in terms of access to information for members of the public. The returns and even names of the dealers are not made public and this creates a veil of secrecy around diamond mining operations. It would have made good practice and legal sense for the Ministry of Mines to publish in a publicly accessible manner all the returns submitted by dealers as well as the licences issued by the Ministry in terms of the Precious Stones Trade Act.

In addition to the above, the Precious Stones Act also provides for the issuance and cancellation of licences and the conditions under which a licence holder or miner may deal in or possess precious stones in Section 7.⁷⁴ The weakness of the Precious Stones Trade Act in relation to the issuance of licences to dealers is that the Act does not contain any specific provision for investigation of applicants before they are issued with a licence or permit as a way of checking their backgrounds. This position may open the system to unscrupulous diamond dealers and other criminals that may have been involved in illegal acts that are against the KPCS minimum standards in Zimbabwe or in other countries.

⁷³ The dealers are required to render to the Secretary in the Ministry of Mines the returns setting out full details of all precious stones deposited with or received or disposed by him during the preceding month.

⁷⁴ Section 7(1) gives power to the Minister of Mines to issue or refuse a licence to trade in precious stones.

Without background checks the country may end up harbouring people who have been involved in trade in conflict diamonds elsewhere.⁷⁵

4.4 Minerals Marketing Corporation of Zimbabwe Act (Chapter 21:04)

The difficulty in the access of information regarding the contracts entered by the government with the mining companies has made it unclear in the case of Marange whether the MMCZ looked for the market or negotiated the contracts on behalf of the diamond mining companies or approved contracts negotiated by mining companies. In the event that MMCZ negotiated the contracts for the sale of minerals with certain buyers or approved the sale with a condition that it will receive the payment, it may invoke section 44 or section 47.

What this will effectively mean is that MMCZ would receive payments and then transfer those payments to the mining company concerned. MMCZ will then deduct commission from the revenue in terms of section 48. Thereafter, the mining company will pay royalties and other taxes to ZIMRA. This creates a multi-layered system that results in deduction of revenue at every turn of the system. This may then mean limited revenue is going to the treasury and complicates the diamond trade chain.

The MMCZ is also required by the law to pay dividends in terms of section 33 of the Act. This is done where in a financial year the revenues of MMCZ are more than sufficient to meet expenditures. In such a case, the MMCZ may pay dividends to shareholders. The financial year of MMCZ ends on the 30th of June of each year. The importance of the MMCZ to the diamond sector also lies in the fact that it was designated as the government institution that is responsible for issuing Kimberley Process Certificates in Zimbabwe. This means all diamond exports from Zimbabwe are supposed to be certified by the MMCZ. The KPCS certificate that is issued by the MMCZ certifies that the diamonds contained in a particular parcel were handled in compliance with KP systems and are not conflict diamonds. This means the MMCZ gives a guarantee to the market.

In Zimbabwe, the MMCZ is the sole marketing and selling agent for all minerals. This means even diamonds are subject to this Act and diamond mining companies should seek authority to sell and market the diamonds they produce if they want to sell or market on their own without MMCZ's involvement. At one point, in January 2010 Mbada Diamonds had unilaterally attempted to auction a

⁷⁵ In Namibia, Botswana and South Africa licences are issued after investigations.

total of 300 000 carats of rough diamonds without the knowledge of the MMCZ.⁷⁶ This was going to be a major breach of the Act. In addition, the attempted auction was going to be contrary to the Supervised Export Mechanism initiated by the KPCS through the Joint Work Plan (JWP) which prescribed that the diamonds should be assessed for compliance with the KPCS requirements and certified by the Monitor before they are sold and exported.⁷⁷ However, the auction was stopped after Mbada was advised against the move.

4.5 Zimbabwe Mining Development Corporation Act (Chapter 21:08)

As previously mentioned, the Zimbabwe Mining Development Corporation Act is another piece of legislation with great implications on diamond mining and production in Zimbabwe. The Act establishes the Zimbabwe Mining Development Corporation (ZMDC) which is the government's investment arm in the mining sector.⁷⁸ The ZMDC is required to pursue its mandate in the mining sector in the national interest and strictly within government economic policy.

