

**Title: The Imperatives of Beneficiation Law for Botswana's Diamond Mining Industry  
and its Implications for Foreign Investment**

**Dissertation Submitted In Partial Fulfilment of the Requirements For The  
Degree of Master of Laws (LL.M) In International Trade and Investment Law in Africa  
(UNIVERSITY OF PRETORIA)**

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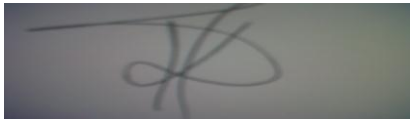
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## DECLARATION

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed



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KUDA TSHIAMO

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‘Because you have been my help, therefore in the shadow of your wings I rejoice!’-*Psalm 63:7*

## ABSTRACT

*The paper shall offer a vigorous debate on the opportunities and challenges of enactment of Beneficiation Law. The term beneficiation has been used largely to mean downward linkages and value addition to mineral resources for the benefit and full participation of the communities in which the mineral resources are mined. The linkages and/ or interface between beneficiation law and international investment protection will also be considered. Here, the writer will endeavour to assess how such a law impacts on protection of foreign investments.*

*The paper shall on a balance argue that the opportunities of enactment of this law far outweighs the costs of coming up with same. In cementing this argument the paper shall draw lessons and inspirations from South Africa's beneficiation strategy and Indonesia which has a successful story on full beneficiation law on mineral resources.*

*The paper will finally conclude by putting forward some recommendations.*

## ABBREVIATIONS AND ACRONYMS

BBSEE: Broad-Based Socio-economic Empowerment Charter

BIDPA: Botswana Institute for Development Policy Analysis

CERDS: Charter of Economic Rights and Duties of States

CoW: Contracts of Work

DMR: Department of Mineral Resources

DTC: Diamond Trading Company (Botswana)

FET: Fair and Equitable Treatment

FPS: Full Protection and Security

HDSA: Historically Disadvantaged South Africans

ICSID: International Convention for Settlement of Investment Disputes

IPR: Smallholder Mining Permit

IUP: Mining Business Permit

IUPK: Special Mining Permit

MCMA: Minerals and Coal Mining Act

MFN: Most Favoured Nation

MMA: Mines and Minerals Act

MMWWR: Ministry of Minerals, Energy and Water resources

MPRDA: Minerals and Petroleum Resources Development Act

NT: National Treatment

WTO: World Trade Organisation

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## CHAPTER 1

### 1.1 Introduction

Diamonds are the most prized and highly valued of gemstones. Throughout history they have been admired by royalty and worn as a symbol of strength, courage and invincibility. Over the centuries the diamond acquired unique status as the ultimate gift of love, in myth and reality. It is the hardest known substance yet has the simplest chemical composition, consisting of crystallized carbon, the chemical element that is fundamental to all life.<sup>1</sup>

Botswana's diamonds are her pride and no wonder the mining sector is the pillar and tower of the economy. The exploration and exploitation of her mineral resources has always been instrumental towards economic development. Botswana is best known for her diamond mines.<sup>2</sup>

All mineral rights in Botswana are vested in the state and it is the Minister of Minerals, Energy and Water resources (MMEWR) who should ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner.<sup>3</sup> The Botswana legal framework for mining operations is anchored on the Mines and Minerals Act (hereinafter "MMA") of 1999. The MMA provides for amongst others, mining licenses, retention licenses, prospecting and mineral permits.<sup>4</sup>

Botswana is the world's largest producer (in value) and exporter of diamonds, which contribute about 30% to Gross Domestic Product (GDP).<sup>5</sup> Foreign direct investment in Botswana is concentrated in the mining sector.<sup>6</sup> Mining remains the largest sector in the economy, accounting for 20.3 percent of total output.<sup>7</sup> Mining has contributed enormously to the economic growth of Botswana, in terms of direct foreign exchange and government revenues generated by diamond sales.<sup>8</sup>

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<sup>1</sup> Marijan Dundek, Diamonds quotes. [http://www.notablequotes.com/d/diamonds\\_quotes.html](http://www.notablequotes.com/d/diamonds_quotes.html), (accessed 16 September 2013).

