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ACRONYMS

DRC	Democratic Republic of Congo
EITI	Extractive Industries Transparency Initiative
IIED	International Institute for Environment and Development
WBCSD	World Business Council for Sustainable Development
TNC	Transnational Corporation
NGO	Non Governmental Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MNE	Multinational Enterprise
AfDB	African Development Bank
IFC	International Finance Corporation
MIGA	Multilateral Investment Guarantee Agency
IBRD	International Bank for Reconstruction and Development
IDA	International Development Association
ICSR	International Corporate Social Responsibilities
IGO	Intergovernmental Organization
EBRD	European Bank for Reconstruction and Development

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TRANSPARENCY IN THE MINING CONTRACT

CHAPTER 1

1. INTRODUCTION

1.1 BACKGROUND INFORMATION

There have been different international agendas for human development and poverty eradication, especially pertaining to developing countries and least developed countries. These agenda need strategies, efforts and practical solutions. The practical solution to a lack of transparency in the negotiation process of the mining contract is going to contribute in the fulfillment of the objectives of such international agendas. That is, relationship between Multinational Corporation and host state pertaining to the negotiation process of a mining contract, and manner in which the contract is negotiated are significant determinants of fair deal which in turn allow the host state to benefit and in this way, such benefit contributes to human development and poverty eradication.[1] The practical solution that is suggested here is one way of harnessing the opportunity offered by Globalization:

> "One of the defining features of today's world is the process of economic globalisation, a process characterised by high levels of international trade and foreign direct investment. This chapter examines this process and notes the broad consensus among economists and policy-makers that economic globalisation in general, and international trade and foreign direct investment in particular, offer an unprecedented opportunity to eradicate poverty and hunger worldwide."[2]

The imbalance[3] which exists in investment area is one of the factors that hinder the international agendas for human development and poverty eradication from achieving their goals; In the

[1] Human development to eradicate poverty http://hdr.undp.org/en/media/hdr_1997_en_overview.pdf (accessed 13th may 2010)
[2] Van den Bossche P (2005) 2

[3] …, regulation requirements are normally more onerous in relation to developing countries. This is particularly the case in relation to investment matters, where capital-seeking economies have little choice but to regulate according to the needs of prospective investors. Both the World Bank and Asian Development Bank encourage the development in emerging economies of legal rules, administrative infrastructure, court systems, and judicial remedies to protect the interests of lenders and investors from abroad. Boulle L (2009) 157

international investment area or international economic law[4] there has never been an effort that takes into account the need of developing or underdeveloped nations, which most often play host state, to the level of providing enforceable remedy[5] to the problem of lack of transparency in the negotiation process of mining contract:

> "According to opponents of the current economic globalisation process, there is excessive emphasis on the economic interests of transnational corporations. In their opinion, social, cultural and environmental interests and the interests of developing countries are not sufficiently taken into account. Often, they hold economic globalisation responsible for world poverty and hunger, environmental disasters, unemployment and many other wrongs of today's world. To many, global economic integration is a malignant force that is destroying the livelihood of millions of workers and exacerbates inequality, social injustice and environmental degradation."[6]

However, the international laws were made by rich nations (mostly European nations) without full participation of the developing or least developed nations to discuss the merits of such laws:

> There is of course a power-based explanation for this situation. The powerful state fashioned rules in order to ensure the protection of the assets of multinational corporations and expatriate plantation owners in the weaker states of the world. No inquiry was made into the issue of whether the exercise of this protection should be conditional on the conduct of the foreign citizen or corporation in the host state.[7]

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[4] Basis of international economic law explained here: http://www.londondegree.org/international_economic_law.pdf (accessed 13th may 2010)

[5] Garner B (1999)1320

[6] Van den Bossche (n 2 above) 12

[7] Sornarajah (2004) 185

To correct the above-mentioned problem the negotiation process of mining contract has to be managed and regulated at the international level. If not, economic globalization[8] is less likely to be a blessing, instead is going to cause economic injustice, social inequality, environmental degradation and cultural distortion.[9]

Therefore, this research could very well relate to the report titled: "Breaking the curse: How transparent taxation and fair taxes can turn Africa's mineral wealth into development."[10] This is report published by four non-government organizations[11] (Southern Africa Resource Watch, The Tax Justice Network for Africa, Christian Aid and Action Aid), with an interest in an equitable world trade system that will enable development.

The report indicates that there are dubious accounting practices which lead to tax avoidance. Also, there is exemption from tax or royalties negotiated by multinational corporations in contracts which are not open for parliament scrutiny:

> "This report argues that African governments have failed to collect the additional rents generated by mining companies before and during the price boom because (i) they have given tax subsidies to the industry and (ii) mining companies have been pushing for tax breaks in secret mining contracts, amounting to an aggressive tax avoidance strategy. As a result, the citizens of mineral-rich countries continue to live in poverty, and are in some cases subject to violent conflict fuelled by the wealth generated from mineral resources as is the case today in the eastern DRC. To break this 'resource curse' and turn mineral wealth into revenue for

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[8] Globalization's meaning and its future direction. http://www.globalpolicy.org/globalization/defining-globalization.html (accessed 13th may 2010)

[9] …, economic globalization has to be managed and regulated at the international level. If not, economic globalisation is likely to be a curse, rather than a blessing, to humankind, aggravating economic inequality, social injustice, environmental degradation and cultural dispossession. Van den Bossche (n 2 above) 2

[10] NGOs (2009) "Breaking the curse"

[11] Garner (n 5 above)1080

> development, the laws, policies, and institutions that govern the financial payments made by mining corporations to national governments need to be reformed."[12]

The poverty and violent conflict aforementioned in the quote above do not encourage trust and interaction between Multinational Corporation and local community (host state). Therefore, there is a need of having multilateral transparency treaty or law for establishing trust and in turn output which comes out of such relationship:

"Drawing on Cotterrell's work, it is possible to identify three ways in which law support trust and, thereby, the productivity that is characteristics of community-like relations. It *expresses*, in the form of contracts, institutions and so on, the trust that holds actors together; it draws actors in further by ensuring their *participation* in social life; and it *coordinates* the differences that hold actors – and different networks of community."[13]

Mistrust between foreign investors and local communities raise the challenge of transparency in the negotiation process of mining contracts. Moreover, where the rules of engagement do not give enough access to stakeholders, the negotiation process of mining contract may undermine the ability of local communities to get fair presentation in relation to resource on which they depend. This could include loss of right, expropriation and environmental degradation:

> "Where local resource rights are weak, natural resource-based investment projects may undermine the ability of local groups to access the resources on which they depend. This may take the form of expropriation or otherwise loss of resource access without adequate compensation; or of environmental degradation such as the pollution of water and other resources essential to the local population."[14]

[12] NGOs (2009) "Breaking the curse" at viii
[13] Perry-Kessaris A (2008) 5
[14] Cotula L(2007)6.

To establish a trust relationship there must be legal protection of the host state, particularly local community rights during the negotiation process.[15] This could be by way of engaging the local community in decision-making that influences their rights:

> "Appropriate legal arrangements and adequate capacity to use them can help local resource users in Africa have greater control over the natural resources on which they depend. This includes more effective legal protection of local resource rights, and greater say in decision-making processes affecting these rights."[16]

Different nations have taken various reforms to address the problem, but the magnitude of the problem requires the international community to act collectively:

> "Yet these reform efforts remain incomplete, and in a number of countries much remains to be done to bring the national legal framework in line with international standards. Even where appropriate legislation is in place, major shortcomings often affect its implementation – for instance, most people living in rural areas are not aware of the rights created by legislation, and do not have the skills and the resources to enforce them."[17]

It is only in the negotiation process where phrase such as 'prevention is better than a cure' could be applicable. However, most legislation that cover mining contracts do not provide for the negotiation process, hence, there is need to have international treaty which is going to make member states confer appropriate attention to this stage of the process:

> "The permanent secretary of the EITI in Mali was appointed by decree in 2007, with the commitment that "signing up to the EITI will help increase national and international confidence in the management of public affairs in our country. This kind of monitoring will allow us to update

[15] Weakness of local resource rights may also undermine the negotiating power of local resource users in their negotiations with incoming investors; and therefore limit their ability to benefit from investment projects through negotiated benefit-sharing arrangements. Cotula (n 13 above) 6

[16] Cotula (n 13 above) 7

[17] *Ibid`*

> information on the revenues generated by the mining industries". Nevertheless, signing up to the EITI is no guarantee of total transparency in the mining sector. While it seems entirely natural to declare what has been paid officially, government and mining companies are unlikely to open up the negotiation of the Conventions of Establishment – which are the cornerstones of the industry."[18]

One thing that is very clear during the negotiation process is that Multinational Corporation is normally represented by its executive or expert body while on the other side; government of the host state is also represented by its own executive or expert body. Now an intractable legal challenge is how these representative bodies are going to remain accountable to those who are going to be affected by their decision making. "More precisely, the question is how to make them accountable in the right way since, as Ruth W Grant and Robert O Keohane note in their influential article, 'Accountability and Abuses of Power in World Politics', such agencies are always accountable to at least one group, the group that set them up or which has power over their budget, and so on."[19] In the case of the host state, the group which has power over the budget of the executive body is parliament. However, the above-mentioned NGOs' report states that mining contracts are not available for Members of Parliament to scrutinize. That is, executive body is not accountable to parliament:

> "Too many African governments are still unwilling to open up their tax deals and tax receipts from mining companies to public and parliamentary scrutiny; and too many mining companies are still pushing for tax exemptions and fail to report what they earn and what they remit to government in each jurisdiction where they operate."[20]

[18] Cotula L (2008) 10
[19] Corder H (2009) 12
[20] NGOs (2009) "Breaking the curse" at x

1.2 PURPOSE OF STUDY

In most developing and least developed countries in Sub-Saharan Africa[21] hope leans to a large extent on the natural resources, such as precious metals which have been bestowed there in plenty. Looking at this position, of Sub-Sahara-African countries, from a neo-classical market perspective[22], one finds wealth of natural resources to be comparative advantage of Sub-Saharan Africa. Therefore, where Sub-Saharan Africa cannot take advantage of natural resources, particularly mining sector, is important to look at what is wrong and suggest proper ways to fix the problem.

The dissertation is under assumption that in the international arena there has been enough legal development to safeguard the rights of foreign investor, but not enough legal progress to guarantee rights of host state and local community, particularly in the negotiation process of mining contract. Therefore, research looks at negotiation process as it is, and suggests ways in which trust relationship can be build so as to allow investment to operate smoothly while host state and local community benefit from it.

In the chapter 2 there will be analysis of the general aims of having a solution to stop lack of transparency in the negotiation process of the mining contract. One assumption is that the aims of the solution are to stop and discourage lack of transparency in the negotiation process of mining contract and thereby, establish trust. Another assumption is that understanding the negative impact of not having multilateral transparency treaty would stimulate political will to have multilateral transparency treaty. There will be logical explanation about how a particular approach-option available to international law will stop lack of transparency in the desired manner. The focus of the research, however, is on the curbing the problematic behavior of multinational corporations and corrupt government officials who favor lack of transparency.

[21] List of countries: http://www.uis.unesco.org/profiles/EN/EDU/countries40350.html (accessed 13th may 2010)
[22] Neoclassical economics bases a great deal of its policy analysis around a particular notion of economic efficiency. If it can be shown that policy A achieves a certain objective with fewer scarce resources than policy B, then policy A is preferred to policy B and it is described as more efficient. Greenwald D (1982) 701

The positive impacts of multilateral transparency treaty are expected to be assurance of compliance with transparency standards, increase of information access, legal empowerment of local community to engage, improvement of negotiation skills and defeating of corruption. Therefore, this study is going to simplify the work of international community in having a legal device that addresses the imbalance of international investment law in a way that is enforceable.

This research is going to recognize, enhance and advance inventive legal tactics to achieve transparency in the negotiation process of mining contract, restrict corruption and guarantee rights of local community so as to establish trust relationship between Multinational Corporation, host state and local community.

1.3 PROBLEM STATEMENT

In the field of investment law emphasis has been on the host state's obligation of transparency but not investor's obligation of transparency. This neglects the imbalance in power of negotiation strengths in a place where the investor has stronger position[23] and has to be trusted by host state, which in turn means investor has to be trusted by communities in which the investments are going to operate, as trusting relationship is an aim for any agreement or contract. Hence, there is need for level of transparency to satisfy both investor and local community (host state). Moreover, ignoring lack of transparency is to neglect the vulnerability to corruption caused by bureaucracy and lack of good governance.[24]

[23] As already noted, when Chile needed technology and investment for new mining ventures in the copper industry the bargaining power of the US copper companies increased. Furthermore, after nationalization the Chilean copper industry remained vulnerable to pressure from US firms by means of an embargo on spares and new technology. Muchlinski P (2007) 107

[24] Public Service International "Good governance and Corruption" http://www.worldpsi.org/Content/ContentGroups/English7/Regions/Africa_and_Arab_countries1/Publications10/EN_Corruption.pdf (accessed 13th may 2010)

1.3.1 POWER OF NEGOTIATION STRENGTH

In the countries with plenty of natural resources, but without capital and technology to exploit them, investors with the needed capital and technology may be best option in the negotiation process.[25] While on the other side, the multinational corporations due to their financial power have technology to be well informed and expertise to secure better deals, as well as financial power for lobbying for what they want.[26] To be precise, most African countries cannot afford technology to do survey of where, what mineral and how much mineral they have and, as result they lack a geological database and inventory.[27] African countries lack and cannot afford experts who work full time in global scale in negotiating mining deals. Again on the other hand, mining corporations have experts who work full time and go around the world negotiating mining contracts. The following quote shows the lobbying power of multinational corporations:

> "There is little doubt that MNEs lobby governments and IGOs to ensure that normative development is business friendly. How successful they may be is another issue, as the case of the failure of the Multilateral Agreement on Investment (MAI), or of the adoption of investment rules in the WTO, may suggest."[28]

[25] During the negotiation phase, a host country competing with other countries to attract foreign investment may be under pressure to give out concessions to the investor. Cotula (n 13 above)26

[26] On one hand, developing countries are criticized by the international economic institutions for upholding special interests of farmers, manufacturers, and cultural groups, while on the other hand, TNCs lobby effectively to advance their economic interests through direct engagement with governments in these countries, and through their leverage and influence in trade negotiation conducted by their own governments. Boulle (n 3 above) 102

[27] Of significance in this respect would be access on the part of host states to information about firms and international markets in which they operate. Here state with more developed databases and professional analytical skills will be at an advantage. Thus 'neo-dependency' may manifest itself in the inability to formulate an effective bargaining position due to lack of relevant information. This dimension of state power should not be overlooked. It may be remedied by the use of multilateral rather than unilateral approaches to regulation, a matter to be considered. Muchlinski (n 22 above) 108

[28] Muchlinski (n 22 above) 82

Looking at what criteria ICSID Arbitral[29] used to determine whether or not a treatment is fair and equitable, one sees that investment laws have not taken into consideration the impact, of lack of transparency in the negotiation process, on local communities in the case of corrupt government officials and bad influence of multinational corporations; instead:

> "The tribunal formulated a general approach for the determination of fair and equitable treatment when it stated: '[…] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, as discriminatory and exposes the claimant to sectional or racial prejudice or involve a lack of due process leading to an outcome which offends judicial propriety-as might be the case with a manifest failure of natural justice in judicial proceedings or complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host state which was reasonably relied on by the claimant'."[30]

The negotiation process of mining contract as it stands today, in the international investment law, has not taken into consideration the complicity of multinational corporations:

> "As has been said, the risk must be *foreseeable* for the actor in order to blame him. With companies this is often the case: They often know exactly that by their purchase of resource, their investment or production, they put environment and the people at risk of remaining in poverty or even deteriorating their circumstance. Interestingly enough, the United Nations Global Compact mentioned above asks the subscribers to implement a principle of due diligence in order not to be complicit in harmful action. The second principle asks the subscribing corporations to make sure that '… they are not complicit in human rights abuses'. The document mentions three different types of 'complicity': Firstly, 'direct complicity'

[29] neutral international arbitrators, http://www.arbitralwomen.org/files/publication/4911201000239.pdf (accessed 13th may 2010)

[30] Waste Management, Inc v United Mexican States, Award, 30 April 2004, Paragraph 98

occurring when a company knowingly assists a state in violating human rights; secondly, beneficial complicity', in which a company benefits directly from human rights abuses committed by someone else; and thirdly, 'silent complicity', which means '… the failure by a company to raise the question of systematic or continuous human rights violations in its interactions with appropriate authorities'. Since a lot of corporations do not know precisely what the effects of their investment and trade relations will be, the Global Compacts asks them to act according to due diligence, 'a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it'"[31]

1.3.2 VULNERABILITY TO CORRUPTION

Lack of good governance and leadership ethics bring along a lack of concern for the well being of the majority who have to benefit through funds obtained from natural resource. This is characterized by corruption and doubtful accounting:

> "Given the vast investment costs and potential profit involved in most mining deals, concession contracts provide opportunities for corruption at various stages of the allocation and implementation process. Companies have a vested interest to maximize their profit margins, ensure a return on capital, minimize the payments they make to the host governments and mitigate the high risks involved in huge mining investments. On their side, national governments frequently fail to get full value for their resource, due to lack of knowledge and capacity, access to technical expertise or corrupt individuals operating in their own interests within weak public and institutional environment."[32]

However, one has legitimate reason to be suspicious where there is an unfair balance in the mining contract and who public officials participated in the negotiation process accumulated wealth not

[31] Mack E, Schramm M, Klasen S and Pogge T (2009) 164
[32] http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156 (accessed 10th December, 2009)

proportional to their legitimate source of income. The following quote indicates the dynamic of relationship between actors during negotiation:

> "The host state in which the investment takes place. The host state sets the terms and conditions of the investment project (often on the basis of negotiations with the investor), and is represented by politicians and government officials. The negotiating power between investor and host state is shaped by imbalances in skills, money and other assets, but also by the extent to which the project is crucially tied to the host country due to location of precious resources or other factors. Bureaucratic inertia and passive resistance from government officials may frustrate the implementation of deals concluded between investors and politicians, thereby undermining the power of investors. The host state engages in varying relations with local resource users (from support to repression). It is composed of different structures (different ministries; state-owned companies; central, deconcentrated and decentralised agencies) that represent possibly conflicting interests (e.g. ministries responsible for petroleum operations and for the environment). It acts through individuals whose behaviour is shaped by varying combinations of official government policy and self-interest (corruption, rent-seeking, protection of vested interests)."[33]

After identifying the above-mentioned problems my hypothesized solution to the problem is multilateral transparency treaty. This could also be referred to as the research hypothesis, since the hypothesized solution could only be empirically tested.

[33] Cotula (n 13 above) 24

1.4 DELINEATION

Lack of transparency in the mining contract can be witnessed in three stages; in the process of negotiation towards signing of contract, the contents of the contract and in the activities pertaining to contracts. All three stages are important and need to be dealt with. However, the size of this dissertation is only enough to discuss one stage, and hence, the focus of dissertation is going to be on lack of transparency in the process of negotiation towards signing of mining contracts.

This thesis is about the negotiation process of mining contract. Hence, the public interest here does not concern substantive rights and duties, but rather the integrity of the process by which investor rights are established which is very similar to integrity of arbitration procedure.[34] That is, presence of lack of transparency in both processes, because "If the governments were establishing these rights for investors by legislation, or by the decision of Executive officials, there would be an opportunity for scrutiny and debate in Parliament, and for challenges to Government decisions in the courts. But by establishing private rights in the international treaties, both possibilities may in practice be excluded in many States whose constitutional provisions give the Executive a more or less free hand in the areas of treaty-making and the conduct of foreign affairs."[35] Therefore, to address this problem in the negotiation process, research identifies and suggests a number of actors or players who should be permitted by multilateral transparency treaty to monitor and evaluate the negotiation process, and how they should be able to do that for the sake of public interest:

[34] French D, Saul M, & White N (2010) 4
[35] French D, Saul M, & White N (n 36 above) 6

"Public participation is regarded as a free-standing goal, worthy of protection and advancement in international agreements. The 1998 Aarhus Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environment Matters does what its name suggests. The 41 State parties, from Ireland and the UK in the west to Tajikistan and Turkmenistan in the east, have bound themselves to guarantee prescribed minimum rights of access to information and to public participation in environmental decision-making. Perhaps the idea will one day catch on in other areas of public life."[36]

[36] French D, Saul M, & White N (n 36 above) 12

1.5 RESEARCH QUESTIONS

1 The conceptual dimension which was examined is; "what role can a multilateral transparency treaty play in bringing about transparency in the negotiation process of mining contract?" or in other words, should there be a multilateral transparency treaty? This is going to be in the context of transparency and power concepts.
2 What should be the features of a multilateral transparency treaty?
3 What roles are going to be assigned by a multilateral treaty to home state, host state, multinational companies and institutions in monitoring and evaluating negotiation process?
4 What are going to be determined, by a multilateral transparency treaty, as proper ways to engage the communities, who live in and are affected by mining activities, in monitoring and evaluating the negotiation process?
5 What is the conclusion of research?

1.6 GENERAL LITERATURE REVIEW

Research looked at other works so as to provide logical explanation as to why lack of transparency in the negotiation process is as it is, the consequences of lack of transparency, and thereby, support the importance of transparency.

Moreover, this study also draws upon other works so as to provide logical explanation as to why multilateral transparency treaty is best way to solve the problem.

There is literature review in the context of transparency, legal empowerment and in the context of multilateral treaty. In reviewing other works this research has pointed out how they can be integral part of whole multilateral transparency treaty.

1.7 BRIEF CHAPTER OVERVIEWS

Chapter 1: Introduction

This Chapter covers background information, purpose of study, problem statement, delineation, research questions, general literature review, brief chapter overviews, and research methodology.

Chapter 2: conceptual dimension

Research focuses on the importance of multilateral treaty in solving the problem. This is done in a way that answers the first research question.

Chapter 3: Features of the Multilateral Transparency Treaty

Here the focus is on appropriate features of the multilateral transparency treaty and how they fit in.

Chapter 4: Roles of different players

Thesis identifies different players who are in the strategic positions to fulfill the aim of multilateral transparency treaty and thereby recognize them formally by showing what their input could be. Also, the problem of extraterritorial jurisdiction and home state's unwillingness to cooperate are addressed here.

Chapter 5: local community

Special attention need to be given to local community pertaining to negotiation process. Hence, the chapter explains how the interest of the local communities could be best protected by recognizing different innovations which should officially be part of multilateral transparency treaty.

Chapter 6: Conclusion

The chapter talks about what has research found; is research expecting; are the recommendations?

1.8 RESEARCH METHODOLOGY

This is indication of how the research came to conclusion pertaining to research questions above-mentioned.

1. Research begins by analyzing the general aims of having a solution to stop lack of transparency in the negotiation process of the mining contract. The assumption is that the aims of the solution are to stop and discourage lack of transparency in the negotiation process of mining contract so as to contribute in human development and poverty eradication.

   Study used data which describe lack of transparency in the mining contract to be a problem and, data that connect problem of lack of transparency to problem of poverty and lack of human development. These data have been collected via internet and library visits. These data are appropriate because once one sees the problem would understand the need or aim to find solution. The analysis of the data is going to involve views and argument of prominent reports and scholars to support argument of this research.

2. There is factual and logical explanation of what causes the lack of transparency in the negotiation process of mining contract.

   Dissertation looks at different data derived from various studies and investigation done by NGOs, Civil Societies Agencies and books of different prominent scholars, etc. These data have been collected via internet and library visits. The suitability of data comes from the fact that such data are outcome of investigations and studies which have not been refuted. The way of analyzing these data included critical theory, historical study of imbalance in the investment law and secondary data analysis.

3. There is logical explanation about how a particular approach-option available to international law will stop lack of transparency in the desired manner. The general technique that the research has employed is to examine articles, reports, recommendations, books regarding international economic laws and point out different experiences so as to persuade a reader that multilateral transparency treaty is only effective way to commit international community in solving problem of lack of transparency in the process of negotiation of mining contract.

   The data pertaining to international economic law have been collected through internet and visits to University of Pretoria's libraries. The data have been analyzed by way of drawing upon mentioned sources and full acknowledgement and specific reference are given at appropriate point in the text.

4. In considering what features should multilateral transparency treaty have? The research has looked at other multilateral instruments which contain multilateral framework so as to see how these frameworks could accommodate transparency in the negotiation process of mining contract. Research has also looked at how local legal devices could be used to accommodate transparency in the negotiation process of mining contract.

   The collection of this data has been done via internet and visits to libraries of University of Pretoria. The analysis of data involves amendments to suit time and circumstances of the negotiation process.

5. In meditating what roles should be assigned by multilateral transparency treaty to home state, host state, multinational companies and institutions in monitoring and evaluating negotiation process? The research has examined different experiences and sources of the international economic laws so as to determine the legal and business relation that exist between Multinational Corporation and home state, host state and institutions, and multinational

corporation and institutions in order to find out how such relation could be used to monitor and evaluate the negotiation process?

The collection of this data was done through internet and library visits. There is close analysis of aims of these actors and strategic tools available at their disposal, and how these tools could be used to fulfill their aims and the purpose of multilateral transparency treaty at same time.

6. In thinking about proper ways to engaged the communities, who live in and are affected by mining activities, in monitoring and evaluating the negotiation process? The research has looked at different reports, recommendation of the round table and books of prominent scholars pertaining to this question and suggests proper ways to engaged communities based on such data.

   Reports, recommendations and books have provided clue or suggestion as to how to engage or protect the interest of local communities. The clues or suggestions are result of analysis of observation done in India and Mali at different times by different researchers. These materials were collected through internet and library visits.

7. Analysis of research contents has indicated what has research found; is research expecting; are research recommendations?

   Here the data are research contents collected through internet and library visits. The deep understanding of research contents has provided the researcher with findings, expectations and recommendations.

Conclusion

The above research methodology discusses data that the research has used and ways through which such data were collected. Also the methodology provides explanation as to suitability of such data and mention techniques used to analyze them.

CHAPTER 2

1. CONCEPTUAL DIMENSION

1.1. Transparency and Power

Here there is fusion of transparency concept and power concept, because for the purpose of this study, transparency is meant to ensure an even power of negotiation and protection of rights; the purpose of transparency is eventually to lead to equal negotiation strength between Multinational Corporation and host state, and empower local community with the information.

The above paragraph indicates that transparency is expected to lead or govern to equal negotiation strength and empower local community. Hence, the study is about governmental transparency, "defined simply and broadly as a governing institution's openness to the gaze of others, is clearly among the pantheon of great political virtues."[37] Transparency can be elaborated as:

> "A fundamental attribute of democracy, a norm of human rights, a tool to promote political and economic prosperity and to curb corruption, and a means to enable effective relations between nation states, transparency appears to provide such a remarkable array of benefits that no right-thinking politician, administrator, policy wonk, or academic could be against it. But transparency is not merely a political norm; candidates, partisans, and activists utilize it as a rhetorical rallying cry and weapon to promise full-scale political and social redemption. Contentious political campaigns and popular political consciousness seethe with allegations that government officials engage in secret, corrupt activities (if not full-scale conspiracies), and overflow with promises that sufficient organization, popular will, and correct leadership will

[37] Fenster M (2005) 4

> finally provide citizens with the responsive, trustworthy, and, above all, *knowable* government they deserve."[38]

Equal negotiation strength and protection of rights provided by transparency could establish trust relationship between multinational corporation, host state (governmental actors) and local community (civil societies), which in turn establishes productivity. The key words are 'trust relationship' as opposed to conflict:

> "Contemporary transparency advocates typically draw connections between their efforts and the beginnings of modern liberal democratic theory in order to make the argument that open government is an essential element of a functional liberal democracy. James Madison's statement in an 1821 letter that "[a] popular Government without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy; or perhaps both," serves as the quote most often used by authors to demonstrate the foundational nature of transparency in modern democratic theory and in the American constitutional scheme. But one can find similar, if not quite as pithy and compelling, sentiments in the classical liberalism of Locke, Mill, and Rousseau, in both Benthamite utilitarian philosophy and Kantian moral philosophy, as well as in the statements of other framers of the American constitution—even if the framers' own deliberations over the constitution were rather less than fully transparent. Bentham, for example, argued that publicity enables closer relations between the state and its public by securing the confidence of the governed in the legislature, by facilitating communication between the state and the public, and by creating a more informed electorate. If fully knowledgeable of the workings of government, the public can play its proper roles as enlightened tribunal and collective decision makers whose "national intelligence," trust, and attention lend "confidence and security" to "open and free policy."[39]

[38] Fenster (n 39 above) 4

[39] Fenster (n 39 above) 9

There is two level transparency; transparency that demand multinational corporation to disclose certain information so that host state could make informed decision during negotiation process, and transparency that inform and engage local communities as not to infringe their rights. In both cases, the information that comes in the transparent manner described in this research does eventually empower host state and local community. The element of power can be seen clearly when the information given by transparency increased ability of public to monitor the government activity and enable individuals to make better decision.[40] Therefore, here there is transparency which provides power. The transparency comes to host state and local community through legal process and, hence, there is legal empowerment.[41] However, fusion of transparency and power is clearly seen when both act as a means to fair and equity.