In response to this legislative mandate the ZMDC has made investments in the Zimbabwean diamond mining sector. It holds 4 Special Grants in Marange namely SG 4718, SG 4719, SG 4720 and SG 4765.⁷⁹ The corporation entered into partnership with foreign investors to form Mbada Diamonds, Diamond Mining Corporation (DMC) and Anjin Investments. According to Global Witness, Anjin Investments is a partnership between ZMDC, members of the Zimbabwe Defence Forces and the Chinese.⁸⁰ The ZMDC also operates Marange Resources.⁸¹

From the above, it is clear that ZMDC is fully involved in diamond mining operations and that it derives its mandate from the Zimbabwe Mining Development Corporation Act. However, what is not clear is how beneficial the contracts and agreements signed between Marange Resources and foreign investors are to the country. It is reported that some diamond mining companies like Anjin are not remitting all revenues to the treasury.⁸² In this case then it is difficult to state that the investments by ZMDC are

⁷⁶ Revelations were made by MMCZ officials during a Parliamentary hearing by the Committee on Mines and Energy on the operations of ZMDC and its partners in Marange diamond mining area. The hearings were held on the 1st and 8th of February 2010.

⁷⁷ Pursuant to reports on human rights abuses in the Marange Diamond Fields, a JWP was set up by the KP to ensure that the Zimbabwean government complied with the KPCS minimum requirements.

⁷⁸ The ZMDC is wholly owned by the government and in terms of Section 33 it is required to pay dividends to the government.

⁷⁹ Abbey Chikane; Kimberley Process Certification Scheme; Fact Finding Mission Report; March 2010.

⁸⁰ Global Witness Report; Financing a Parallel Government: The Involvement of the secret police and military in Zimbabwe's diamond, cotton and property sectors; June 2012.

⁸¹ Marange Resources is formerly known as Canadile which was taken over due to misrepresentation of its finances.

⁸² Government fumes over revenue: <http://www.herald.co.zw/govt-fumes-over-diamond-revenue/>, 2014.

benefiting the country and are in the national interest as contemplated in Section 22 (b) of the Zimbabwe Mining Development Corporation Act.

These challenges arise as a result of failure by government to publish and disclose the mining contracts, revenues and payments being made by mining companies in a disaggregated manner so that the general public can track and know how much is being generated and understand the contractual terms and conditions set for the mining companies. This is contrary to the KPCS minimum requirements which advocate for the transparency and accountability from diamond producing countries. Had there been transparency from the negotiation of contracts to the payment of revenues and royalties, the general public will have been fully informed and been aware of the benefits that the country makes from the exploitation of the diamonds.

4.6 Mining Taxation (Mines and Minerals Act, Income Tax Act and Finance Act)

The Income Tax Act and the Mines and Minerals Act provide scope for capital allowances and remissions. The major problem with Zimbabwe's current tax system is the issue of tax exemptions or in some cases remissions.⁸³ The President has the powers to remit, in whole or in part, the royalties payable on any mineral for such period as he may determine whenever he deems it expedient to do so as an inducement to the commencement or continuation of mining operations, the processing or refining within Zimbabwe of minerals or the development of any export market.⁸⁴ This may mean the fiscus will not be getting revenue in taxes during that period.

The tax holidays and exemptions and other hidden subsidies granted to multinationals in secretive agreements deprive governments and their citizens of significant tax revenues.⁸⁵ In terms of enforcement of the taxation system, there is a duty on every person whose gross income does not consist solely of salary, wages or similar compensation for personal service, to keep proper books and accounts of all his or her transactions.⁸⁶

More importantly, section 40 of the Income Tax Act gives power to the Commissioner-General of ZIMRA to have access to all public records. The Commissioner or any person authorised by him may inspect any

⁸³ Remissions may be granted by the President in terms of Section 254 of the Mines and Minerals Act which provides for remission of royalty.

⁸⁴ However, the remission may not be for more than 4 years from the date it was granted.

⁸⁵ Tax Justice Network-Africa: Tax Us if You Can - Why Africa Should Stand Up for Tax Justice; 2011.

⁸⁶ Section 37B (1) of the Income Tax Act.

registers, books, accounts, records, returns, papers, documents in the custody of any officer in the Public Service. The inspection may tend to secure any tax or to give proof or lead to the discovery of any fraud, offence or omission in relation to any tax. Public officials are required to furnish the Commissioner or an authorized person such information as may be required.⁸⁷

Section 252 of the Mines and Minerals Act also gives power to the Commissioner-General of ZIMRA or any person duly authorized by him to have access for the purpose of inspection of all books and records, reports and other documents relating to the acquisition, disposal or removal of any mineral for the purpose of ascertaining or verifying any return, details, solemn declaration, certificate or document rendered. Any tax payer may also be required by the Commissioner to furnish him with information on his shareholding and dividends received. The Income Tax Act also requires every company in terms of section 42(1) to furnish the Commissioners with returns and a copy of the memorandum and articles of association within 30 days of its incorporation.⁸⁸

From the above it is clear that the Commissioner-General of ZIMRA has a lot of powers that may enable him to carry out inspections or investigations for taxation purposes in the mineral industry, which includes the diamond sector. This in a way promotes the provisions of the KPCS as well in making sure all moneys are traced and linked to clean diamond trade and not open for any money laundering. The KPCS emphasizes that all money transactions need to be done through a proper banking system for easy traceability purposes.