<sup>2</sup> Ministry of MMEWR, 'Botswana Mineral Investment Promotion Report'(2008) 3.

<sup>3</sup> The Mines and Minerals Act of 1999 sec 3, Laws of Botswana.

<sup>4</sup> Sections 13, 25, 37 and 52 of MMA.

<sup>5</sup> Botswana Annex, SACU-Botswana, Trade Policy Review WT/TPR/S/222/BWA.

<sup>6</sup> Bank of Botswana Annual Report (2009) 87.

<sup>7</sup> Bank of Botswana Annual Report (2012) 65. <http://www.bankofbotswana.bw/assets/uploaded/bob-ar-2012-main.pdf> (accessed 17 September 2013).

<sup>8</sup> Available at DTC (Botswana) website. [http://www.dtcbotswana.com/about\\_us.php](http://www.dtcbotswana.com/about_us.php) (accessed 4 October 2013).



The most notable investment is by Diamond Trading Company (DTC Botswana). DTC Botswana is an equal shareholding (50/50) Joint Venture partnership between the Government of the Republic of Botswana and De Beers Group.<sup>9</sup> It is the world's largest and most sophisticated rough diamond sorting and valuing operation.<sup>10</sup> DTC Botswana sorts and values Debswana Diamond Company's rough diamond production.<sup>11</sup>

## 1.2 Problem statement

The country's attention was recently focused on its parliament proceedings. Sometime in February 2013, the Parliament engaged in a somewhat heated debate on the enactment of beneficiation legislation. The motion was tabled by Member of Parliament Phillip Makgalemele, requesting the government to enact beneficiation legislation for Botswana. This motion was met with mixed feelings in the house.<sup>12</sup> Other members of Parliament believed that it was crucial to have such legislation in place, as it could help transform the country's abundant minerals and other resources to a competitive advantage.<sup>13</sup>

The motion did not escape sharp and loud criticism from some of the members of Parliament who lamented it would be disastrous to enact beneficiation legislation. Interestingly, the Minister of Trade and Industry, Ms Makgato-Malesu argued that such legislation would scare away investors who would not be interested in it.<sup>14</sup> One would assume that she saw it as tantamount to expropriation or at least likely to lead to some kind of interference in the investors' rights. Consequently, the voting results were 19 for the motion, 23 against the motion whilst one Minister abstained.<sup>15</sup>

This study seeks to explore and investigate the legislators' lack of enthusiasm, for creation of beneficiation legislation which is deemed a vehicle instrumental to take the economy of Botswana to greater heights. Beneficiation is often considered one of the options available to countries seeking to take full advantage of their mineral wealth. In fact, the African Union has a mining vision of February 2009, which vision is to have a knowledge-driven African

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<sup>9</sup> DTC (Botswana) (n 8 above).

<sup>10</sup> DTC (Botswana) (n 8 above).

<sup>11</sup> DTC (Botswana) (n 8 above).

<sup>12</sup> 'Beneficiation law may scare away investors' *Ministry of Trade and Industry* (Botswana) 18 February 2013. [WWW.GOV.BW](http://WWW.GOV.BW) (accessed 20 August 2013).

<sup>13</sup> Ministry of Trade and Industry (Botswana) website (n 12 as above).

<sup>14</sup> Ministry of Trade and Industry (Botswana) website (n 12 as above).

<sup>15</sup> Ministry of Trade and Industry (Botswana) website (n 12 as above).

mining sector that catalyses and contributes to the broad-based growth and development of a single African market through, amongst other things, beneficiation.<sup>16</sup>

Against this background, this investigation, attempts to make a case for the enactment of beneficiation legislation in Botswana while anticipating the impacts and challenges it is likely to have on Botswana's foreign investment. It will further investigate whether beneficiation legislation could be equated to expropriation or some kind of interference with investors' rights and thus scare them away. The principal question for interrogation is whether beneficiation legislation is the best guarantee for local community benefits under Botswana's regulatory regime for diamond mining, or it is just another flawed concept that will undoubtedly scare investors away as some view it.