While there are many literatures which represent conceptualization of power, the power referred here relate to Weber's definition:

> "… power as the capacity of one actor to influence the behaviour of another. In this view, power is a capacity that actors may or may not have ("powerful" and "powerless"), that is exercised (or not) intentionally, and that is inserted in a relationship of subordination between two or more actors (between "dominant" and "subordinate" actors). Coercion, or threat of coercion, explicit or implicit, is the ultimate guarantor of compliance."[42]

The multilateral transparency treaty which is recommended by this study is an institution that is going to regulate the capacity of one actor to influence the behavior of another; hence, the role of

[40] Transparency proponents also cite instrumental reasons for imposing disclosure requirements on government. ... The most significant consequences flow from the public's increased ability to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions. Additional information also enables individuals to make better decisions in their private lives and in their engagement in the market, resulting, for example, in changed consumer and industry behavior in fields as diverse as health and the environment. Fenster (n 39 above) 12

[41] Empowerment is the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives. Legal empowerment is empowerment brought about through use of legal processes Cotula (n 13 above) 18

[42] Cotula (n 13 above)18

multilateral transparency treaty is going to be dominant one with coercion or threat of coercion. This is going to make multilateral transparency treaty the ultimate guarantor of compliance.

This study advocates strong transparent requirements given to the fact that the voluntary codes[43] or available legal tools don't work efficiently, for if there were respect and compliance with the fundamental rights that which are found in most constitutional structure of host states it would have not been necessary to have transparency requirements. "Critics argue that strong forms of transparency requirements are neither essential nor beneficial to a democratic republic, which in its constitutional structure can correct any governmental abuses—either internally through checks and balances or externally through elections—without the dangers and inefficiencies that excessive openness creates."[44] However, the following quote about behaviors of actors indicates again that the constitutional structures available do not support fundamental rights or need additional legal tools to make actors behave ethically:

> "Given the vast investment costs and potential profit involved in most mining deals, concession contracts provide opportunities for corruption at various stages of the allocation and implementation process. Companies have a vested interest to maximize their profit margins, ensure a return on capital, minimize the payments they make to the host governments and mitigate the high risks involved in huge mining investments. On their side, national governments frequently fail to get full value for their resource, due to lack of knowledge and capacity, access to technical expertise or corrupt individuals operating in their own interests within weak public and institutional environment."[45]

1.2. In the context of transparency

[43] Voluntary Codes of Conduct for Multinational Corporations: http://www.icca-corporateaccountability.org/PDFs/JOBE-Combined.pdf (accessed 13th May 2010)
[44] Fenster (n 39 above) 9

[45] http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156 (accessed 10th December, 2009)

The concept of the transparency in the investment law and specifically in the negotiation process of the mining contract has to receive different interpretation; a balance interpretation. It is not stated what investor's obligation of transparency should include, but in the *Metalclad* case the tribunal held that the host State's obligation of transparency to include: "the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters."[46]

In the same *Metalclad* magnitude there should be investor's obligation of transparency which mutually refers to the availability of information in and around such negotiation process of mining contract to host state and local community, even before the conclusion of contract. The relevance of this transparency obligation has to be seen in the light of the fact that there is imbalance in the power of negotiation strengths between mining firms and host State. Meaning that the mining firms are better equipped to be well informed than host state (developing or under developed nations).

The initial public scrutiny and transparency do enhance the chances of making mining contract long lasting, for openness provide opportunity for firms and host state (local people) to satisfy themselves with terms. This can be noted in the civil society organization recommendation given in the framework of the world social forum that took place in Nairobi January, 07, where it asked governments "to only grant licences for extractive industries' operations with the free, prior and informed consent of the local community."[47]

Another emphasis of local people participation was given by IIED[48] and WBCSD[49] report which stated that:

> "Practical experience has demonstrated to companies that there are significant benefits to good consultation at the local level. Perhaps the most important for a mining project is that

[46] Tudor (2008) 175.

[47] http://www.cidse.org/uploadedFiles/Publications/Publication_repository/cidse_WSF_recommendations_extractives_jan07_EN.pdf (accessed 10th December, 2009)

[48] International Institute for Environment and Development http://www.iied.org/ (accessed 13th May 2010)

[49] World Business Council for Sustainable Development http://www.**wbcsd**.org/ (accessed 13th May 2010)

> the process helps foster genuine relationships with mutual respect, shared concerns, and shared objectives among the community, company, and other actors."[50]

1.3. In the context of lack of transparency

The argument here is not for creation of something new, but rather for giving appropriate weight in matters concerning lack of transparency in the negotiation process of mining contract especially after looking at the consequences. Now is high time to be concern about this issue since there is momentum towards climate solutions.[51]

Events of the Misreporting accounts and tax fraud by mining corporations[52] indicate that it is high time to have balance in the international economic laws which address the urgent need of protection of the common people in the developing countries. Lack of transparency and corporate standard indicate that there cannot be a voluntary initiative on part of Mining Corporation to curb misreporting accounts, tax fraud and corruption. One also cannot expect voluntary initiative on the part of Mining Corporation after seeing the deliberate disregard of the OECD guidelines:

> "Despite this global standard, multinational mining companies seeking to invest or expand their investment in Africa continue to enter into confidential agreements with governments to acquire special tax rates and concessions that are outside the statutory framework. These tax concessions are normally included in a mining development agreement, which sets out the

[50] Report by IIED and WBCSD, " Breaking New Ground." http://www.iied.org/pubs/pdfs/G00901.pdf (accessed 13th December, 2009)

[51] BEYOND KYOTO ADDRESSING THE CHALLENGES OF CLIMATE CHANGE http://www.klima.au.dk/fileadmin/filer/Beyond_Kyoto/7_Aarhus_statements_on_climate_change_09.03.18.pdf (accessed 14th May 2010)

[52] Taxation and Financing for Development http://www.eurodad.org/uploadedFiles/Whats_New/News/SOMO%20Taxation%20and%20Financing%20for%20Development_October%202008%20(2).pdf (accessed 14th May 2010)

> detailed responsibilities of each party. These agreements are legal commercial contracts, and override national law. Where they include tax rates, these override the national tax regime."[53]

Also the fact that local communities are not engaged in the negotiation process cannot be said to be domestic matter hence shall be left to host state. Poverty is breeding ground of global concerns as seen in a case of Somalia piracy thus there has to be specific respond in international investment laws:

> "In order to create desirable conditions in the international system, from peace to health to prosperity, international law must address the capacity and the will of domestic governments to respond to these issues at their source. The primary purpose of international law then shifts from providing independent regulation above the national state to interacting with, strengthening, and supporting domestic institutions. International law can perform this function in three principal ways: strengthening domestic institutions, backstopping them, and compelling them to act."[54]

1.4. Treaty

While solution to lack of transparency in the negotiation process of the mining contract must be grounded on the firm theoretical and conceptual parameters, there has to be translation of these theory and concept into practical solution. The approach taken by this research is to see multilateral treaty as practical solution to lack of transparency in negotiation process of mining contract; this research realize the need to go further than OECD voluntary code of conduct for Multinational Corporations and an attempt of the United Nations Commissions on Transnational Corporations which stopped at code in draft form. Economists have expressed this approach using different words:

> "Neo-classical economic analysis points to the development of multilateral regulation as most efficient solution to the control of MNEs. ... International incorporation for MNEs could be instituted as well as universal standard for the protection and promotion of investment. The system would require the establishment of multilateral institutions that would police and develop the system. This model requires the restriction of state sovereignty in the economic

[53] NGOs (2009) "Breaking the curse" at 36
[54] Nijman J & Nollkaemper A (2007) 111

> sphere through the acceptance of the right of the international system to regulate matters previously within the exclusive domain of state jurisdiction. Such a system has been periodically promoted, as under the abortive Havana Charter of 1948, which sought to set up the International Trade Organization as part of the post-war multilateral economic order. Its most recent manifestation comes with above mentioned initiatives of the OECD and the Word Bank in the field of foreign investment, and in the establishment of the WTO and the extension of its mandate to investment related trade issues."[55]

The fact that there is a number of international instruments to guide international investment such as the OECD guidelines and the multilateral agreement on investment, the UN Draft Code of Conduct for Transnational Corporation, the WTO agreements and foreign investment and so on indicate that the international community recognized the need to have social framework for global society. Now the vexing question could be why up to this point the international community does not have institution which would enforce the law on global scale by sovereign means.[56] The answer to vexing question is lack of political will caused by the fact: "The nation states and their organizations of cooperation are mainly hindered by the fact that these states compete against each other, e.g., for investment and for the masterminds."[57] Hence, the thesis is of assumption that understanding the negative impacts of not having political will would assist in gathering the political will needed. The first negative impact:

> From the perspective of civil society actors, international law and institutions are of limited relevance in mediating day to day relations with government and investment actors in host states. For example, the OECD Guidelines for Multinational Enterprises provide that multinational enterprises should take account of their environmental and social impact, but are entirely voluntary and implemented by state-based National Contact points. True, some comfort can be drawn from developments such as the increasing willingness of the International Centre for the Settlements of Investment Dispute to accept *amicus* briefings from

[55] Muchlinski (n 22 above) 119
[56] Regarding law, it has to be acknowledged that under conditions of globalization there is yet no institution that could enforce the law on global scale by sovereign means. Homann K, Koslowski P & Luetge C (eds) (2007) 4
[57] Homann K, Koslowski P & Luetge C (n 63 above) 4

> civil society actors in countries such as Bolivia, Tanzania and Argentina, which began with *Methanex Corporation v United State of America* (2005). However, this is 'no golden age of civil society participation in investment dispute settlements', not least because it is dominated by civil society actors based in more developed home states.[58]

Another negative impact of not having political will to establish such international institution can be observed from the fact that: "The territorial constraints on legislative jurisdiction ensure that assistance from the regulatory authorities of home states is rarely forthcoming. For example, when a UK-based environmental group complained to the UK Department of Trade and Industry about the environmental damage threatened by a port project involving UK investment in the Dahanu region of Maharastra, it was met with shrug. The chances of such an institution offering a solution to an Indian civil society actor must be impossible remote."[59]

Also the need for the international community to have political will to establish international institution can be witnessed in the attitude or perception that: "Relatively little attention, or respect, is paid to the role of host state legal systems in mediating investor-civil society-government relations. For example, Oren Perez has dismissed any faith in 'regulatory capabilities of developing countries' as misguided'."[60]

This time around there is going to be a political will as Multilateral Transparency Treaty advocated here is totally opposite of Multilateral Agreement on Investment (MAI): The Multilateral Transparency Treaty, contrary to Multilateral Agreement on Investment, supports transparency, engagement and is not protectionist:

> "The MAI did not materialize because of several factors that occasioned strong opposition from developing countries, NGOs and academics: it provided too much protection against risk for foreign investors (the moral hazard problem), it impinged severely on the sovereignty of capital-receiving states, it took little account of social and environmental consideration, and its

[58] Perry-Kessaris A (2008) 2
[59] Perry-Kessaris (n 65 above) 3
[60] Perry-Kessaris (n 65 above) 3

> dispute settlement procedures favoured foreign investor over local interests. It was also criticized for being developed in secrecy by OECD countries with little public transparency or formal accountability, after which there were attempts to 'impose' the agreement on developing countries."[61]

There is no convincing evidence which indicates that having an institution, which would enforce law on global scale by sovereign means, would breach national policy to the level of harming a nation.[62] Moreover, even if such institution would breach national policy, the current encroachment of national policy caused by Multinational Corporation cannot be avoided[63] by not having such institution and as matter of fact "it is beyond dispute that social framework or social order is important for acting ethically."[64]

Any introduction of more strict requirements pertaining to transparency by any country alone would provide multinational corporations with room to defeat well intended law by easily move to another country with less strict requirements. This can be reflected in the attitude of transnational corporations (TNCs) as explained in the NGO report:

> "TNCs can treat the world like their assembly line – manufacturing goods where labour is cheapest, basing operations where taxes are lowest and selling goods where the price is

[61] Boulle (n 3 above) 102

[62] From the perspective of governments, international economic laws that restrict protectionism, impose conditionality and so on, are an encroachment on national policy space. But states still determine 'which and how much of the remedies prescribed in Washington' to apply, and to which member of its population. For example, former chief economist of the World Bank Joseph Stiglitz has attributed the ability of India (and China) to weather the 1997 global economic crisis with a healthy growth rate 5 per cent to the fact that it maintained capital control throughout. Perry-Kessaris (n 65 above) 2

[63] The process of globalization leads to a decrease in the nation states' capability for governance. The main reasons for this are the rapid increase in the sheer number of interactions, the interdependencies resulting from this and competition among states which leaves the actors with greater alternatives for evading a state's power. In both regard, no great changes can be expected for the future. While the differentiation of society into subsystems already caused the political system to lose a considerable amount of capacity for governance, this process is further accelerated by the emergence of a global society. Homann K, Koslowski P & Luetge C (n 63 above) 4

[64] Homann K, Koslowski P & Luetge C (n 63 above) 3

> highest. If taxes or labour laws are imposed in one country, they can simply move to another."[65]

Therefore, only a treaty can show the international community effort to achieve a fair balance between corporate interest and social responsibilities such as human development and eradication of poverty. The former secretary-general, Kofi A. Annan in his letter to heads of state and government, 14th march 2005, seems to use different words to express same thing:

> " … The treaties also reflect the international community's effort over sixty years to build a multilateral framework of agreed rules not only to govern inter-state relations but also to strengthen the legal environment in which individual live and business operate."[66]

Solution of lack of transparency in the negotiation process of the mining contract depends on the force of states' collective efforts to put together and improve rule of law in every country and in international level. That is, an act of imposing new requirements aiming at improving transparency necessitates bringing in players such as home state, host state and institutions. However, these new players to play constructive role there must be coordination and assignment of specific roles to such players by multilateral transparency treaty.

The coordination and assignment of specific roles to players can be made clear by a treaty and enforce by multilateral institution; which means, the circumstances have changed; there is more interaction, interdependency and competition among states to call for such treaty and institution, because social order is needed in the global society by Multinational Corporations and states.[67]

Hence, having multilateral transparency treaty has to be deemed as part of legal evolutionary: "As national economies liberalize and globalization develops, so do legal systems adopt and adapt legal

[65] Excerpts from 'The Global Workplace', a project of War on Want, www.globalworkplace.org/?lid=74, visited on 15 May 2004.