4.7 The Zimbabwe Diamond Policy of 2012

As an attempt to address the policy gaps and weaknesses that exist in the diamond supply chain related to diamond exploration, licencing, protection of diamonds from smuggling and theft, valuation, value addition, marketing and export of rough diamonds, the Government of Zimbabwe, through the Ministry of Mines developed a Diamond Policy.⁸⁹ At both a conceptual and practical level, a policy can be regarded as a statement of Government's intentions, strategies and overall vision for a given sector. A policy is usually in the form of statements and pronouncements or formal positions on an issue⁹⁰ and it helps to mitigate against negative effects and to maximize positive results.

⁸⁷ Section 40(2) of the Income Tax Act.

⁸⁸ It is an offence to fail or refuse to file with the Commissioner a copy a company's memorandum or articles of association.

⁸⁹ *Supra* n. 4 at 25.

⁹⁰ Borrini –Feyerabend et al., 2004.

However, it should be mentioned that a Policy as a statement of intent does not have the force of law and, therefore, it is not enforceable.⁹¹ In the legal field it will be extremely difficult to successfully claim enforcement of provisions contained in a policy statement in the event that government fails to fulfil its policy objectives.⁹² Therefore, the draft Diamond Policy developed by the Zimbabwean government is just a policy that does not have the force of law and Zimbabweans may not be able to hold government or diamond mining companies to account in the event that they fail to adhere and implement its objectives and aims.⁹³

Some of the diamond mining areas identified by the draft Diamond Policy in Zimbabwe include the Marange diamond fields, River Ranch Mine in Beitbridge, Murowa Mine in Zvishavane and deposits that were discovered in 1903 at Somabula in the Midlands Province. Another diamond mine is operating in Chimanimani District called DTZ Orzego allegedly owned by the Russians and some local partners.⁹⁴ The policy notes some of the challenges being faced in the exploitation and production of diamond resources such as limited exploration, smuggling, lack of value addition and beneficiation, limited transparency and accountability and the lack of a comprehensive legislative framework to regulate the sector.⁹⁵ An analysis of the problems identified in the draft Diamond Policy shows that the policy misses some of the glaring problems that have dogged the diamond mining sector such as violations of communities' civil, political, environmental, economic, social and cultural rights.⁹⁶

In terms of objectives, article 3.1 of the draft Diamond Policy states that the objective of the policy is to enable the development of diamond legislation, the Diamond Act with the following objectives; to preserve the image of Zimbabwean diamonds, valuation, marketing in line with international standards and to protect the diamond industry from smuggling. In addition, the Diamond Act is expected to promote transparency, economic benefits, beneficiation and efficient and effective control, handling and transportation of diamonds as well as monitoring of security related aspects. Reference to the development of a legislative framework (Diamond Act) in the draft Diamond Policy clearly indicates that there is need for the country to adopt a specific and legally binding instrument.⁹⁷

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Zimbabwe Environmental Law Association; Legal and Policy Handbook; 2011.

⁹⁷ *Supra* n. 4 at 27.

The draft Diamond Policy also identifies the need to put in place stringent measures and controls for licensing and security across the rough diamonds chain. In that respect, one of the principles included in the policy is the need to provide stringent controls to ensure licencing of participants in the diamond industry from prospectors, miners, buyers/ dealers, cutters and exporters with the objective of ensuring good reputation and professional standards in the industry. This principle is in line with the KPCS requirement that all diamond buyers, sellers, exporters, agents and courier companies should be registered and licensed.