### **1.3 Research questions**

The over-arching question this study will seek to answer is:

- a) Whether beneficiation legislation is the best guarantee for local community benefits under Botswana's regulatory regime for diamond mining, or it is just another flawed concept that will undoubtedly scare investors away?

In answering this broad question, attempts will be made to answer the following sub-questions:

- b) What is the current legal environment of Botswana's diamond mining industry?
- c) What is beneficiation and the controversial debate surrounding it?
- d) What are the likely implications the enactment of beneficiation legislation on protection of foreign direct investments?
- e) Are there any lessons to be learnt from South Africa and Indonesia to ensure successful enactment of beneficiation legislation?

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<sup>16</sup> African Union Mining Vision (2009) 6.

## **1.4 Thesis statement**

This investigation attempts to make a case for the enactment of beneficiation legislation in Botswana. Thus, there is a need to assess this law in the light of protection of foreign investments. This assessment will eventually assist proffer practical recommendations for Botswana's beneficiation legislation.

## **1.5 Objectives**

To discuss how beneficiation legislation may impact foreign investments in Botswana. The study would also attempt to demonstrate these impacts with aid of lessons from South Africa and Indonesia and lastly, to offer necessary practical recommendations.

## **1.6 Justification**

This study is not only relevant to the government of Botswana and Africa but also to the international community. It will critically analyse the effects beneficiation legislation in the diamond mining industry may have on protection of foreign investments in Botswana. It will further attempt to foster confidence in the policy makers by providing a balanced debate on the matter, and present a unique opportunity for them to re-think the enactment of beneficiation legislation.

The study will also draw lessons from South Africa and Indonesia. Those jurisdictions are developing countries like Botswana. South Africa is chosen due its almost similar economic developments with Botswana. Indonesia is chosen because it has been successful in enacting full beneficiation legislation. For the academia, the study will contribute to the on-going and ever expanding debate on beneficiation law and promote assessment of the law in light of its linkage to protection of foreign investments.

## **1.7 Preliminary literature review**

A considerable body of literature exists concerning the notion of beneficiation. There is much on the nature, scope and application of beneficiation legislation. This literature mainly

exists in the form of journal articles, newspaper articles, conference and presentation papers. Finding books on the subject matter appears to be challenging.

Research reveals that scholars are divided on the significance of beneficiation legislation. Two different approaches exist on the issue. One approach comprises of those who argue that beneficiation while superficially attractive, is an inherently flawed concept and a bad policy paradigm.<sup>17</sup> The other approach consists of those who see beneficiation as an emerging norm relevant to international law.<sup>18</sup> For instance conferences are constantly held in Africa to share ideas on how to benefitiate African countries' solid minerals. The aim of such conferences is to ensure that the participants acquire full understanding of opportunities to be derived from domestic beneficiation of African solid minerals.<sup>19</sup>

The only challenge is that this literature does not address the issue whether beneficiation legislation would be necessary for economies such as Botswana's nor does it offer insights on its impact on foreign investment protection. Consequently, it remains to be found whether or not beneficiation legislation is the best guarantee for local community benefits under Botswana's regulatory regime for diamond mining and its likely impacts on foreign investments.

## **1.8 Proposed methodology**

This is a desk and library based study. It relies on both published and unpublished materials, taking into account significant primary and secondary sources of information on the issue in addressing the research questions. Various Acts of Parliament from different jurisdictions on the subject matter will be consulted.

The secondary sources of information include, but not limited to, relevant journal articles, newspaper reports and publications, as well as position papers written by law-firms. The study relies also heavily on internet public sources. Speeches and government press releases

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<sup>17</sup> R Hausmann et al 'Examining Beneficiation' (2007) Center for International Development, Harvard University 1-25. <http://www.cid.harvard.edu/southafrica> (accessed 14 September 2013).