[66] Multilateral Treaty Framework: An invitation to Universal Participation, Page vii

[67] Journal of Management and Marketing Research "States, firms, and the structure of market risk" http://www.aabri.com/manuscripts/09265.pdf (accessed 14th may 2010)

rules, principles and policies. In the process, law undergoes evolutionary changes, both in its content and procedures, and arguably also in its status and nature. This evolutionary development leads to a plurality of legal sources at both domestic and international levels."[68]

The multilateral transparency treaty is going to coordinate between interest and values of Multinational Corporation, host state government and local community. The participation of local community through civil society does not mean absence of conflict. This is because the legal needs, awareness and perspective of Multinational Corporation and local community differ and therefore, need of order require there be a coordinating power (multilateral transparency treaty). The order can be brought by multilateral transparency treaty which has authority and institution to enforce it. In this paragraph the following quoted idea of state legal system has been given given global perspective and practicability:

> "The third communal legal mechanism is to coordinate between the interest and values of various networks of community. 'An emphasis on community does not imply an absence of conflict.' It actually 'highlights key foci of legal contradiction and controversy'. A community approach to law suggests the 'gaps' which have been the subject of so much socio-legal scholarship must exist not between law on the one hand and the social on the other, but between conflicting 'types of social relations (and their law)'. The 'legal needs, … structure [,] … consciousness and outlook' of networks of community vary considerably, and 'the needs of order require that there be … a coordinating power'. This function is performed by state legal system, which is able to 'insist, coercively, on the prevalence … of its legal vision and legal controls' and so 'dominates' all other laws."[69]

Moreover, Multilateral Transparency Treaty becomes appropriate to govern negotiation process of mining contract, because home states seemingly agree only to international law to govern international investment contract:

[68] Boulle (n 3 above) 99
[69] Perry-Kessaris (n 65 above)16

> "Capital-exporting countries have sought to control host state sovereignty in this field by way of two principal legal techniques: first, by asserting that the proper law governing the international investment agreement is international law and secondly, by the adoption of so-called 'stabilization clauses' in international investment contracts under which 'the government party undertakes neither to annul the agreement nor to modify its terms, either by legislation or by administrative measures'. This invokes the doctrine of 'sanctity of contract' as a justification for limiting the ability of the host state subsequently to alter the terms of investment agreement by law. Both approaches are controversial as they assert a contractually based restriction upon the sovereignty of the host state over internal economic affairs."[70]

CHAPTER 3

1. FEATURES OF THE MULTILATERAL TRANSPARENCY TREATY

Just like any other element of globalization, there has to be an effort to bring legal rules and procedures into enough resemblance so as to have negotiation processes of mining contracts have same result in different jurisdiction.

Treaty in aiming for transparency is going to establish order and trust relationship by developing rules, institution and dispute resolution procedure.[71]

There are a number of international, regional and country instruments which set out declarations and principles that could provide features or basis for features of multilateral transparency system in relation to negotiation process of mining contract. The instruments that have been looked at include:

1. OECD guidelines for Multinational Enterprises[72]

[70] Muchlinski (n 22 above) 578

[71] Treaties articulate substantive rules and procedural principles, and they establish international bodies with 'law functions', such as promulgating norms and policies or adjudicating treaty-based disputes. Boulle (n 3 above) 136

[72] http://www.oecd.org/dataoecd/56/36/1922428.pdf (accessed 21st May 2010)

2. OECD Principles of Corporate Governance[73]
3. NAFTA (North America Free Trade Agreement)[74]
4. Marrakesh agreement establishing the WTO[75]
5. UN Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting[76]
6. The 1998 Aarhus Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environment Matters[77]
7. United Nations Global Compact[78]
8. OECD voluntary code of conduct for Multinational Corporations[79]
9. United Nations Commissions on Transnational Corporations[80]
10. The UN Draft Code of Conduct for Transnational Corporation[81]
11. The WTO agreements and foreign investment[82]
12. Methanex Corporation v United State of America[83]
13. Multilateral Agreement on Investment (MAI)[84]

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[73] http://www.oecd.org/dataoecd/32/18/31557724.pdf (accessed 4th May, 2010)

[74] http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx (accessed 21st May 2010)

[75] http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 21st May 2010)

[76] http://www.unctad.org/Templates/Startpage.asp?intItemID=2531 (accessed 21st May 2010)

[77] http://www.unece.org/env/pp/documents/cep43e.pdf (accessed 21st May 2010)

[78] http://www.unglobalcompact.org/ (accessed 21st May 2010)

[79] http://www.icca-corporateaccountability.org/PDFs/JOBE-Combined.pdf (accessed 13th May 2010)

[80] http://www.benchpost.com/unctc/ (accessed 21st May 2010)

[81] http://unctc.unctad.org/data/e90iia11k.pdf (accessed 21st May 2010)

[82] http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm (accessed 21st May 2010)

[83] http://www.iisd.org/pdf/2005/commentary_methanex.pdf (accessed 21st May 2010)

14. Metalclad Corporation v The United Mexican State[85]
15. The TRIMS Agreement[86]
16. UNCITRAL Arbitration Rules[87]
17. ICSID Convention[88]
18. New Zealand Securities Commission[89]
19. US *Sarbanes-Oxley Act of* 2002.[90]
20. Mexican Foreign Investment Act[91]
21. Right to information Act in 2000 of Karnataka state in India[92]
22. Right to information Act in 2005 of Central India[93]
23. A Notification on Environmental Impact Assessment in 1994 issued by Ministry of Environment and Forest in India.[94]

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[84] http://www.oecd.org/daf/mai/ (accessed 21st May 2010)

[85] http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155 (accessed 21st May 2010)

[86] http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trims_01_e.htm (accessed 21st May 2010)

[87] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (accessed 21st May 2010)

[88] http://icsid.worldbank.org/ICSID/Index.jsp (accessed 21st May 2010)

[89] http://www.sec-com.govt.nz/ (accessed 21st May 2010)

[90] http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf (accessed 21st May 2010)

[91] www.si-rnie.economia.gob.mx/documentos/ley_ing.doc (accessed 21st May 2010)

[92] http://www.karnataka.gov.in/dpal/pdf_files/RIGHT%20TO%20INFORMATION%20ACT-B.pdf (accessed 21st May 2010)

[93] http://righttoinformation.gov.in/webactrti.htm (accessed 21st May 2010)

[94] http://himachal.gov.in/environment/notifications/eia_1994.pdf (accessed 21st May 2010)

1.1. OECD guidelines for Multinational Enterprises

The purpose of the OECD guidelines very much resembling the general object of this dissertation as both transparency and guidelines assist in removing confusion, establish trust and certainty between multinational corporation, government and community, which in turn enhance wellbeing and livehood, mitigate and put an end to problems which may come in relation to their operation:

> "The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises the other elements of which relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives."[95]

Chapters of the OECD guidelines which are relevant to achievement of transparency, such as disclosure and combating bribery chapters as well as parts of the other chapters which require MNEs to provide information, are appropriate base for features of the multilateral transparency system. The meaning attached to these chapters by OECD guidelines should be deemed to mean same thing in this treaty, except where amended by this recommendation.

1.1.1. DISCLOSURE

The grandeur of disclosure provision brings urge to quote the provision:

> "1. Enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance. This information should be disclosed for the enterprise as whole and, where appropriate, along

[95] OECD guidelines for multinational enterprises, page 9.

business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns."[96]

The above quoted paragraph becomes essential in the multilateral transparency treaty; because what and when information received by other negotiating parties do assist in achieving meaningful negotiation during negotiation process. The disclosure provision continues:

"2. Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported."[97]

The kind of disclosure standard quoted above if applied by MNCs before and during negotiation process is going to contribute to fairness of negotiation process, since MNCs are custodian of large portion of useful information. The information cannot at times be useful if is not sufficient or complete. Disclosure provision includes:

"3. Enterprises should disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them."[98]

Contribution of above sub-section 3 becomes essential to multilateral transparency system; because parties in negotiation process must know the identity of Multinational Corporation with which they negotiate and the identity of those influence it. A provision of disclosure goes on to state that:

"4. Enterprises should also disclose material information on:"[99]

[96] OECD guideline no 3 on disclosure Ss 1, page 15
[97] OECD (n 83 above)Ss 2, page 15
[98] OECD (n 83 above)Ss 3, page 15
[99] OECD (n 83 above)Ss 4, page 15

"*a)* The financial and operating results of the company."[100]

"*b)* Company objectives."[101]

"*c)* Major share ownership and voting rights."[102]

"*d)* Members of the board and key executives, and their remuneration."[103]

"*e)* Material foreseeable risk factors."[104]

"*f)* Material issues regarding employees and other stakeholders."[105]

"*g)* Governance structures and policies."[106]

Also sub-section 4(a), (b)), (c), (d), (e), (f) and (g) could assist other participating negotiators to know whether they are about to do business with the capable MNCs in terms of financial and activities, whether the objectives of the corporation agree with host state policies, whether major share owner is not enemy of host state, whether personalities of the managing or controlling board are trustworthy, what precaution the corporation has taken regarding health of employees, environment and waste, what mechanism of dealing with employment dispute is in place and means of communication with other stakeholder. Paragraph 5 of disclosure provision includes:

"5. Enterprises are encouraged to communicate additional information that could include:"[107]

"*a)* Value statements or statements of business conduct intended for public disclosure including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. In addition, the date of adoption, the

[100] OECD (n 83 above)Ss 4(a), page 15
[101] OECD (n 83 above)Ss 4(b), page 15
[102] OECD (n 83 above) Ss 4(c), page 15
[103] OECD (n 83 above) Ss 4(d), page 15
[104] OECD (n 83 above) Ss 4(e), page 15
[105] OECD (n 83 above) Ss 4(f), page 15
[106] OECD (n 83 above) Ss 4(g), page 15
[107] OECD (n 83 above) Ss 5, page 15

countries and entities to which such statements apply and its performance in relation to these statements may be communicated."[108]

" b) Information on systems for managing risks and complying with laws, and on statements or codes of business conduct."[109]

"c) Information on relationships with employees and other stakeholders."[110]

Sub-section 5(a), (b), and (c) could allow negotiators of the mining contract to learn the corporation initiative and commitment based on the declaration and principles to which the corporation has signed on and, hence, arise certainty between employees, stakeholders and corporation.

1.1.1.2. AMENDMENTS TO DISCLOSURE PROVISION

There are amendments to be done to disclosure provision of the OECD guidelines to suit the Multilateral Transparency System. The guidelines are going to remain as they are but,

1. Disclosure has to be made in such reasonable period as to enable negotiating parties to have a meaningful and fair negotiation.
2. Disclosure has to be made in such a manner as to enable negotiating parties to have a meaningful and fair negotiation.
3. Member would have to establish national enquiry points where information can be obtained by different stakeholders such as civil societies, constituent representative (Member of Parliament), etc.

1.1.2. COMBATING BRIBERY

[108] OECD (n 83 above) Ss 5(a), page 15
[109] OECD (n 83 above) Ss 5(b), page 16
[110] OECD (n 83 above)Ss 5(c), page 16

The combating bribery provision of the OECD guidelines has sub-sections which are important in ensuring transparency during negotiation process of mining contract. The following are relevant sub-sections and reasons of their relevancy:

> "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:"[111]

1. "Not offer, nor give in to demands, to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as means of channelling payments to public officials, to employees of business partners or to their relatives or business associates."[112]

In order to achieve the aim of transparency during negotiation process of the mining contract, an enterprise shall comply with what sub-section 1 of combating bribery require. The behavior forbidden by sub-section 1 if allowed there would be negotiators with wrong intention, and therefore, defeat the aim of transparency which is to achieve fair negotiation.

2. "Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities."[113]

The multilateral transparency treaty has to adopt the above sub-section 2 of combating bribery to deal with situation where agents are involved. Where expertise needed, negotiations at times do involve agents.

3. "Enhance the transparency of their activities in the fight against bribery and extortion. Measures could include making public commitments against bribery and extortion and disclosing the management systems the company has adopted in order to honour these

[111] OECD guideline no 6 on combating bribery, page 21
[112] OECD (n 98 above) Ss 1, page 21
[113] OECD (n 98 above) Ss 2, page 21

commitments. The enterprise should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery and extortion."[114]

The above quoted sub-section 3 of combating bribery should be adopted by multilateral transparency treaty to reinforce the commitment of enterprise against bribery, since it enhances transparency.

6. "Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Contributions should fully comply with public disclosure requirements and should be reported to senior management."[115]

Sub-section 6 of combating bribery also seems capable to further the objectives of the multilateral transparency treaty by calling upon disclosure and refraining from act that could bring undue influence, and in turn, cause unfair negotiation.

1.1.2.1. THE AMENDMENTS OF COMBATING BRIBERY PROVISION

The following are necessary amendments to sub-sections of combating bribery provision in order to suit multilateral transparency treaty:

1. The observation or compliance with relevant combating-bribery provisions shall be done in such a reasonable period as to enable negotiating parties to have fair and meaningful negotiation.
2. The observation or compliance with relevant combating-bribery provisions shall be done in such a manner as to enable negotiating parties to have a fair and meaningful negotiation.
3. Any relevant information regarding observation or compliance with relevant combating-bribery provisions shall be available in the national enquiry point for stakeholders such as civil societies, Member of Parliament, etc.

[114] OECD (n 98 above) Ss 3, page 21
[115] OECD (n 98 above) Ss 6, page 21

OECD principles of Corporate Governance should be referred as regarding meaning of terminology used in the OECD Guideline.[116]However, the amendments mentioned here should prevail.

1.2. NAFTA (North America Free Trade Agreement)

As to the transparency standard that host state has to fulfill in relation to negotiation process of mining contract; the tribunal in *Metalclad* case gave plausible idea as to what should be obligation of the host state:

> "Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (*NAFTA Article 102(1)*). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."[117]

1.3. Marrakesh agreement establishing the WTO

[116] OECD Principles of Corporate Governance (Paris: OECD, 2004)
[117] Metalclad Corporation v. The United Mexican State, Para 76.

Looking from TRIMs[118] perspective and all other angles of the WTO agreement[119], the transparency requirements suggested here do not breach any of the WTO obligations. Therefore, is not wrong to suggest that Multilateral Transparency Treaty should be allowed to become one of the annexes to Marrakesh agreement,[120] so as to take advantage of already established ideas, institutions and procedures, by introducing little amendments.

The WTO is already concerned about foreign investment in a country. Therefore, what is needed is just extension of scope of WTO law to include negotiation process of mining contract:

> "While investment and competition policy issues remain largely outside the scope of WTO law, it should be noted that WTO law already deals with specific aspects of these issues. …, the GATS provides for rules regarding the supply of services through commercial presence abroad, i.e. through foreign investment in the country where the services are supplied. Moreover, …, the Agreement on Trade-Related Investment Measures (the 'TRIMS Agreement') provides that Members' regulations dealing with foreign investments must respect the obligations in Article III (national treatment obligation) and Article XI (prohibition on quantitative restrictions) of the GATT 1994."[121]

[118] the Agreement on Trade-Related Investment Measures (the 'TRIMS Agreement'), which provides that Members' regulations dealing with foreign investments must respect the obligations in Article III (national treatment obligation) and Article XI (prohibition on quantitative restrictions) of the GATT 1994. Van den Bossche (n 2 above) 48

[119] The Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement') is the most ambitious and far-reaching international trade agreement ever concluded. It consists of a short basic agreement (of sixteen articles) and numerous other agreements and understandings included in the annexes to this basic agreement. Van den Bossche (n 2 above) 45

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[121] Van den Bossche (n 2 above) 702

While European communities in Doha wanted inclusion of 'transparency in government procurement (part of Singapore issues)' as part of agenda of negotiation,[122] developing countries to have something in return should have wanted 'Multilateral Transparency Treaty' as part of agenda of negotiation, since most of multinational mining companies originate from developed countries and benefit from lack of transparency.

The WTO should seek to ensure transparency in the negotiation process of mining contract using the above-mentioned OECD guidelines as rules. There should be establishment of transparency policy review body similar to trade policy review body (TPRB).[123]

1.3.1. Transparency Policy Review Mechanism

The function of WTO in the transparency review mechanism should be similar to trade policy review mechanism,[124] but not the same.