However, what is missing is clear-language in the policy of the types of licences that will be issued. For example it is not clear if government will also issue licences for research as is the case in South Africa, Botswana and Namibia. This category is important as it should be treated differently from those who acquire diamonds for trade and business purposes.⁹⁸ Research in the diamond sector is vital as it will lead to discovery of new uses of the diamonds. The draft diamond policy recognizes that security of the diamonds is critical since they are a high value commodity and that there is need to monitor security related aspects of diamond prospecting, mining and downstream acts as well as the declaration of certain areas as restricted areas.⁹⁹ Security areas may include diamond exploration, sorting areas and extraction areas.¹⁰⁰

Another relevant security aspect that is included in the diamond policy is that all diamond mining and handling operations shall operate on a security plan approved by the Minister of Mines prior to commencement of operations.¹⁰¹ This provision is valuable for curbing smuggling, leakages and illicit trade. However, the problem is that the draft diamond policy does not give particular and specific details on the security requirements to be included in the security plans. It does not also contain specific standards on security requirements for the diamond industry. In addition, the policy omits the need for security checks, monitoring and investigations to assess compliance with security plans by all licence holders or the diamond industry.¹⁰²

⁹⁸ The Mines and Minerals Amendment Bill of 2015 provides for issuance of various licences that are provided for in other regions. If Bill is passed into law, this will be a step towards the right direction as it will be in line with the international best practices.

⁹⁹ *Supra* n. 4 at 28.

¹⁰⁰ Section 4.6 of the Diamond Policy.

¹⁰¹ Section 9.8 of the Diamond Policy.

¹⁰² *Supra* n. 4 at 31.

In the same breath, the diamond policy does not provide for security and background checks for prospective employees and agents by licence holders across the diamond supply chain to eliminate those who at any point may have been involved in illegal diamond trade or other offences related to diamonds. One of the positive issues contained in the diamond policy is the requirement for payment of appropriate and regular remuneration for people responsible for the regulation and administration of the diamond industry. If employees are not adequately remunerated they may end up stealing and smuggling diamonds through formation of syndicates.

The declaration of diamond mining, prospecting and sorting areas as restricted areas is another issue that is emotive and should be handled properly. The policy does not make reference to the need to respect the interests, rights and needs of communities where prospecting or mining is taking place and in situations where areas or buildings have been declared as protected or restricted areas. In this respect the policy does not give any indication of how the rights of communities will be protected in areas that are declared as protected or restricted areas. International best practice in the provision of security in the extractive sector requires state or private security officials to act in a manner consistent with the protection and promotion of human rights and consistent with local and national laws of the country.¹⁰³

For example the Voluntary Principles on Security and Human Rights that were adopted by the United States of America and United Kingdom Governments require companies in the extractive and energy sectors to carry out a security risk assessment which identifies security risks and outlines ways to deal with the risks and how to protect human rights.¹⁰⁴ Further, companies are required to consult regularly with communities about the impact of their security arrangements.¹⁰⁵

The Voluntary Principles also require security officials to use force only when it is absolutely necessary to do so and to an extent proportional to the threat.¹⁰⁶ At the same time the rights of individuals should not be violated when people are exercising the right to freedom of association and peaceful assembly and the right to engage in collective bargaining. For example the South African Police Service tragically killed 34 miners at the Lonmin Platinum Mine in Marikana, Rustenburg in the North West Province of

¹⁰³ Voluntary Principles on Security and Human Rights; 2000.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

South Africa who were protesting in demand for better wages and working conditions.¹⁰⁷ This appeared as if the police were protecting the interests of business more than that of workers.

In its current form the draft diamond policy pays little attention to human rights issues. Another gap in the draft Diamond Policy is that it makes casual and vague reference to transparency and accountability issues. The policy states the need to promote transparency by government entities to all stakeholders and promote the involvement of all relevant stakeholders in the operations of the industry.¹⁰⁸ However, these statements are not supported by any strategies or provisions that will be used by government to promote transparency and accountability in the diamond supply chain such as access to information, disclosure of contracts, investment agreements and revenue flows and use, prior informed consent for communities affected by diamond production operations, public participation and consultation.

Further, the policy is silent on the issue of cash payments and transactions in the diamond industry. This issue should have been addressed as the KPCS requires all cash payments and transactions to be made through the banking system. This is a measure that may prevent money laundering, fight against corruption and broadly promote transparency and accountability in the sector since the paper trail can be followed through the bank system.

The other loophole in the draft policy is failure to make provision for the local diamond industry to develop self-regulation mechanisms that will help in addressing some of the industry related challenges. There is no system of warranties at a local level as provided for in the KPCS Core Document. In this case the policy is silent on voluntary measures that may be adopted by the diamond industry in Zimbabwe to regulate and control its own operations amongst members to curb illegal digging, illicit trade and smuggling and even human rights violations.

Further, the diamond policy is silent on provisions relating to how and what role civil society organisations, citizens, and oversight bodies such as parliament or any other bodies that may be created to monitor the diamond sector can play to promote transparency and accountability. This is in light of the fact that the KPCS is a tripartite arrangement that includes the states, the diamond industry and civil society and this arrangement should also be reflected at the local level.