<sup>18</sup> C Kabemba 'Alternatives on Resource Trade and Access to Information in Africa: A response to EU Policy on Raw Materials' (2012) Comhlámh Policy Report

<sup>19</sup> On Ore Beneficiation Africa 17 – 18 March 2014 | Indaba Hotel & Conference Centre, Johannesburg, Beneficiating to unlock value in Africa's iron ore deposits. <http://www.immevents.com/mining-conference/iron-ore-beneficiation-africa/p14w01webpdf> (accessed 10 February 2014).

will also be considered. The study will adopt a descriptive, analytical and exploratory approach. The aim is to build on the existing literature and on-going debate on beneficiation legislation, particularly placing more emphasis on the impacts it is likely to have on protection of foreign investments.

### **1.9 Limitations to the study**

A lot has been written on beneficiation, however this only exist in the form of journal articles, conference presentation papers, and newspaper publications. Besides, the mining industry is also very sensitive, as a result obtaining some information proved to be a challenge.

### **1.10 Overview of chapters**

#### **a) Chapter 1**

This chapter introduces the study. It further outlines the nature of the study, significance, methodology and the literature review.

#### **b) Chapter 2**

This chapter provides a brief history on the Botswana diamond mining industry. It also discusses and assesses the current legal regulatory framework of the diamond mining sector.

#### **c) Chapter 3**

This chapter examines the concept of beneficiation in depth. In addition, it presents both arguments for opportunities and challenges of Beneficiation legislation.

#### **d) Chapter 4**

This chapter explores the likely impacts of beneficiation legislation in Botswana with regard to protection of existing and potential foreign investments.

#### **e) Chapter 5**

This chapter investigates whether or not there are lessons to be drawn from South Africa and Indonesia which have gone a milestone in this area.

## f) Chapter 6

This chapter makes some concluding remarks for the study while at the same time offering some recommendations.

## CHAPTER 2

### DIAMOND MINING INDUSTRY AND THE REGULATORY REGIME

#### 2.1 Introduction

This chapter gives a brief history of the diamonds mining sector and takes a look at the legal environment for diamond mining industry in Botswana, before making the concluding remarks.

Botswana has been said to be the ‘Switzerland of Africa,’ mainly due to its diamonds sector.<sup>20</sup> The mining sector greatly contributes to the wealth of the country.<sup>21</sup> The economy is thus highly anchored on this sector.<sup>22</sup> It cannot be gainsaid that Botswana has one of the most lucrative diamond mining sectors. She has been ranked as the greatest diamond producing state in the world by value at 21% of global rough diamond production alone.<sup>23</sup> Botswana is home to two of the world’s two largest diamond mines, Jwaneng and Orapa.<sup>24</sup>

Thus Botswana retains the best address in diamonds in Africa.<sup>25</sup> It is not in dispute that the diamond industry has translated Botswana economy into a middle-income nation and one of the most dynamic economies in Africa.<sup>26</sup> Diamond mining has fuelled much of its economic expansion and currently accounts for 70-80% of export earnings.<sup>27</sup>

#### 2.2 Botswana diamond discovery

The search of diamonds in Botswana began in the Tuli Block in 1955.<sup>28</sup> Diamonds were first discovered in 1959 and the first kimberlites were discovered in 1967.<sup>29</sup> The first mine, Orapa mine was discovered in 1967.<sup>30</sup> The Orapa pipe held a great potential and the approval was

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<sup>20</sup> ‘Diamond Exploration in Elephant Country’ Botswana Diamond Plc 10 October 2011 4. [www.botswanadiamonds.co.uk](http://www.botswanadiamonds.co.uk).

<sup>21</sup> European Commission ‘Country Level Evaluation Botswana’ (December 2009) 11 Final Report Volume 1 Main Report Mining (in this sense not only of diamonds but copper and nickel).

<sup>22</sup> European Commission Report (n 21 above) 11.

<sup>23</sup> ‘All about Botswana’, Pangolin Diamonds, Corp. <http://www.pangolindiamondscorp.com/about-botswana.php> (accessed 29 February 2014).

<sup>24</sup> Pangolin Diamonds (n 23 above).

<sup>25</sup> Botswana Diamond Plc Annual Report (2012) 11. [www.botswanadiamonds.co.uk](http://www.botswanadiamonds.co.uk) .