The transparency review mechanism should provide for the repeated shared understand and assessment of the complete array of individual members' transparency policies and practices and their influence on the functioning of the multilateral transparency system.[125]

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[122] On the Singapore issues, developing countries were unwilling to agree to the demand of the European Communities and others to start negotiations on these issues. Van den Bossche (n 2 above) 93

[123] The trade policy reviews are carried out by the Trade Policy Review Body (TPRB) on the basis of two reports: a report supplied by the Member under review, in which the Member describes the trade policies and practices it pursues; and a report, drawn up by the WTO Secretariat, based on the information available to it and that provided by the Member under review. Van den Bossche. (n 2 above) 95

[124] A fourth function of the WTO is the administration of the trade policy review mechanism (TPRM). The TPRM provides for the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. Van den Bossche (n 2 above) 94

[125] The TPRM provides for the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. Van den Bossche (n 2 above) 94

The purpose of transparency policy review mechanism should be similar to purpose of trade policy review mechanism:

1. To achieve greater transparency in negotiation process and understanding of the transparency policies and practices of members;[126]
2. To improve compliance by all members to rules, discipline and commitments made under the WTO agreements, especially in relation to Multilateral Transparency Treaty.[127]

The transparency policy review should be carried out by the transparency policy review body on the basis of two reports: a report supplied by the member under review, in which the member describes the transparency policies and practices it pursues; and a report, drawn up by the WTO secretariat, based on the information available to it and that provided by member under review.[128]

These reports, together with the concluding remarks by the Transparency Policy Review Body Chairperson on a Member's review and the minutes of the meeting of the Transparency Policy Review Body should be published shortly after the review and are a valuable source of information on a WTO Member's trade policy. The Transparency Policy Review reports and the minutes of the Transparency Policy Review should be available on the Documents Online database of the WTO for various stakeholders.[129]

By public disapproving inconsistencies with WTO law of a member's transparency policies or practices inconsistent with the multilateral transparency treaty, the transparency policy review mechanism

[126] The purpose of the TPRM is: to achieve greater transparency in, and understanding of, the trade policies and practices of Members. Van den Bossche (n 2 above) 95

[127]The purpose of the TPRM is: to contribute, in this way, to improved adherence by all Members to rules, disciplines and commitments made under the WTO agreements. Van den Bossche (n 2 above) 95

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would intend to shame members into compliance and to bolster domestic opposition to transparency policies or practices inconsistent with the law.[130]

1.4. POINTS TO NOTE

2. During negotiation process there must be consideration of land ownership rights arising from registered land titles and customary land rights. This is going to allow local community to know what to expect from mining contract as compensation. However, regarding these two issues, local community must be represented by competent body (NGOs or Civil Society) so as to avoid situations that resemble what took place in Kalana village:

> "This does not seem to be the case, however, as most people know nothing about the arrangements of the Mining Code or the Land Code. Having been told that mining was going to be very important for their village, elders in Kalana willingly handed over land in return for promises of development activities that would benefit the whole community. As will be discussed below, these promises are not crystallised in legally binding agreements. In addition, some people displaced by the mine reportedly only received land, bricks and water to build new houses by way of compensation for the destruction of their homes."[131]

3. Negotiation cannot be a one-off exercise in relation to dynamic issues. Therefore, it has to be understood that multilateral transparency treaty is applicable whenever there is renegotiation of dynamic issues. However, negotiating parties have discretion to decide what the dynamic issues are. This is going to address the following concern:

[130] However, by publicly deploring inconsistencies with WTO law of a Member's trade policy or practices inconsistent with WTO law, the TPRM intends to 'shame' Members into compliance and to bolster domestic opposition to trade policy and practices inconsistent with WTO law. Likewise, by publicly praising WTO-consistent trade policies, the TPRM bolsters, both internationally and domestically, support for such policies. Van den Bossche (n 2 above) 96

[131] Cotula (n 17 above) 20

> "In the area of local consultation and benefit sharing, innovative legislation in some countries requires investors to consult local resource users, and provides a framework for such users to negotiate benefit-sharing agreements with incoming investors. Yet, conceptual limitations (e.g. with consultation being viewed as a one-off exercise, while investment projects may last several decades), legal ambiguities (e.g. as to the legal value of benefit-sharing agreements) and practical constraints (e.g. as to major disparities in negotiating power, and as to risks of elite capture within local "communities") all affect the materialisation of the benefits that this legislation can bring."[132]

Also negotiation cannot be a one-off exercise in the following complexity:

> "Another challenge is the degree of complexity of mining contracts. Mining is a long term investment and contracts must establish how rents will be divided between governments and companies as well as how cost and risks will be shared. Negotiations in the mining sector are made even more complex by high levels of uncertainty and incomplete or faulty information at the time of the signing of the contracts. Neither companies nor governments can anticipate the exploration costs, future levels of production or whether the mineral prices will justify these costs."[133]

The consideration of above mentioned circumstances by multilateral transparency treaty is not something new, but a well established practice which has been taking place:

> "…, international practice in this field has increasingly favoured the periodic renegotiation of such agreements. In these circumstances the international legality of renegotiation per se can no longer be doubted. In order to avoid the inflexibility that a contract governed by stabilization clause may create, the view has been put forward that investment agreements should, as matter of standard form, include renegotiation clause. The inclusion of such a clause would clearly place renegotiation on a plane of legal acceptability and avoid arguments that taint renegotiation with illegality. On the

[132] Cotula (n 13 above) 2
[133] http://www.u4.no/helpdesk/helpdesk/query.cfm?id=156 (accessed 10th December, 2009)

other hand, such a clause may encourage specious attempts at renegotiation by either party. Thus, relatively few agreements have a general renegotiation clause."

4. Thesis has suggested various roles for different players (home state, host state, institutions and multinational corporations). These suggestions shall be deemed to be part of treaty's features and recommendations.

1.5. DISPUTE SETTLEMENT SYSTEM

An emphasis on multilateral transparency treaty which provide standard of transparency in the negotiation process of mining contract does not suggest an absence of conflict between investor and host state (local community). Therefore, a comprehensive[134] multilateral transparency treaty has to have a system of dispute settlement which has empirically been tested, in the area of investment, to deal with dispute and avoid trial and error approach.

The system of dispute settlement, as it is now, in the WTO is byproduct of evolution.[135] Therefore is not going to be out place to advocate adoption of ICSID[136] by WTO in relation to negotiation process of mining contract. However, note that dispute in relation to negotiation process of mining has to be

[134] Panel reports, dispute settlement rulings, arbitration awards and court decisions, generally build up consistent case law and evolve into time tested precedents, generally accepted interpretations and new rules which may fill ''gaps'' in existing treaty law and progressively transform multilateral treaties into more consistent legal systems. Van den Bossche (n 2 above) 179

[135] In the context of the Tokyo Round in the late 1970s and during the early 1980s, the Contracting Parties codified, as well as modified, emerging dispute settlement procedures. The GATT dispute settlement system gradually evolved, from a power-based system of dispute settlement through diplomatic negotiations, into a system that had many of the features of a rules-based system of dispute settlement through adjudication. Van den Bossche (n 2 above) 178

[136] The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention).

deemed to pertain to obligations arising under a specific covered agreement; therefore, article 1.2 of DSU[137] has to be applicable.

The WTO has to adopt the ICSID, because ICSID is a system devoted to the dispute between investor and state that has already been empirically tested. And contrary to DSU, the ICSID has shown tendency to provide *locus stand* to *amicus curiae*, while DSU is only about government to government dispute. The fact that investors have direct access to ICSID makes investors more likely to invest in a member state of ICSID. However, the WTO has to supplement ICSID since it has mechanism to supervise the transparency policies and practices of the member states and, improve compliance with the multilateral transparency treaty. Therefore, the two systems, WTO and ICSID, have to work together to make multilateral transparency treaty comprehensive.

In circumstance where neither disputing party is a party or a national of a party to the multilateral transparency treaty or Marrakesh agreement, the UNCITRAL Arbitration Rules should be used as alternative.

As regarding *locus standi* of the civil society or NGO which represent interest of local community or host state in general; the multilateral transparency treaty suggests that host state designate such a body to the ICSID Centre in accordance to Article 25(1) of ICSID Convention.[138]

CHAPTER 4

1. ROLES OF DIFFERENT PLAYERS

The move by different players into evaluation and monitoring of negotiation process of mining contract as a means to advance host countries and local communities protection goals raises important international policy questions regarding how this narrower idea of evaluation and

[137] Van den Bossche (n 2 above) 188

[138] Chapter iv, Regulation 20(c) http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (accessed 14th May 2010)

monitoring fits into broader policy discussion of different theoretical ideas of the multinational corporation.

Transparency advocated here could be double-edged pupose which protects host state, local community of area in which multinational corporation operates and shareholders of the multinational corporation; "Individual shareholders in widely held, 'public', companies are, in most cases, not in a position to adequately enforce the companies' disclosure and other obligations. Action by a public agency therefore appears most justifiable-and most necessary-to enforce such obligations"[139]Thus, multilateral transparency treaty has to come in and require contracting states to have national laws which formally recognize the roles of these public agencies or players:

> "In a similar vein, Fitzsimons also refers to the costs of bringing a private action, the lack of information available to shareholders and their inability to evaluate that information, as reasons why public enforcement of company law is necessary in many cases. He claims that the private enforcement of New Zealand's insider trading laws has proven ineffective for these reasons. He recommends greater powers of enforcement for the Securities Commission and notes that, although the Commission has until recently not had a formal enforcement role in this area, it has 'found itself playing an increasing role in the regulation and detection of insider trading, in the total absence of shareholders and public issuer action'. This has included informal investigations, publication of reports either suggesting or providing evidence of insider trading, and the summoning and admonition of alleged offenders. Other commentators also contend that shareholders in larger companies are, for the most part, inactive when it comes to corporate governance issues in general, and enforcement in particular."[140]

The evaluation and monitoring of negotiation process of mining contracts can be viewed as both host state confidence and local community engagement measures, intended to improve the fairness, balance and efficiency of mining contract. This is so, because currently there are often many local

[139] Berkahn M (2006) 18.

[140] Berkahn (n 126 above) 13.

communities which don't get fair representation in the negotiation process and uninformed host state with poor negotiation skills.[141]

1.1 HOME STATE

The home state of the Mining Corporation is in the better position to exercise legal control over the conduct of Mining Corporation in a host state.[142] Moreover, home state has moral obligation not to appear to foster illegal activities of the multinational corporation even if it benefit from such activities.

The importance of home state and security provided by it to a Multinational Corporation[143] if harnessed could serve the purpose of multilateral transparency treaty, since the compliance of Multinational Corporation is very crucial in the implementation of treaty:

> "Equally, it is possible to expect home states to undertake certain responsibilities. In particular, given that the majority of home states are developed, while many host states are developing

[141] Cotula (n 17 above) 15

[142] Moreover, despite the apparent reduction in state sovereignty brought about by international economic law, some states have the power to impact significantly on the other states through the cross-border application of their national laws and policies. Thus, the 'death of nation-state' thesis is, it is suggested, exaggerated, and at best the state is in a situation of somnolence. As Berman has expressed it, 'While nation-state may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational or non-territorial norms.' In the process, the purpose of the contemporary state becomes less about regulating the internal economy and more about upholding economic globalization. Boulle (n 3 above) 107

[143] The resilience paradox is also a function of the importance of nation-states to modern corporations. …, governments in developed countries support corporations, and thereby globalization, through state financial assistance for businesses, known as 'corporate welfare'. These activities, which accentuated during the global economic crisis beginning in 2008, have a basis in law, if only in broad legally sanctioned discretions delegated to public agencies. Boulle (n 3 above) 107

> or less developed, it may be valuable, as a stimulus for investment, to extend certain duties on home states to facilitate outward investment to developing country, such as the provision of incentive or the encouragement of technology transfer. In addition, the home states' legal and regulatory system might be used to ensure that MNEs based there conform to certain standard of good corporate citizenship through the sanction of home country laws and regulations, and through the provision of legal redress for claimants from outside the home country who are in dispute with the parent company for the acts of its overseas subsidiaries."[144]

The home state through the connection of nationality is capable of evaluating and monitoring the activities of mining companies and therefore, has duty to ensure compliance with transparency. This is supported by Sornarajah's view pertaining to multinational corporations' obligations:

> "Most of the obligations that have been created require action by home state of multinational corporations or their courts and, for that reason, may be considered under the heading of home state measures and obligations. The creation of responsibility in the multinational corporation is not in itself a home state measure, but, if such responsibility has to be enforced through the intermediacy of the home state's courts, then it would be fair to characterize such responsibility as involving a home state measure. It is necessary to identify these obligations."[145]

1.1.1 HOME STATE ROLE

The above paragraphs indicate the importance of home states in protecting transparency standards under international law, within their jurisdiction. The features of treaty provide exact nature of home states' duties to protect against Multinational Corporation and host state by providing transparency

[144] Muchlinski (n 22 above) 84

[145] Sornarajah (n 128 above) 174

standards that Multinational Corporation and host state must meet during negotiation process of mining contract.

The home state after being a contracting party has to have policies and laws in place that protect transparency standards mentioned in the treaty. These transparency standards should be standards that multinational corporations and host state are judged against; the transparency standards mentioned in the multilateral transparency treaty are what home states should expect from Multinational Corporations and host states:

> "The home state where the investor's parent company is based. This may exert pressures on international financial institutions and/or on the host state (including through its official development agency and through international financial institutions), so as to affect decisions on whether the project should go ahead and under what terms."[146]

The company law in home state could embed transparency standards mentioned in the treaty to make law obvious for Multinational Corporations; also the financial law regulating financial market in home state could contain transparency requirements mentioned in the treaty to influence behavior of multinational corporations abroad.