¹⁰⁷ Mail and Guardian; Marikana tragedy: Who authorised the use of live ammunition? <http://mg.co.za/article/2012-08-21-marikana-tragedy-who-authorized-the-use-of-live-ammunition>, August 2012.

¹⁰⁸ Article 2.2 of the Diamond Policy.

With respect to beneficiation and value addition, the policy states that the Government shall reserve a quota of all diamonds produced in Zimbabwe for local polishing and jewellery manufacturing.¹⁰⁹ This provision comes from government's stance of creating opportunities for value addition and beneficiation of the diamond sector at the local level through cutting and polishing. While the draft diamond policy does not provide a threshold for the quota to be reserved for domestic beneficiation and value addition, it currently stands at 10% per category of diamonds (gem, near gem and industrial).¹¹⁰ However, while this provision is noble, lessons need to be learnt from the licencing of the diamond manufacturers, most of who reportedly ended up exporting the diamonds they received from the diamond pool. This means there is need for greater transparency and accountability safeguards in the policy and the MMCZ regulations.

In terms of institutional arrangements, the draft diamond policy envisages a marketing system where the government controls diamond sales and marketing through an agent appointed by Government. Further, the policy states that the sale of diamonds shall either be by tender or negotiation or any other system approved by government.¹¹¹ It is not clear whether the agent will be state owned like the Minerals and Marketing Corporation of Zimbabwe, privately owned or a joint venture between a private entity and the State.

However, whatever form it takes, the merits and demerits of these entities need to be fully considered. The advantage of a single government-owned entity is that it enables maximum control by the government over taxes. However, its disadvantage is that a state owned monopoly on diamond marketing may not provide scope for competition and realization of market prices to diamond producers and dealers. The lack of competitive prices may encourage dealers and producers to create a black market and smuggle diamonds in a bid to get better and fairer prices. On the sale of diamonds through a tender system or negotiations, it is submitted that negotiations may create opportunities for corruption.¹¹² The best way will be through a public tender system that will promote transparency and accountability.¹¹³

¹⁰⁹ Article 8 of the Diamond Policy.

¹¹⁰ This is in terms of Regulation 124 of the Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufacturers).

¹¹¹ Article 6.1 and 6.2 of the Diamond Policy.

¹¹² *Supra* n. 4 at 34.

¹¹³ *Ibid.*

Further, on institutional arrangements, the draft diamond policy provides for the establishment of the Diamond Commissioner, a Government Diamond Valuator and the Diamond Board. The policy proposes that these will be established through a Diamond Act. It is not clear from the diamond policy how both the Diamond Commissioner and Diamond Valuator are going to be appointed and what their specific functions and powers will be.

Another gap in the policy is that it does not make any reference to the Zimbabwe Revenue Authority (ZIMRA), especially in marketing, sales and valuation of diamonds, yet ZIMRA plays a key role in revenue collection. However, the policy makes constant reference to the Diamond Act as a means for regulating the diamond sector and that regulations will be developed to support the Diamond Act and the Mines and Minerals Act.¹¹⁴ In this regard, the Diamond Board and the Diamond Commissioners' establishment is set to be brought into existence through the Diamond Act which is yet to be enacted and signed into law.

Lastly, the diamond policy document does not contain enough information on statistics to show the potential of the diamond sector. It appears as if the diamond policy is not being treated as an important government policy document. However, the Mines and Minerals Bill of 2015 seem to be having provisions on the establishment of the cadastre system wherein statistics of the mineral content will be introduced. This is in accordance with the best international practice where geological information on mineral reserves and contents have to be known in order to attract investments.¹¹⁵

4.8 Institutional frameworks in other diamond producing regions in Southern Africa

Pursuant to the advent of the KPCS in 2003 to prevent 'conflict diamonds' from entering the mainstream rough diamond market, various diamond producing countries had to tweak their laws in order to be aligned with the provisions of the KPCS. In the paragraphs below, highlights will be made on the legal and institutional frameworks that other diamond producing countries in Southern Africa had to introduce so as to be compliant with the KPCS minimum requirements. This is from an angle of highlighting that if some countries could do it, Zimbabwe can learn from such countries and customize their laws accordingly.

¹¹⁴ Article 9 of the Diamond Policy.

¹¹⁵ The fragmentation of the laws that govern the mineral sector is one of the disadvantages in Zimbabwe as important provisions are found in different Acts and Regulations that govern the entire natural resources sector.