<sup>26</sup> Plc Annual Report (n 25 above) 11.

<sup>27</sup> Plc Annual Report (n 25 above) 11.

<sup>28</sup> <http://www.debswana.com/About%20Debswana/Pages/HistoryAndProfile.aspx>.

<sup>29</sup> Pangolin Diamonds Corp (n 23 above).

<sup>30</sup> Debswana webpage (n 28 above).

granted to the shareholders to develop it.<sup>31</sup> A year after, two other small pipes were discovered some 40 kilometres south-east of Orapa, near Letlhakane village.<sup>32</sup>

Formation of the De Beers Botswana Mining Company took place in 1969.<sup>33</sup> This was a joint venture between De Beers (85%) and the Botswana Government (15%).<sup>34</sup> Orapa mine was officially commissioned in 1971.<sup>35</sup> When the Letlhakane mine was commissioned in 1975 the shareholding of Botswana Government was 50%.<sup>36</sup> In August 1982, after ten years of its discovery, Jwaneng mine was officially opened.<sup>37</sup>

Damtshaa, commenced production in 2002.<sup>38</sup> Lerala Mine commenced in 2008.<sup>39</sup> B/K11 and Karowe Mines started operation in 2011.<sup>40</sup> The Ghaghoo Mine is scheduled to start production in June 2014.<sup>41</sup> Today a number of companies other than De Beers are found in Botswana. For instance Botswana Diamond Company (BOD) discovered the newest producing diamond mine in the world, the Karowe Diamond Mine. This mine is said to produce exceptional stones and some very rare blue stones.<sup>42</sup> According to the directors of BOD more diamond mines are yet to be discovered in Botswana.<sup>43</sup>

### 2.3 Towards beneficiation

The initial position of De Beers on beneficiation and its shift thereafter, through its managing directors is worth mentioning. Ralfe first opined Botswana diamonds should be polished where they could yield more revenues, and that an attempt to beneficiate locally is only a national folly and not an acknowledgement of its economic realities.<sup>44</sup> This company has always resisted beneficiation and as a result Botswana for a very long time have not benefited from their wealth. De Beers' stance on beneficiation six years later was radically opposed to its earlier statement. Penny stated:

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<sup>31</sup> Debswana webpage (n 28 above).

<sup>32</sup> Debswana webpage (n 28 above).

<sup>33</sup> L Daniels 'Spotlight on Botswana' (2004) 31 *Rough Diamond Review*.

<sup>34</sup> Daniels (n 33 above).

<sup>35</sup> Debswana webpage (n 28 above).

<sup>36</sup> Daniels (n 33 above) 31.

<sup>37</sup> Daniels (n 33 above) 31.

<sup>38</sup> Daniels (n 33 above) 31.

<sup>39</sup> MC Brook 'The Journey of Botswana's Diamonds' (2012) 7.

<sup>40</sup> Brook (n 39 above) 7.

<sup>41</sup> 'Ghaghoo mine nears production after Gem Diamonds hits kimberlite' *Sunday Standard* 30 January 2014. <http://www.sundaystandard.info/article.php?NewsID=18978&GroupID=3>

<sup>42</sup> Botswana Diamond Plc 'Botswana Diamond Fact Sheet' (6 June 2013) 2. [www.botswanadiamonds.co.uk](http://www.botswanadiamonds.co.uk) (accessed 15 March 2014).

<sup>43</sup> Botswana Diamond Plc (n 42 above).

<sup>44</sup> DeBeers Managing Director interview in 2001, Even-Zohar (2007).