Home state could introduce independent body mandated to ensure compliance of multinational corporations with the transparency standards conferred by a treaty, but which also act as inquiry point.[147] The body should have power to investigate, sanction and provide remedy to victims. This body should be funded by home state. The status of this body should pursue the following example:

> "At the other end of the formality spectrum are those political avenues of redress that operate by means of public protests and direct actions, civil society campaigns, or direct submissions to

[146] Cotula (n 13 above) 25

[147] Since the end of 1997, each Member is required to establish one or more enquiry points to provide information on laws and regulations affecting trade in services. Members have an obligation to respond promptly to all requests by any other Member for specific information on any of its measures of general application. For the benefit of developing-country Members, developed country Members have a special obligation to establish 'contact points' to facilitate the access of service suppliers from developing-country Members to information of special interest to them. Van den Bossche (n 2 above) 496

> political representatives. Intermediate in this spectrum are an increasing number of extrajudicial mechanisms, including state-based non-judicial mechanisms – for example, national human rights institutions or mechanisms such as the Organisation for Economic Cooperation and Developments' (OECD's) National Contact Points (NCPs) –along with non-state mechanisms provided by industry organisations, multi-stakeholder initiatives or specific companies or projects. Available *remedies* also vary, depending on the mechanism used. Remedies can include compensation, restitution of damage, guarantees of non-repetition or cessation of business operations, disclosure of information, changes in relevant law, and public apologies."[148]

Another strategic position of home states is the fact that most of these countries are developed and donors to the host states. This factor gives home states influence:

> "Donors are also pressing for greater transparency, linking progress in this arena with the implementation of good governance policies. The Malian government signed up to the Extractive Industries Transparency Initiative (EITI) on 2nd August 2006, and began putting in place the institutional framework for the EITI in 2007. Decree N° 7-180 PM-RM of 6th June 2007 created two structures"[149]

1.2 INSTITUTIONS

1.2.1 FINANCIAL INSTITUTIONS

Again the international economic institutions have a role to play in promoting the multilateral transparency treaty, since the requirements of achieving treaty's goals are more or less the same as good governance requirements expected by World Bank and International Monetary Fund (IMF).[150]

[148] Macdonald K (2009) 10
[149] Cotula (n 17 above) 9

[150] The international economic institutions such as the World Bank and International Monetary Fund (IMF), while criticized in relation to their own internal governance arrangements, attempt to impose good governance requirements on state as conditions of grant of loans. While the domestic initiatives are not autonomous expressions of national sovereignty, they

The experience shows that the international economic institutions were successful in attaining more or less the same objectives as those of multilateral transparency treaty by using good governance requirements.[151]

The institutions such as Commercial Banks, World Bank, EBRD[152], AfDB and Financial Service Authority[153] could play a role in enforcing transparency obligation of Mining Corporations and host states, pertaining to negotiation process; they can introduce requirements of transparency, found in the multilateral transparency treaty, in their policies:

> "International financial institutions (the World Bank through its IFC and MIGA but also IBRD and IDA arms; regional development banks) and commercial lenders supporting the investment project. These may require the investor to comply with their institutional policies (e.g. on environmental and social impact assessment), thereby affecting relations between investors and local resource users. International financial institutions may also exert considerable influence on the host state because of the importance of their overall lending to the state."[154]

However:

> "The World Bank-inspired reform of mining codes in various African states has generally been very liberal, with the 1999 reform of Mali's Mining Code putting a 20 per cent cap on state holdings in mining companies. Given that the World Bank group's International Finance

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do involve the development and reinforcement of state institutions and laws. The governance requirements expected by international bodies relate to changes in constitutional arrangements, electoral processes, budgeting, court systems, anti-corruption mechanisms and many other features of the state systems concerned. National interventions along these lines involve external impositions on domestic law, government and politics, with the intention of strengthening the capacities of the state systems involved, in the context of the 'minimalist state' thesis of the market system. Boulle (n 3 above)108

[151] The interventions have had some success in developing countries in eliminating corruption, balancing budgets and introducing financial discipline. There has been an improvement in some national legal institutions through capacity building for judges, registrars and other court officials. Legislatives reforms have ensued in areas of elections, commercial law, transparency requirements, court processes and administrative law. While these have been legitimate innovations on their own terms, they have been constructed in the context of a market-state mentality. Boulle (n 3 above) 109

[152] Illustrate assistance of the bank in observance of international standards. Graham (2010) 6 *Mining Environmental Management*

[153] Keepin (2010) 14 *Mining Journal*

[154] Cotula (n 13 above) 25

> Corporation (IFC) funds several mining companies, the World Bank's intervention in the reform of mining legislation and IFC's participation in mining operations raise questions about a possible conflict of interest. These concerns have been taken up by various national and international NGOs, but are refuted by the Malian government and the mining companies concerned."[155]

The most important matter in the negotiation process is that all stakeholders taking part in the negotiation must have crucial information before making decision. To achieve this important matter, the methods employed by commercial banks to do feasibility studies before providing any loan could come in handy as witnessed in the involvement of Micon International Limited:

> "Micon International Limited is thoroughly familiar with the requirements of financial institutions and securities regulators in all of the major mining-financial jurisdictions. The company has worked for, and is known to, the international banking community and investment houses. The professionals at Micon International have particular experience in the independent review of feasibility studies, and the subsequent monitoring of construction and operation, on behalf of banks and other institutions which provide loan funds to finance mineral development. For equity financing, Micon has provided the independent technical assessment required by securities regulators and stock exchanges in Canada (under National Instrument 43-101), the United States (Securities and Exchange Commission), Australia and Europe (Competent Person reports)."[156]

The investment guarantee schemes, such as UK Export Credit Guarantee Department (ECGD)[157] and Overseas Private Investment Corporate (OPIC)[158], provided by different institutions could be used to pressure multinational corporations and host states to comply with the transparency requirements, owing to the facts that multinational corporations need such guarantee in relation to political risks and host states have to be deemed eligible by these institutions so as to attract investments:

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[155] Cotula (n 17 above) 8
[156] Micon International Limited

[157] ECGD's business principles http://www.ecgd.gov.uk/ecgds-business-principles.pdf (accessed 14th May 2010)
[158] http://www.opic.gov/about-us (accessed 14th May 2010)

> "The threat of political risks, such as expropriation, is a factor that will increase the perceived costs of investment in a host state. However, these costs may be reduced if insurance is taken out against political risk. This kind of cover may be available through private insurers, although this has not always been easy to obtain given the difficulties of quantifying the risk involved. Thus, to ensure the availability of political risks cover, the governments of capital-exporting states have sponsored public sector or mixed public/private sector schemes. Such schemes have traditionally focused on developing host states and have been administered as part of the home state's foreign aid programme, although some schemes, such as the UK Export Credit Guarantee Department (ECGD), are directed at foreign trade and investment generally. Therefore, such schemes may be more than merely an insurance service; they may be an instrument of the home state's foreign economic and development policy."[159]

There can be a certificate, resembling the Kimberley Process Certificate,[160] which certifies negotiation process of mining contract as being in compliance with the requirements of the Multilateral Transparency Treaty. The verification of whether certificate confirms compliance with transparency standards should be done by securities regulators, banks, civil societies and NGOs in case are not going to be invited in the negotiation process. Even though for different purpose, here the role of these actors could resemble that of Securities and Exchange Commission[161], and Canadian securities regulators:

> "Canadian securities regulators have now made a policy choice that corporate officers will be responsible for financial statements. The chief executive officer (CEO) and the chief financial officer (CFO) are required to give assurances about the quality of disclosure, rather than requiring corporate boards to have express systems in place to monitor the financial disclosure

[159] Muchlinski (n 22 above) 614

[160] KIMBERLEY PROCESS CERTIFICATE means a forgery resistant document with a particular format which identifies a shipment of rough diamonds as being in compliance with the requirements of the Certification Scheme (Section 1, Definitions, KIMBERLEY PROCESS CERTIFICATION SCHEME)

[161] The US legislature has responded to this spate of financial scandals by enacting the Sarbanes-Oxley Act 2002 which requires chief executive officers and chief financial officers of companies to provide written certification to the Securities and Exchange Commission which states that they have reviewed the financial reports and confirm that to his or her knowledge these reports comply with accounting requirements, and that the information contained in the financial reports "fairly presents, in all material respects, the financial condition and results" of the company. Fisher J, Bewsey J, Waters M, Ovey E (2003) 605

of management. Canadian securities regulators have promulgated certification requirements to enhance the integrity of corporate disclosure, based in part on requirements under the US *Sarbanes-Oxley Act of* 2002. On May 27, 2003, the SEC adopted rules requiring an annual management report on, and auditor attestation of, a company's internal controls over financial reporting. Certification requirements are aimed at protecting investors by improving the accuracy and reliability of corporate disclosure. Disclosure facilitates the monitoring of corporate managers and can serve as a signaling device regarding the quality of corporate governance, as well as the financial health of the corporation."[162]

1.2.2 INTERGOVERNMENTAL ORGANIZATION

UN Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR)

UN Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting could play an oversight role to oversee the audit of Multinational Corporation involved in the negotiation process and to provide other actors; host state and civil society representing local community with informative accurate and independent audit reports of such Multinational Corporation. Meaning that, with minor changes, the UN Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting could do in international stage what the Public Company Accounting Oversight Board (PCAOB)[163] does in the United States of America:

> "The principal reforms that Sarbanes-Oxley brought about can be summarized as follows. First, it established the Public company Accounting Oversight Board (PCAOB) to oversee the audit of companies subject to securities laws and to further the public interest in the preparation of informative accurate and independent audit reports for such companies. In order to achieve

[162] Lyons J, Words Worth Communication (2008) 682
[163] Public Company Accounting Oversight Board Bylaws and Rules – Rules – Inspections http://pcaobus.org/Rules/PCAOBRules/Documents/Section_4.pdf (accessed 14th May 2010)

> these aims the PCAOB has the duties of registering public accountancy firms in accordance with criteria established under the Act, to establish relevant standards of auditing quality control and ethics, to conduct inspections of accountancy firms to assess compliance with the Act and its requirements, and to conduct investigations and disciplinary procedures on the basis of fair procedural rules. … The PCAOB may also extend the Act to firms that do not issue audit reports but which play a substantial role in the preparation and furnishing of such report, thereby allowing for the regulation of overseas associates of the lead auditor of a MNE listed on US markets. … In addition, lead audit partners must be rotated every five years, clear statements as to accounting policy used in drawing up of the accounts must be made, there must be no employment ties between the audit firm and senior staff of the company being audited, and the principal executive and financial officers of the company being audited must certify that all annual and quarterly reports do not, to their knowledge, contain any untrue statements and fairly represent the financial results and operating conditions of their company. Any attempt by senior executive, or any person acting under his or her direction, to take action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant into undertaking an audit of the financial statements, with the purpose of rendering such statements misleading, is rendered illegal…"[164]

To provide UN Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting with a formal place in the multilateral transparency treaty would harmonize financial report requirements during negotiation process and hence rid multinational corporations of inconvenience to meet different standards:

> "Corporate disclosure by MNEs in annual accounts and other financial statements raises special problems not encountered by purely national enterprises. In particular, MNEs will face differing national disclosure requirements in home and host states, all of which have to be met. Furthermore, the creation of useful financial information will be more difficult than for purely national companies. Accounting practices differ considerably between states, resulting in financial information that may be hard to compare. Comparability will be further hindered

[164] Muchlinski (n 22 above) 149

by the fact that MNEs will earn their profits in different currencies. Thus, the need arises to devise methods of transnational accounting and foreign currency translation, both for the drawing up of accounts within the MNE and for comparing the performance of different MNEs. Furthermore, as corporate groups, MNE will be required to produce consolidated accounts for their worldwide profits and losses. Given the foregoing factors the difficulties surrounding this exercise are considerable. New complications are added by growing requirements for segmental reporting, and for social disclosure aimed, not at investors, but at other constituencies representing wider social and political interests as described ... Moreover, new reporting devices, such as value-added statements showing the economic contribution of the MNE to a given host state, and environmental audits, showing the environmental impact of enterprise's activities, have been instituted."[165]

1.2.3 NGOs

It is difficult to find plausible argument to refute to admit NGOs as formal players, since international law is not result of legitimate democratic procedure.[166] "In other words, the question whether international law should provide and protect a form of political participation through non-governmental organization is on another and more fundamental level than the issue of which particular organization should be entitled to participate in which particular situations."[167]

In all issues regarding transparency falling within this treaty, NGOs must have positions that adhere to ICSID and WTO. However, understanding the importance of NGOs, there must be effort to provide *locus standi* to NGOs, this won't be first time:

"… The survey of international and regional procedures which provide NGOs with locus standi demonstrates that NGOs have important role to play in many compliance mechanisms. The

[165] Muchlinski (n 22 above) 159
[166] The acceptance of a concept of legal legitimacy that is ultimately linked to individual implies, of course, a standpoint that international law is not legitimate. Lindblom A (2005) 28
[167] Lindblom (n 157 above) 34

> number of procedures open to NGOs as parties is increasing. An important development in this regard was, of course, the coming into force of the 9th Additional Protocol to the ECHR in 1990, which made it possible for NGOs to refer cases that had first been considered by the commission to the European Court of Human Rights and, in 1998, the 11th Protocol, which gave direct access for NGOs and individual to the Court. As of yet, the European Court of Human Rights and the ECJ are the only courts which are directly accessible to NGOs as parties (the latter providing only limited access). However, when the African Court of Justice comes into operation, NGOs will be able to institute cases there too."[168]

Chapter 5 elaborates the role of civil society, but also "beyond the interactions of states and MNEs, the role of NGOs needs to be taken into account as a relatively new participant in the process of bargaining over regulatory controls."[169] Civil society and Non-governmental organization[170] as institutions have proved to be effective defender of local community's interest and therefore have to be assigned clear roles by multilateral transparency treaty:

> "Non-governmental organisations (NGOs) scrutinising the investment project. These may undertake public campaigns against the project or for its adopting higher social and environmental standards. This may put pressure on investors and lenders as well as on the home and host states, and affect their behaviour."[171]

1.3 HOST STATE

[168] Lindblom (n 157 above) 298
[169] Muchlinski (n 22 above) 108
[170] While the activities of such organizations are perhaps, best known to lawyers in the field of human rights protection, NGOs have been inceasingly active in the field of foreign investment, as apparent voices of so-called 'civil society'. With the growth of economic globalization, the activities of such bodies can be expected to grow. Indeed, aided by the internet, NGOs are filling a gap in regulatory order by placing certain ideas and issues on the political agenda, and contesting the very future of that regulatory order, by their actions. Muchlinski (n 22 above) 83

[171] Cotula (n 13 above) 26

The host state has important role to play[172] as the implementation of the multilateral transparency treaty depend on incorporation of the standards of such treaty into host state policy and law making processes for manifestation of such treaty. "Apart from entry requirements, the host may impose measures to ensure adequate revenue from investment by way of taxation. It will also normally subject the local affiliate of the MNE to the general system of business regulation in force within host state, including competition, company, labour, and intellectual property law,"[173]therefore, treaty perceives host state institutions to be as strategic to negotiation process of mining contract as they are strategic to the operation of such mining contract:

> "As John Gray argues, 'state institutions are a strategically decisive territory upon which competition between corporations is waged'. Citizens, industry groups, NGOs and consumers also seek to pressure the state to provide protection against the force of the market and the uncertainty and unpredictability that they entail. The nation-state is still the site for political expression, and in countries with national elections the losers from economic globalization can, and do, express their concerns through electoral choices, as has occurred emphatically in India and several South American countries. This political expression does not yet occur at the global level, even though real decisions and choices are made there that have local impacts – while economics crosses national borders, political expression remains within them. This accounts for the arguments in favor of more democratic involvement in the domestic processes involved in negotiating and ratifying international treaties."[174]

The host state is likely to have policy development committed to increasing the scope for cross-border investment for Multinational Corporations. It is in this kind of policy that the translation of objectives of the multilateral transparency treaty should fit in; given to the fact that transparency promotes trust relationship between Multinational Corporation, government actors and civil societies.