4.8.1 Botswana's legal and institutional framework

Botswana is the leading diamond-producing country in terms of value, and the second largest in terms of volume.¹¹⁶ In 2013, Botswana produced 23.2 million carats with a stated value of \$3.63 billion.¹¹⁷ The success of Botswana is attributed to a more stable political, legislative and institutional framework that attracts investments and has worked in curbing leakages and smuggling of diamonds.¹¹⁸ Some of the laws that regulate diamond trade and management in Botswana include; the Diamond Cutting Act (Chapter 66:04), Export and Import of Rough Diamonds Regulations (SI 24 of 2004) and the Precious and Semi-Precious Stones (Protection) Act (Chapter 66:03). These will be discussed briefly in the paragraphs below in relation to ensuring compliance with the KPCS minimum requirements.

a) Diamond Cutting Act (Chapter 66:04)

The Diamond Cutting Act of Botswana was enacted to regulate the cutting, sawing, cleaving and polishing of rough and uncut diamonds. This Diamond Cutting Act is akin to and equivalent to Zimbabwe's Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations which were discussed in detail in the paragraphs above. The Diamond Cutting Act of Botswana prohibits any person from cutting any rough or uncut diamond unless they hold a licence.¹¹⁹ In this regard, the Diamond Cutting Act of Botswana clearly sets out the various classes and types of licences in the diamond cutting and polishing sector.¹²⁰

The Diamond Cutting Act of Botswana also outlines the application process for licences.¹²¹ It is worth to be noted that the Act prescribes that the Minister may cause an investigation to be made on the applicant to enable him to decide whether or not to grant any class of the licences.¹²² Closely related to this requirement is another provision in the Act which bars people

¹¹⁶ World's top diamond producing countries: <http://www.ehudlaniado.com/home/index.php/news/entry/world-s-top-diamond-producing-countries>.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Section 3(1) of the Diamond Cutting Act.

¹²⁰ Section 4 of the Diamond Cutting Act: The following types of licences are issued in terms of the Act; a Diamond Cutters Licence that entitles the holder to cut rough diamonds for business or trade purposes, a Diamond Research Licence that entitles the holder to conduct research into the physical properties of diamonds and the uses to which diamonds can be put (this will not be for business or trade purposes) and a Diamond Toolmakers Licence that entitles the holder to set rough diamonds or uncut diamonds not suitable for polishing in tools or implements.

¹²¹ Section 6 of the Diamond Cutting Act.

¹²² *Ibid.*

who have been involved in illicit diamond trade or other precious stones whether in Botswana or other countries from getting licences.¹²³

The concept of investigations before granting licences and barring those who have been involved in illegal diamond activities is critical in the diamond sector to curb illegality and illicit trade in the diamond supply chain. This requirement is closely linked to the KPCS requirement that participants shall make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme.

This will ensure that previous offenders, either as individuals or companies are identified through such investigations and due diligence before the issuance of licences for mining, cutting and polishing or any other activities that require a licence. The current Zimbabwe's Diamond Policy does not cater for the background check of prospective applicants which makes the system to be susceptible to being entered and infiltrated by companies or individuals that have been involved in illicit trade or smuggling of diamonds.

b) Export and Import of Rough Diamonds Regulations (SI 24 of 2004)

The Export and Import of Rough Diamonds Regulations of Botswana were passed to domesticate the KPCS. According to section 3, the export of rough diamonds without a KPCS Certificate is prohibited. The KPCS Certificate can only be issued by the Minister of Minerals, Energy and Water provided he is satisfied that the provisions of the regulations have been met by an applicant. This will then enable him to certify that the diamonds have been handled in accordance with the KPCS.¹²⁴

The Minister may refuse to issue a KPCS Certificate if diamonds have not been handled in line with KPCS standards. Section 6 also prohibits the import of rough diamonds unless they are accompanied by a KPCS Certificate issued in the country of export. Zimbabwe has also domesticated the KPCS partly through the amendments to the Mines and Minerals Act and also through the Diamond Policy.

As prescribed by the KPCS Core Document, the Export and Import regulations also contain a section on offences and penalties. Section 9 of the regulations makes it an offence to export or

¹²³ Section 12(2) of the Diamond Cutting Act.