For the African diamond producing countries, beneficiation is not optional, not a passing whim motivated by political correctness, but an imperative, an absolutely essential and critical part of their macroeconomic policy designed to uplift their economies to provide education and jobs and healthcare for their people and to make poverty history.... We [De Beers] don't embrace this out of misguided enthusiasm or altruism. No, we embrace it because it makes good business sense and because it is the right thing to do.<sup>45</sup>

It is believed that Botswana's opportunity to fight for downstream linkages came in 2005 when the De Beers' mining licence expired and was due for renewal.<sup>46</sup> At that point, the government had greater leverage and hence insisted that De Beers should assist Botswana to come up with a diamond cutting and polishing industry.<sup>47</sup> It was apparent that De Beers could not evade undertaking some level of beneficiation at least. A contract which ensured the cutting and polishing of diamond locally came into force.<sup>48</sup> Diamond Trading Company Botswana (DTCB) was established in 2006 thus replacing Botswana Diamond Valuing Company (BDVC).<sup>49</sup> The aim of this establishment was to make diamonds available for sale in Botswana for local manufacturing.<sup>50</sup>

The headquarters of DTCB were moved from London to Botswana.<sup>51</sup> In 2012 a state diamond trading company was established.<sup>52</sup> This state owned company sells diamonds independently of the DTCB joint venture.

## 2.4 Botswana's beneficiation strategy and stage of beneficiation

The Botswana's stage of beneficiation can be distilled from the above discussion. Below are diagrams showing the various stages of beneficiation in Botswana and as well as point out which stages have been achieved and still to be achieved.

**Figures 2.4.1- Source: Minister of MMEWR Hon. Kitso Mokaila presentation 'Botswana's Diamond Mining Journey' 18 March 2013.**

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<sup>45</sup> John Helmer 'ALROSA Attacks African Diamond Beneficiation' <http://johnhelmer.net/?p=289> (accessed 4 March 2014).

<sup>46</sup> L Mbayi 'Linkages in Botswana's Diamond Cutting and Polishing Industry' (March 2011) 21 MMCP Discussion Paper No. 6.

<sup>47</sup> Mbayi (n 46 above) 21.

<sup>48</sup> Botswana Annex 1 'SACU Trade Review Policy' (2009) 107par 189 WT/TPR/222/BWA.

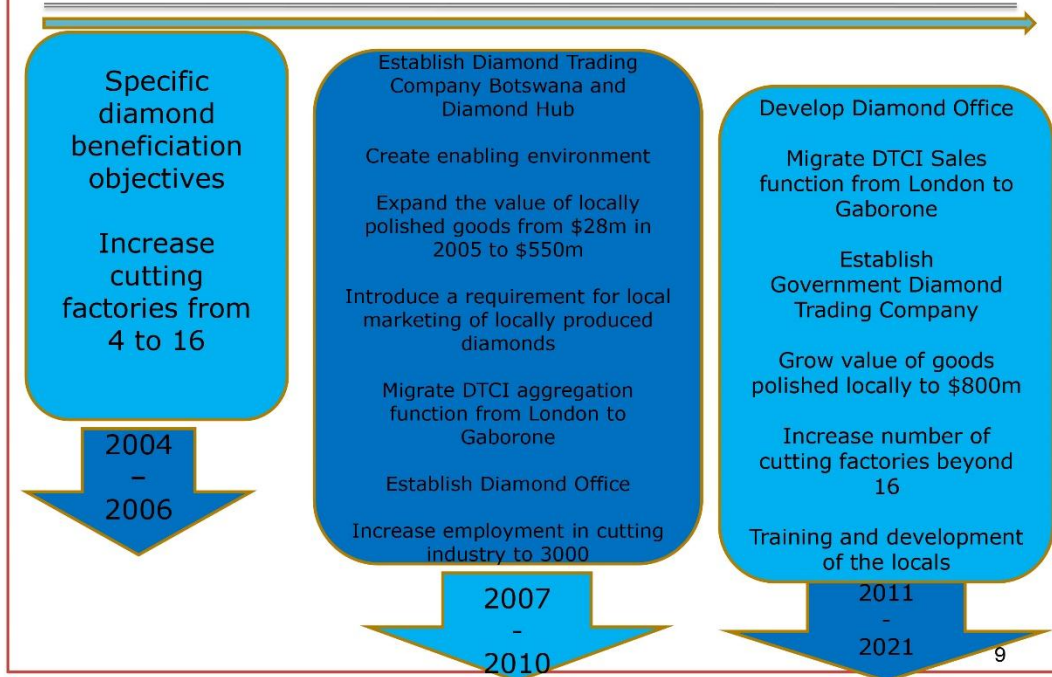
<sup>49</sup> Botswana Annex 1(n 48 above) 107para 189.