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[172] There are numerous instances of domestic laws that further the objectives of economic globalization. These comprise a combination of laws that are primarily of domestic significance but that incidentally facilitate globalization, and those that are made with specific goal of pursuing globalization objectives. The practice of trading and investing across borders has domestic legal implications in itself. It implies systems of contract, business association, and property law that can operate across national borders, and it also implies systems of local dispute resolution either through domestic courts and tribunals or through private ADR processes. Even where there are no specific treaty or convention requirements, participation in cross-border economy activities necessitates certain domestic legal arrangements. Boulle (n 3 above) 109

[173] Muchlinski (n 22 above) 85

[174] Boulle (n 3 above) 106

Just like WTO Agreement and General Agreement on Tariff and Trade (GATT), this multilateral transparency treaty is going to require domestic law, in relation to negotiation process of mining contract, to promote transparency in the same manner "as trade agreements also require specific policy responses from domestic governments, and, even where there is no legal duty to act, they create expectations of participants in the global economy."[175]

There must be "'Screening laws' involve the case-by-case review of proposed foreign investments by a specialized public authority in the host state that is charged with task of establishing whether or not a given proposal is in accordance with the economic and/ or social policies of the host state,"[176] but the focal point of these screening laws should be whether the proposed mining contract meet the transparency requirements mentioned in the multilateral transparency treaty. Having screening laws is not something new, except that focus has been on other areas; the good example is Mexican Foreign Investment Act:

> "The Act has limited screening procedures to certain economic activities, listed in Article 8, where the foreign investor is seeking a participation of more than 49 per cent, and to foreign acquisitions of over 49 per cent in Mexican corporations where the total value of the stated capital exceeds 85m New Pesos. Screening is to be carried out by National Commission of Foreign Investments. In evaluating applications for approval under the above provisions, the commission must take into account: the impact upon the employment and training of workers; the technological contribution; compliance with environmental provisions and, in general, the contribution of the proposed investment to the increased competitiveness of Mexico's factories and businesses."[177]

1.4 MULTINATIONAL CORPORATION

[175] Boulle (n 3 above) 104
[176] Muchlinski (n 22 above) 201
[177] Muchlinski (n 22 above) 203

This treaty has less unfamiliar suggestions as to what multinational corporations suppose to do in relation to transparency obligations, except that it elevates the self regulation of Multinational Corporations to international formal level:

> "Since the 1980s the concept of corporate self-regulation has become increasingly advocated as part of the business friendly climate created by neo-liberal ascendancy. It is clear that the withdrawal of the state from high level mandatory regulation in the business sphere will require alternative approaches to regulation. In this regard corporate self-regulation may be used to fill the regulatory gap. This may lead to transnational systems of informal regulation based on the practices of MNEs, beyond the positive law of the nation state or of international law, resulting in order maintenance systems that are unconnected with any particular territory. These systems exist wherever networks or groups operate across borders and create their own system-specific internal proto-legal orders. The application of commercial customs and practices by firms may be one example creating a system that develops new contract regimes and dispute settlement systems outside formal state or international laws. Another might be the internal management systems outside formal state or international laws. Another might be the internal management systems of multinationals which may be used to determine the resolution of internal disputes and issues without reference to outside laws."[178]

Most often where particular standards are important for multinational corporations then such standards are formalized at international level but rarely so where specific standards are important for host states:

> "Although not an all embracing generalization, it is fair to say that the regulation of MNEs tends to be based on formal, mandatory sources of regulation such as national laws, administrative rules, and binding international agreements, where the commercial organization of the firm and protection of its investments are involved. On the other hand, the vast bulk of sources concerning ICSR are non-binding voluntary codes or declarations. These include codes of conduct developed by individual companies or industry sectors, NGO codes, codes drawn up by governments, or IGOs of which the codes of conduct developed by the

[178] Muchlinski (n 22 above) 113

> International Labour Organization (ILO) are of especial importance. On the other hand, some sources are legally binding as they take the form of binding conventions on specific issues. The 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions is most prominent example, as are the numerous ILO conventions on labour standards. Such international standard setting conventions acquire the force of binding international treaties among the membership of the sponsoring IGO, or among the signatory states, if membership of the convention is permitted to any country including non-member of the sponsoring IGO."[179]

However, there is definitely need to formalized codes of conduct of the multinational corporations, which are important for host states, at international level. This is because there is contradiction as to whether codes of conduct override local law or vice versa:

> "The wording of the codes does not always give clear answers to the question whether the company standard will take precedence over local law or practice at the place of production, or if the interpretation of national law will rather determine the interpretation of standards. The difficulty of reconciling possible contradiction between self-imposed obligations and national laws was mentioned in several interviews. One company representative cited Thailand as an example: here, the code of conduct called for a maximum 48-hour working week; where overtime was worked, the maximum increased to 60 hours. According to one interviewee, since the law in Thailand allowed for far more than 48 hours a week to be worked, suppliers there said 'quite rightly, of course' that employees could be found working more than 60 hours a week. Thus, the corporate representative in the German office was of the view that one could only gradually move towards the 60-hour limit. This decision seems to reflect an approach that favours applying the lowest standard required under national law."[180]

During the negotiation process the host state (government) and local community (civil society) may inquire about the contribution of Multinational Corporations to the economy, environmental impact,

[179] Muchlinski (n 22 above) 110
[180] Dilling O, Herberg M, and Winter G (2008) 73

employment security and overall attitude of such multinational corporation. Therefore, Multinational Corporation would have to do what is called social disclosure:

> "As noted above, the activities of large corporations attract the attention not only of financial stakeholders but also of other groups and interests. The latter may require information of an order different from that contained in the firm's financial statements. Thus, according to Choi and Mueller, social disclosure or accounting 'refers to the measurement and communication of information about a firm's effects on employee welfare, the local community and the environment. In contrast to traditional reporting methods, social responsibility disclosures embrace *non-financial* as well as financial performance measures'. Social disclosure challenges the notion that a corporation is not responsible to the community at large for its actions. The demand for social disclosure places the corporation in position more like that of a provider of public services that must explain and account for its actions in the light of broad conceptions of public interest."[181]

2. EXTRATERRITORIAL JURISDICTION

The problem of jurisdiction seems to have been dealt with whereby Multilateral Transparency Treaty suggests adoption of International Convention on Settlement of Investment Disputes. The ICSID Convention directs member country to enforce the award as if it was conferred by highest court of such member country:

> "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."[182]

[181] Muchlinski (n 22 above) 375
[182] Convention on the Settlement of Investment Dispute, Section 6, Article 54(1)

However, is going to be helpful to have in each member-country a law that allow domestic court to take up a case whereby there is understanding that "substantial justice will not be done in the alternative forum"[183] or "acts committed in violation of the law of nations-even if these acts occurred abroad."[184] This could show commitment to provide remedy and increase assurance of enforcement of award conferred as result of ICSID.

The idea of extraterritorial jurisdiction by home state could favor home state interest, since broad view of the home state interest does embrace the view of not being seen as a state which unjust enriches itself at the expenses of poor or weak nation.[185] "Inquiries about responsibility have rarely been conducted in the context of unjust enrichment law, such investigations traditionally being confined in the main criminal law, or to the context of a person's tortuous liability for loss. My hope is that by now bringing them to bear upon the current field, we may glean additional insights into some of the most 'basic' ideas which precipitate and shape legal liabilities for gain."[186]Even though this view was not directed to international investment law, yet the concept could provide basis for imposing legal liability no home state and Multinational Corporation as defendant:

> "A defendant's causal responsibility for harm leads to both moral responsibility for harm and moral liability for the gain he obtains through the same conduct. This then provides a sound normative basis for the imposition of legal liability."[187]

Above all concerns, it's very obvious that either home state or host state does at times find itself in situation where it desires extra-territorial jurisdiction to protect its interest. Hence, there is need to have multilateral transparency treaty which accommodate this situation instead of depending on

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[183] Cotula (n 13 above) 104

[184] Cotula (n 13 above) 104

[185] In the *Filartiga* case, a US court held that it had jurisdiction to hear cases concerning violations of international (human rights) law. Cotula (n 13 above) 104

[186] Chambers R, Mitchell C & Penner J (2009) 147
[187] Chambers R, Mitchell C & Penner J (n 177 above) 172

diplomatic efforts or national laws that may not have the reach. Muchlinski has explained situations in which extra-territorial jurisdiction may be desired:

> "Thus, the legislature may wish to prescribe laws that apply to whole of the MNE group regardless of its presence in another jurisdiction. For example, the home state may seek to protect its strategic interests by prohibiting companies possessing its nationality from trading with potential enemy powers. Such a prohibition would apply to the parent by reason of its nationality of incorporation. It could be made to extend to its overseas subsidiaries by reason of the nationality of the parent, on the basis of the control that it exercises over its subsidiaries. This disregards the legal nationality of the subsidiary as juristic person incorporated under the law of the host state, and extends the law of the home state to its actions. To take another example, where the home state of a MNE imposes disclosure requirements on the parent, whether for the purposes of company law or taxation, the latter may seek to avoid those requirements by locating the relevant information abroad with a subsidiary incorporated under a legal system that protects the confidentiality of commercial information. In these circumstances the home state will order the production of the information only if it is prepared to extend the reach of its court orders into the host country of the subsidiary. Equally, where a foreign parent company incorporates an operating subsidiary in the host country, and that subsidiary eventually becomes insolvent as a result of negligent decisions made by the parent, the liquidator of the subsidiary may only be successful if he can persuade the courts of the host state to issue process out of the jurisdiction against the parent corporation in an action for negligence."[188]

3. HOME STATE UNWILLINGNESS TO CONTROL MINING CORPORATION

The duty of home state to make sure that its corporate nations do not harm host state while abroad, can be easily done where there is economic benefit of home state to be protected than where there is

[188] Muchlinski (n 22 above) 115

economic benefit of the host state to be protected. It was seen in the *Alcoa case*[189] that United States Courts have jurisdiction where the United State interest had to be protected, even if the illegal act was done by Multinational Corporation through its subsidiary abroad. However, where the issue involves protection of the host state interest this very same United State does avoid bringing the multinational corporation within its jurisdiction, even if the parent corporation is located in United State, good example is *Sarei v. Rio Tinto.* [190]

Nevertheless, the role reverse which turns home state into host state has made home state to have mutual respect to host state's economic interest:

> "New concerns have emerged for home states as a result of the increased integration of the international economy. In particular, as the principal home states have also become leading host states, they have had to consider the need for the equal and reciprocal treatment of inward and outward investment. This has lead to the gradual acceptance of policies aimed at progressive liberalization of entry conditions and harmonization of treatment standards, as evidenced by OECD Codes in these fields. The leading home states are concerned to extend these principles to all host states, as shown by their willingness to conclude investor protection treaties with such states, and their support for multilateral investment rules."[191]

Moreover, one could take advantage of the home state's foreign policy which is based on credibility.[192] Unless a nation has credibility it is hard for such nation to sell its ideas and foreign policy. This home state credibility could be foundation of persuading home state to take action against non-transparency of Multinational Corporation.

Multilateral Transparency Treaty provides additional reason to home state to control Multinational Corporation, since home state governments are already under pressure to regulate insider dealing. There is already trend to increase disclosure obligation therefore, one does not expect home states to be unwilling; "… From an initial concern with shareholders and creditor protection, disclosure has now

[189] US v. Aluminium Co. of America (Alcoa), 148 F 2d 416 (2nd Cir., 1945)
[190] Sarei v. Rio Tinto, 221 F Supp 2d 1116 (CD Cal. 2002)
[191] Muchlinski (n 22 above) 85
[192] Arms Issue Seen as Hurting US Credibility Abroad
http://www.globalpolicy.org/component/content/article/167/35386.html (accessed 14th May 2010)

evolved to include information responsive to the needs of employees, consumers and the public."[193] Therefore, for reasons that are slight different, both Multilateral Transparency Treaty and home state seek similar disclosure; Treaty is concern about multinational corporation, host state and local community, while home state is concern about share holders and creditors as acknowledged by British Department of Trade and Industry: "In 1973, the Department acknowledge the 'need for fuller disclosure … as a spur to efficiency'. Similarly, the Panel has stressed 'shareholders should be given sufficient evidence, facts and opinions on which an adequate judgment and decision can be reached'."[194]Therefore:

> "Both home and host states may require information from a MNE about its worldwide operations for their respective regulatory purposes. In addition, there may be non-governmental stakeholders, most notably investors, creditors, employees, and consumers, who need information from the firm about matters of direct concern to their interests."[195]

Treaty intends to curb improper behaviors so are home state regulations in relation to insider dealings:

> "As a method of preventing fraud and improper conduct, disclosure has gained widespread acceptance. In this context it performs a regulatory function by enhancing standards of behavior and reducing the opportunities for fraudulent or improper activities. Hence, it acts as an alternative form of regulation to the direct regulation of transactions."[196]

CHAPTER 5

1. LOCAL COMMUNITY

[193] Suter J (1989) 199
[194] Suter (n 185 above) 200
[195] Muchlinski (n 22 above) 337
[196] Suter (n 185 above) 204

Special attention need to be given to local community pertaining to negotiation process. Hence, the chapter is going to explain how the interest of the local communities could be best protected in the negotiation process of the mining contract through multilateral transparency treaty; "… In this respect, there is a need for additional independent studies and evaluations, as well as further investigations into the situation of communities living in and around mining areas…"[197]

As indicated in the background information, the multilateral transparency treaty is also expected to contribute in addressing the problem of imbalance in the international economic law or investment law, because such inequity consequently cause imbalance in the power of negotiation strength and undermine the international effort for human development and eradication of poverty.

The imbalance in the investment law in context of this chapter means the legal needs of local community in a host state, vis-a-vis negotiation process of mining contract (or investment contract), which include legal means to enforce transparency in relation to negotiation process, have not been taken into consideration not only by international economic law which was made by powerful nations to suit their nation interest and corporate priority,[198] but also at times such needs are disregarded by host state government through lack of transparency which conceal corruption as to bring civil societies to act on behalf of local community.