¹²⁴ *Ibid.*

import rough diamonds in way that is contrary to the regulations. If a person is convicted of such an offence he will be liable to a fine not exceeding P500 or to an imprisonment term not exceeding six months, or to both. In my view, the penalty in the Botswana legislation for exporting or importing diamonds without a KPCS certificate is not deterrent enough and does not tally with the KPCS requirement that penalties must be dissuasive and proportional. This is prone to being abused by those with means to pay the penalties due to the leniency in such penalties.

c) Precious and Semi-Precious Stones (Protection) Act (Chapter 66:03)

The Botswana Precious and Semi-Precious Stones Act provide for the protection of the precious stones industry and regulate dealings in precious stones. The Act defines a precious stone as a diamond or any other substance declared to be a precious stone.¹²⁵ The Act provides the framework for the acquisition of licences. In terms of Section 8 any person may obtain a licence to deal in rough or uncut precious stones as a buyer, seller, importer or exporter.

This is in line with the KPCS requirement that all diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities. Zimbabwe's Precious Stones Trade Act provides for the licencing of buyers, dealers and sellers among others but does not clearly regulate couriers or transporters of rough diamonds and this poses a threat in the security of diamond trade.

4.8.2 Namibia's legal and institutional framework

Namibia features as one country that produces diamonds in Southern Africa. Namibia's diamond industry is regulated by the Diamond Act¹²⁶ which provides control measures in respect of possession, purchase, sale, import and export of diamonds. The Diamond Act of Namibia establishes the Diamond Board. The objectives of the Namibian Diamond Board include advising the Minister on any matters relating to the diamond industry and the control and protection of diamond resources.

The Diamond Board includes the police commissioner and it is argued that the inclusion of police officers in the Diamond Board may be an attempt to ensure that the law enforcement agents are also actively involved in the decision making processes and bring their expertise on security issues. This may be critical for the KPCS which has been plagued by lack of enforcement of internal control measures by

¹²⁵ Section 2 of the Act.

¹²⁶ Act 13 of 1999.

participants, therefore once the law enforcement agents are involved in decision making processes they will be able to implement diamond control measures effectively.¹²⁷

In Zimbabwe the draft Diamond Policy proposes the establishment of a Diamond Board of Zimbabwe just like the position in Namibia. However, the Policy does not give details on how the proposed Diamond Board will be constituted and its composition. It is not clear if the Board will include a police officer as a member of the Board. While the Namibian Diamond Board includes representatives of government, diamond producers, small scale producers, trade unions, cutters and dealers, it is not specific on inclusion of community groups. It is not clear as well if the Diamond Board in Zimbabwe as proposed in the Diamond Policy will include communities affected by diamond mining operations.¹²⁸

Further, the Namibia Diamond Act provides for the establishment of a Diamond Board Fund¹²⁹ to cater for the expenses of the Board and the appointment of a Diamond Commissioner whose functions include issuing licences. In similar fashion, the Diamond Policy of Zimbabwe proposes the establishment of a Diamond Board Fund and the appointment of a Diamond Commissioner who will administer the Diamond Act. The above institutional provisions show that the drafters of the Zimbabwe Diamond Policy drew a lot of lessons from Namibia and were heavily influenced by the legal position in Namibia.

In the Namibian Diamond Act there is a section that states the various types of licences that can be applied for in the diamond sector, just like the Botswana Diamond Cutting Act. The types of licences include the following; diamond dealers licence, diamond cutting licence, diamond tool making licence and diamond research licence. In addition, persons may be given various kinds of permits such as a permit to possess unpolished diamonds, permit to receive or purchase an unpolished diamond and a permit to export or import an unpolished diamond.¹³⁰ It seems the licences issued in Namibia are similar to those that are issued in Botswana.

The Namibian Diamond Act also provides for the control measures related to unpolished diamonds. The law makes it an offence for anyone to possess unpolished diamonds without a licence and if one is convicted of the offence, such a person will be liable to a fine not exceeding N\$1 000 000 or to a prison term of 20 years or to both such fine and imprisonment term. These penalties are heavy enough to

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Section 11 of the Diamond Act.

¹³⁰ Section 27 of the Namibian Diamond Act.

deter anyone who might want to deal in unpolished diamonds without a licence, as contemplated in the KPCS Core Document.

4.8.3 South Africa legal and institutional framework

South Africa is another major producer of diamond and it boasts a better organized cutting and polishing industry that is part of the country's beneficiation programme. South Africa passed the Diamonds Act¹³¹ to establish the South African Diamond and Precious Metals Regulator,¹³² the State Diamond Trader¹³³ and to provide for control over the possession, purchase and sale, processing, local beneficiation and export of diamonds.