<sup>50</sup> Botswana Annex (n 48 above) 107.

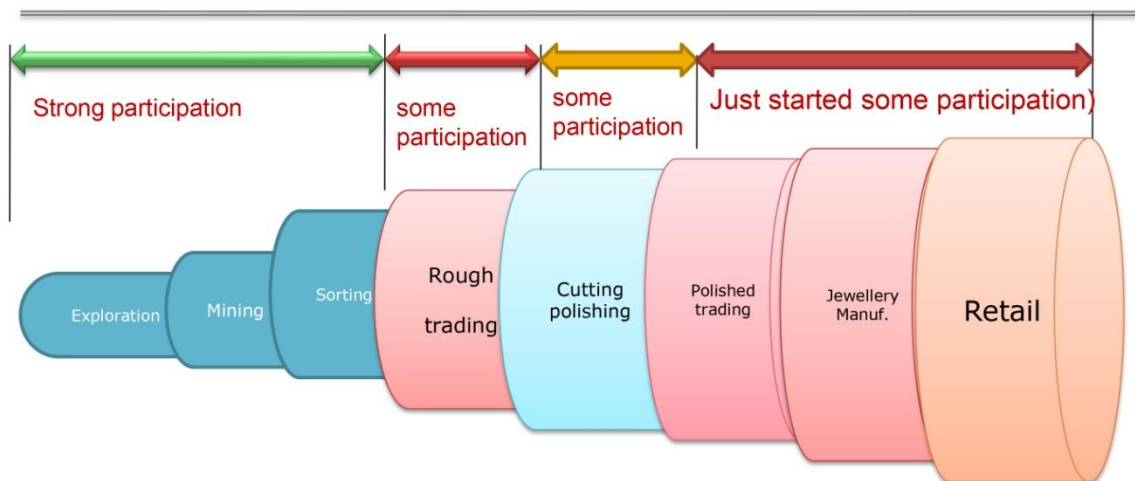
<sup>51</sup> This is now the biggest rough diamond sorting and valuation facility globally.

<sup>52</sup> Brook (n 39 above) 13.

## Diamond Beneficiation Strategy



## Where is Botswana - Diamond value chain



## 2.5 Legislative framework

This section discusses and analyses the various pieces of legislation in the diamond mining industry.

### 2.5.1 Mines and Minerals Act (MMA) and Regulations

All mineral rights in Botswana are vested in the state and it is the Minister of MMEWR who should ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner.<sup>53</sup> The Botswana legal framework for mining operations is anchored on the MMA. It creates an environment to obtain *inter alia*, mining licences, retention licences, prospecting licences and mineral permits for small scale mining operations.<sup>54</sup> Retention licences allow prospectors to defer mining of uneconomic deposits for up to six years.<sup>55</sup> Mining licences are issued only to Botswana-registered companies. Licence applicants must show proof of technical competence and access to adequate financial resources.<sup>56</sup> Government participation in mining licences is negotiated on a full participation basis.<sup>57</sup>

For purposes of beneficiation, only a few sections are worthy of highlighting and it shall become more clearer why these have to be flagged in chapter five where South African and Indonesian beneficiation through legislation experiences are discussed.

Section 3 is to the effect that the Minister shall ensure, in the public interest, that the mineral resources of the Republic are investigated and exploited in the most efficient, beneficial and timely manner. Section 12 provides for preference of Botswana products in so far as purchase, construction and installation in the diamond operations are concerned. A thorough perusal of the Act and its Regulations for provisions which could be utilized to facilitate beneficiation dismally failed. Only the above sections are relevant hence the need to look for lessons from other jurisdictions.

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<sup>53</sup> See generally the Mines and Minerals Act of 1999, Laws of Botswana.

<sup>54</sup> Sections 13, 25, 37 and 52 (n 53 above).

<sup>55</sup> Section 30 (n 53 above).