Role of multilateral transparency treaty as a legal system is to bring trust, stable and productive relationship between multinational corporations, government and local community.[199] However, as aforementioned the disregard of local community's need by host state government does bring civil

[197] Cotula (n 17 above) 10

[198] There is of course a power-based explanation for this situation. The powerful state fashioned rules in order to ensure the protection of the assets of multinational corporations and expatriate plantation owners in the weaker states of the world. No inquiry was made into the issue of whether the exercise of this protection should be conditional on the conduct of the foreign citizen or corporation in the host state. Sornarajah (n 128 above) 185

[199] First, legal systems express what already holds actors together. Second, legal systems draw actors in further by ensuring their participation in social life. Third, legal systems coordinate the differences that hold actors apart. Each communal legal mechanism functions, to different degrees, as a marker, consolidator and developer of networks of community. Perry-Kessaris (n 65 above) 13

society to act on behalf of the local community. Therefore, is also appropriate to state that the role of multilateral transparency treaty as legal system is to bring trust, stable and productive relationship between Multinational Corporation, government and civil society.[200]

Multilateral transparency treaty recommended here, though is going to provide means to enforce transparency; the transparency aimed at is eventually expected to govern trusting relationship between stakeholders such as Multinational Corporation, home state, host state (government), institutions (e.g civil society) and local community. This is not something new, Cotterell in his work:

> "For example, he observes that '*impersonal* systems of confidence', including systems of governance, are often indirectly 'underpinned by and, in a sense, modeled on idealized relations of mutual *interpersonal* trust'. Second, he emphasizes that trust is vital to *all* types of stable, productive social interactions. It then becomes clear that trust can serve as a reference point for a systematic and integrated analysis of relations within and between multiple networks of community, for example those which might be formed by foreign investment, civil society and government actors. Third, Cotterrell identifies and elaborates on law's role in nurturing trust and, thereby, relations of community."[201]

Through multilateral transparency treaty, the Multinational Corporation and members of local community must trust in each other's honesty, fair dealing and good faith. Here multinational corporation is part of the local community in which it operates; In other words one could say:

> "Instrumental economic relations of community will require that individuals have interpersonal trust in each other's 'honesty, fair dealing and good faith'. Law supports the existance of such trust by stabilising the basic components of commercial interaction, such as companies

[200] Drawing on Cotterrell's work, it is possible to identify three ways in which law support trust and, thereby, the productivity that is characteristics of community-like relations. It *expresses*, in the form of contracts, institutions and so on, the trust that holds actors together; it draws actors in further by ensuring their *participation* in social life; and it *coordinates* the differences that hold actors – and different networks of community.Perry-Kessaris (n 65 above) 5
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[201] Perry-Kessaris (n 65 above) 12

(organisations) and contract (transactions). Here Cotterrell is echoing the work of Ian Macneil on the relational theory of contract. For example, Macneil has observed that contracts are 'instruments of social cooperation'. The role of (state) contract law is not only to offer 'general stability' as background to such social relations, but also to be 'directly facilitative' of them, supporting 'cooperation' and the 'continuation of interdependence' between the parties."[202]

It has to be formal in the multilateral transparency treaty that civil society represents the interest of local community during negotiation process, if the civil society represents public interest. This way of local community participation has already been noted and seems to work:

"The benefits of participation, and in particular of tripartite participation by civil society, private sector and state actors, have accordingly been noted at international level with increasing frequency in recent years. For example, in the enviromental field, rights of public participation, access to information and access to justice were declared in Principle 10 of the 1992 Rio Declaration. That aspiration found concrete expression in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Enviromental Matters, signed in 1998 under the auspices of United Nations Economic Commission for Europe. The call for participation was widened in 1999, when then Secretary General of the United Nations, Kofi Annan, famously called upon business leaders to join UN agencies and civil society actors in a Global Compact to support progress in relation to social and environmental issues. By 2007, the Global Forum on Reinventing Government defined governance itself as 'the process of interaction between three sets of actors-the State, civil society, and the private sector – in making political, administrative, economic, and social decision that affect citizens'. It observed that trust in government is enhanced by the participation of the private sector in the form of public-private partnerships, and of civil society through 'effective society engagement'."[203]

[202] Perry-Kessaris (n 65 above) 13
[203] Perry-Kessaris (n 65 above) 15

In normal circumstance the local community can be engaged in monitoring the investment by having its constituent representative in the parliament scrutinize the mining contract and questioning the activities of the Mining Corporation where appropriate. However, in most cases parliament does not have access to these mining contracts as NGOs report stated "Too many African governments are still unwilling to open up their tax deals and tax receipts from mining companies to public and parliamentary scrutiny;"[204] And if parliament happens to have access, is when the contract has already been signed, which means is difficult or impossible to change the terms of contract:

> "In practice, the negotiation of Conventions of Establishment takes place without any transparency or public scrutiny. Such is the lack of transparency that even elected MPs are kept in the dark about "the mining issue". The only aspect of the conventions that is publicised concerns the identity of consortium members and shareholders."[205]

Therefore, the multilateral transparency treaty shall associate rights and responsibilities to civil society which is engaged as representative of the local community in the negotiation process. The participation of civil society could bring expertise as well as minimize the chances of the deception; of the constituent representative to agree against the interest of local community, especially in event of bribery:

> "Overall, legal avenues for local communities or the public at large to scrutinise and participate in contract negotiation are very limited. We were told that villages are routinely "canvassed" before exploration to convince residents of the importance of future mining activities. People who had left the village to live in Bamako were called in to Morila to help win over local public opinion by presenting mining as a source of well-paid employment and a catalyst for local development. Knowing the importance of custom and traditional institutions in rural areas, the authorities and mining companies may easily secure local support with promises to provide well-paid employment and local development. Communities are left with high expectations for

[204] NGOs (2009) "Breaking the curse" at x
[205] Cotula (n 17 above) 16

> the future but no real understanding of the stakes involved– including with regard to use of and rights to their land."[206]

In the multilateral transparency treaty a civil society shall have right to access information based on 'Disclosure' provision of the OECD guidelines above-mentioned. This right shall be domesticated, to follow Indian example, by having right to Information Act in member-states:

> "Today, access to information in Bengaluru is protected by both Union and State law. These laws can be regarded as rare expressions of trust by government actors in civil society actors. The government of Karnataka introduced a Right to information Act in 2000, followed in 2005 by a central Right to Information Act. The Karnataka Act and its accompanying Rules stipulates that Information must be supplied in timely fashion following a request by a member of the public. It also imposes a duty on public officials to publish certain information about their organization of their own volition – so called *suo moto* disclosures (PAC websites)."[207]

Another method of engaging local community is through public hearing. The multilateral transparency treat should provide for public hearing which is going to bring together local community that would be affected by mining contract, government agencies, Multinational Corporation, contract supporters, consultants and civil societies. This is important platform for local community to give their input in the negotiation process of mining contract. The Indian experience regarding the environmental clearance process could be put into use in making this mechanism effective:

> "Potentially the most significant gateway for broad participation in administrative process surrounding the approval and operation of foreign direct investment occur within the environmental clearance process. This process was introduced when the Ministry of Environment and Forest issued a notification on Environmental Impact Assessment in 1994. This bound investment actors, domestic and foreign, who promote certain large or otherwise sensitive projects to obtain special environmental clearance prior to establishment or

[206] Cotula (n 17 above) 16
[207] Perry-Kessaris (n 65 above) 89

> operation. A 1997 amendment to this Notification stipulated that environmental clearances must be based, *inter alia,* on the proceedings of a public hearing, to be conducted by the State Pollution Control Boards. These hearings 'bring together local communities, project affected people, government agencies, project proponents, planners, consultants and NGOs'. Civil society actors regard them as a crucial legal platform' for their participation in shaping development projects, including foreign investment. However, a number of factors, structural and behavioural, appear to have tipped the process in favour of investment actors."[208]

Not to repeat Indian bad experience,[209] the multilateral transparency treaty hereby recommends adoption of procedure discussed by Bob Meinig, the legal consultant of Municipal Research and Service Centre of Washington,[210]as method of conducting and recording public hearing. Cost of this process shall be met by government.

The purpose of public hearing during negotiation process is the same as the purpose of environmental clearance process, which is coordination: "to highlight the 'potential impacts (beneficial and adverse) of a project', whether 'environmental, social, cultural or aesthetic …', in order to inform decisions to award clearances, and if so, with what conditions."[211]

Indian experience shows advantage or importance of public hearing in engaging local community:

> "It seems likely that emphasis on speed at the beginning of the investment process will undermine efficiency in the medium to long-run. A UK-based solicitor observed that public hearing in India 'can be useful' and gave the example of a power project hearing in which some 'important' environmental considerations were raised and taken into account. Two other UK-based solicitors agreed that hearings are useful, but because once concerns have been aired and solution proposed, investors have a degree of certainty, at least in respect of

[208] Perry-Kessaris (n 65 above) 99

[209] Perry-Kessaris (n 65 above) 99-106

[210] http://www.mrsc.org/focuspub/hearings.aspx (accessed 24th May 2009)

[211] Perry-Kessaris (n 65 above) 121

> environmental issues. However, certainty depends in part upon the effectiveness of coordination. In the presence of multiple competing interests and values, investment actors would do well to value coordination. As the Infrastructure Project saga suggests, when effective public hearings do not occur or are defective, uncoordinated concerns are simply stored up for future deployment."[212]

As part of enforcement mechanism, the multilateral transparency treaty shall provide that every member state should have national law which provide for 'public interest litigation'. This is kind of law which would allow any member of local community or civil society to challenge that which is against public interest or local community interest, during negotiation process of mining contract, in the host state:

> "As in many other countries, executive power in India has always been checked and balanced with power of judicial review. The Constitution of India provides that a judicial review of behavior of state actors may be launched by writ petition. A wide interpretation of the 'state' under Article 12 of the Constitution has ensured that any government body can be challenged in judicially review. Although the action must initially be filed against a public body, a private party may added as a respondent, so both government actors and foreign investors may be the subject of such petition. Cases in which the behavior of state actors is alleged to have resulted in breach of general constitutional rights can be heard in the High Court and cases involving an alleged breach of fundamental right can be heard directly in the Supreme Court (Article 226 and 32). Many fundamental rights have been interpreted widely, including right to life (Article 21), which has been interpreted to include a right to a healthy and pollution-free environment."[213]

Moreover:

> "In the 1980s, the judiciary relaxed its rules of *locus standi* and began to allow individual and groups to bring such writ petitions in the public, rather than their individual, interest."[214]

[212] Perry-Kessaris (n 65 above) 122
[213] Perry-Kessaris (n 65 above) 111
[214] Perry-Kessaris (n 65 above) 111

Local community to benefit in the negotiation process must have local resource rights. Therefore, legal empowerment of local resource users clearly strengthening the position of local community in negotiation process of mining contract.[215] This is because in the negotiation process between host state and Multinational Corporation, "the bargaining process between them will involve a consideration of the content of the host state's laws and regulations. This should be viewed as a starting point for negotiation, as an initial statement of the host state's regulatory goals."[216] The following is example of empowerment:

> "Empowerment may occur through opening to negotiation decisions previously closed to it, or through providing local groups with assets they can use in their negotiations with outside actors. Different legal (and para-legal) tools are mutually reinforcing, as their cumulative empowerment potential is likely to be greater than the sum of that ascribable to each individual tool. For instance, requirements to negotiate benefit-sharing arrangements are likely to be more effective where complemented by tools vesting clear and secure rights with local resource users, and by tools ensuring fair compensation standards and processes for takings should benefit-sharing negotiations fail."[217]

CHAPTER 6

1. Conclusion

This study has developed a conceptual framework and practical solution for increasing transparency in the negotiation process within context of mining contract in Sub-Saharan Africa. This has been done through analysis of effect of current legal position of international economic law to any relevant

[215] Hill (2006) 14 *Mining Weekly* volume 12 no 16
[216] Muchlinski (n 22 above) 105

[217] Cotula L (n 13 above) 4

situation that resemble Sub-Saharan Africa. Analysis also involves repositioning of legal tools to serve transparency at international level in relation to negotiation process of mining contract.

Chapter 1 of the study analysed the imbalance of international economic law as well as unequal negotiation power between Multinational Corporation, host state and local community. The chapter found, in general, that law provides greater degree of transparency obligations to host state than to Multinational Corporation during negotiation process and, that transparency obligations of Multinational Corporation and host state are not formally accountable to local community.

The procedure and level of engaging local community during negotiation process is not clear in domestic legislations of the host states. Also there is no law which addresses host state's lack of crucial information as well as indicates who and how negotiation process should be monitored and evaluated before coming to conclusion. These defaults undermine legal protection of resource rights of local community and generally reflect unequal power of negotiation.

To correct these defaults, the law of engagement during negotiation process has to be reinforced by multilateral transparency treaty. Multinational Corporations are entitled to be informed of "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement". So do host state and local community need to be informed of all relevant information to conclude a fair deal. The argument here is not that host states should have less transparency obligations; but that Multinational Corporations should be subjected to the same degree of transparency obligations as host states. This asks for measures to provide same degree of information to host state and local community in relation to negotiation process; and for creativeness to cure specific problem of local community to engage and access crucial information in relation to negotiation process.

Chapter 3 and 4 recognize, enhance and advance inventive legal tactics, from various instruments, to achieve transparency in the negotiation process of mining contract. This includes transparency standards, supervision, review, verification and dispute settlement methods. Chapter 5 of the study analysed latest legal inventions in India. These include methods for protecting local community

interest; and for consultation with local community regarding project that may operates in that community's area. These legal methods have blessing of legislature, executive and judiciary. Civil societies and various individuals in using these legal methods have succeeded to protect rights and secure information. The limitation of these methods depends on individual capacity.

The legal innovation has assisted local community to participate and know what to expect. However, problems such as host state not having crucial information and local community not being engaged need to be tackled by new enactments, capacity building programmes, financial assistance, and above all there shall be collective effort of international community guided by multilateral transparency treaty.

Multilateral Transparency Treaty is an essential legal method to strengthen these legal innovations so as to provide host state with crucial information, negotiation skills and engage local community in the negotiation process. Treaty is going to guide what and how information is to be given to host state by Multinational Corporation and in the case of engaging local community what should be the aim, extent, standard, and manner of the discussion. Moreover, treaty is going to provide transparency policy review mechanism and include dispute settlement procedure.

The local community normally wants to see direct benefit of the investment, in terms of job creation and supply of basic service such as water, electricity and school. Though rational, is still unrealistic for any Mining Corporation to have a view that since it meets tax obligation then is up to government to provide such basic service:

> "The duties that mining companies are expected to fulfil are expressly formulated in relation to their workforce, meaning that there are no legal obligations toward the community at large. Even the requirement to contribute to the installation or improvement of infrastructures is for the health and education of company employees and their families."[218]

[218] Cotula (n 17 above) 23

Organized small scale miners with feasible business plan shall have access to capital by way of loan. This is going to make local people to participate in their own economy instead of only depending on the outcome of negotiation process in relation to their land rights as also viewed in a Big Table: "Facilitate the development of African Junior Resource Companies, possibly through a dedicated finance instrument under the AfDB. This could contribute to an increase of local participation in and ownership of natural resources projects."[219]

Universities in the host states could have departments dedicated to study of understanding investment motives, business culture and practices of the investors coming from home states so as to strengthen the negotiation capacity of their respective countries; "With very little available data on the context and impacts of mining activities, there is an urgent need to conduct more research to support informed debate on the costs and benefits of this sector, including its economic, social, environmental and other impacts."[220]

Therefore, Sub-Saharan Africa needs financial support to cure the problem of technology and expertise, so as to get better deals and take advantage of increase demand in market. There is no doubt that the growth of China and India economies has increased demand of precious metals.

When legal tools such as multilateral transparency treaty and national legislations are in place, what is needed next is to promote the awareness and encourage usefulness of these legal tools

[219] The 2007 Big Table
[220] Cotula (n 17 above) 30

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