The objectives of the Diamond Regulator include, but are not limited to; ensuring that diamond resources are exploited and developed in the best interest of the people of South Africa, promoting equitable access to and local beneficiation of South African diamonds and to ensure compliance with the KPCS minimum requirements.¹³⁴ These objectives and functions¹³⁵ are key to the development of the diamond sector in South Africa and show that the country is committed to complying with the KPCS requirements in the trade and export of diamonds.

In terms of offences and penalties, the Diamond Act prohibits the possession and sale of diamonds without a licence or permit. Further, the law prohibits the polishing of diamonds or setting of diamonds in tools unless a person is a beneficiator or a researcher authorized in writing by the Regulator. The export of unpolished diamonds is prohibited unless one is a holder of a permit, a dealer or a producer. For accountability purposes the licenced dealers, producers and beneficiators are required to keep registers of the diamond transactions.

Overall, the legal position in South Africa is similar in many respects to the legal position in Namibia and Botswana. There is a need for Zimbabwe to learn from the frameworks that its neighbours have adopted in order to make the best from its diamond exploitation to the benefit of its citizens.

¹³¹ Act 56 of 1986.

¹³² South African Diamonds and Precious Metals Regulator: <http://www.sadpmr.co.za/pages/about-us/mandate>.

¹³³ State Diamond Trader: <http://www.statediamondtrader.gov.za/profile.html>.

¹³⁴ Section 4 of the Diamonds Act.

¹³⁵ The functions of the Regulators are stated as including; considering applications for licences and permits and to appoint an expert in market prices as a Diamond Valuator.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

Conclusion

In this study, a discussion was undertaken on the advent of the KPCS as a regulatory institution that was introduced to regulate the trade in rough diamonds. In Chapter 2, I discussed the KPCS in detail as an international institution that was introduced to govern the diamond industry. I highlighted the impact that the KPCS has had on the national diamond regulation regimes of various states. My findings were that the trade in conflict diamonds in various states has been largely curbed as a result of the influence of the KPCS on national diamond regulation regimes.

A specific study was made on the current status of the regulatory regime that governs the exploitation of diamonds in Zimbabwe and whether the current laws are ensuring the proper oversight in the exploitation of the diamonds, as well as whether the current laws are ensuring that the KPCS minimum requirements are met. This was discussed in detail in Chapter 3 and my findings were that the diamond regulatory laws in Zimbabwe are fragmented and most of them outdated, which has led to the improper and ineffective governance of the exploitation of diamonds.

I also looked at whether the current diamond regulatory institutions have been effective in ensuring transparency and accountability in the diamond industry in Zimbabwe. This was detailed in my Chapter 4 and my findings were that the minimum requirements set by the KPCS in ensuring accountability and transparency in Zimbabwe's diamond industry have not been appropriately met which has led to large amounts of revenue not being accounted for and the overall citizens left in the dark on the government contracts with the diamond mining houses.

Above all, I came to a conclusion that Zimbabwe is lagging behind as far as the regulation of the diamond industry is concerned. This makes it hard for the KPCS to be fully effective and to have an impact in the regulation of the diamond sector. An analysis of Zimbabwe's Precious Stones Trade Act showed that the Act is part of the internal control systems adopted by Zimbabwe to comply with the KPCS minimum requirements. However, it is clear that these measures are not adequate to ensure that illegal goods or diamonds are eliminated from the system. In fact, the Act is not good enough to curb smuggling, illicit trade and to enhance transparency and accountability. In this case there is an urgent need to embark on legal reforms that will concretize and domesticate some of the KPCS minimum standards that are meant to prevent trade in conflict diamonds.

There is a need for a Diamond Act which will address the issues in the diamond sector and also be aligned to the best international practices in the exploitation of the diamond, including being aligned with the KPCS minimum requirements. The Diamond Policy was a good step towards the right direction and it needed to be taken to its logical end by introducing a Diamond Act which would help to regulate the sector in a manner that would significantly benefit the Zimbabwean economy.

In light of the above, it is suggested that the following be considered as recommendations that can help in the proper regulation of the diamond industry in Zimbabwe.

Recommendations

- 1.** Zimbabwe to formulate a Diamond Act that will make the Diamond Policy to be enforceable. The Act will also make it easier for the KPCS minimum requirements to be implemented.
- 2.** The Zimbabwean Parliament to play an active role in holding those with responsibility to account on the functioning of the diamond sector on behalf of the citizenry, which is one of the aims of the Kimberly Process.
- 3.** The KP to continue to make an impact and to show effectiveness as an international institution established to ensure that the trade in diamonds is done in an appropriate way, without any violation of human rights.

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