<sup>56</sup> Botswana Annex (n 48 above) 106 para 184.

<sup>57</sup> Brook (n 39 above) 5.

## **2.5.2 Other diamond mining regulating Acts and regulations**

### **2.5.2.1 Diamond Cutting Act<sup>58</sup>**

The Diamond Cutting Act regulates the cutting, sawing, cleaving and polishing of rough and uncut diamonds and provides for other such related matters.<sup>59</sup> Section 29 also provides for preference of Botswana as far as installation, purchasing and construction of facilities is concerned.

### **2.5.2.2 Exports and Import of Rough Diamonds Regulations<sup>60</sup>**

These deal with regulation of exportation and importation of rough diamonds in Botswana. They place particular emphasis on the ‘Kimberly Process Certificate.’ Importation and exportation of rough diamonds would not be possible without the said certificate.

## **2.6 Conclusion**

It is reiterated that Botswana is known to be the best diamond address in Africa and thus commonly and loosely named the ‘Switzerland of Africa’. Exploration of diamonds in Botswana started around 1967. However, nothing much was done to explore them fully. This can be partly attributed to the position formally adopted by De Beers as regards beneficiation. As shown above, De Beers has always been opposed to value addition of diamonds locally. It has always maintained that it was ideal that diamonds be cut and exported offshore. This position has since changed, as at least 21 companies have been licensed to date for cutting and polishing purposes.

Botswana’s beneficiation strategy is also not ambitious, enough, for instance, the target by 2021 is to have increased the number of cutting factories and improve training and development of the locals. What about diamond jewellery manufacturing and retailing? Furthermore, thorough perusal of diamond mining legal framework was found to be shallow and hence not pungent enough to advance full diamond beneficiation. The latter statement will become clearer in chapter five. The next chapter gives an in-depth discussion of beneficiation by providing a debate on arguments for and against beneficiation.

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<sup>58</sup> Chapter 66:04 of 1979 (Laws of Botswana).

<sup>59</sup> See the preamble of the Act.

<sup>60</sup> Statutory Instrument No. 24 of 2004, published 19 March 2004.

## CHAPTER 3

### BENEFICIATION IN DEPTH: OPPORTUNITIES AND CHALLENGES

#### 3.1 Introduction

In the previous chapter, a brief history of the diamonds mining sector was given and the legal environment for diamond mining industry in Botswana was examined. The conclusion was that Botswana's beneficiation strategy is not ambitious enough, that the legal framework that under-gird the diamond mining industry is shallow and hence not pungent enough to advance full diamond beneficiation.

In this chapter however, the objective is to examine the concept of beneficiation in depth. It attempts to answer the question: what is beneficiation and the controversial debate surrounding it? In so doing it sets off by providing a brief genesis of beneficiation which can be traced to the Staples Thesis. It discusses the types of beneficiation and concludes by providing arguments for and against beneficiation.

#### 3.2 Beneficiation genesis

Beneficiation has its roots from the Staples Thesis. Staple Thesis is a theory asserting that 'the export of natural resources, or staples, from Canada to more advanced economies has a pervasive impact on the economy as well as on the social and political systems.'<sup>61</sup> It was formulated in the 1920s by economic historians HA Innis and WA Mackintosh.<sup>62</sup> This thesis has been neatly captured by Grynberg.<sup>63</sup> He postulates that 'the staples thesis or approach is the basis of the contemporary debate on beneficiation and linkages between staples and the manufacturing sector. Innis argued that countries tend to fall into a 'staples trap' whereby they would tend to fall back into the export of staples and that growth would occur, but not economic transformation. Mackintosh argued that development spread through backward linkages and that sustained transformation could occur in a staples economy.'<sup>64</sup>

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<sup>61</sup> Canadian Encyclopedia. <http://www.thecanadianencyclopedia.com/articles/staple-thesis> (accessed 10 February 2014).

<sup>62</sup> Canadian Encyclopedi (n 61 above).

<sup>63</sup> R Grynberg 'Some Like Them Rough: The future of Diamond Beneficiation in Botswana' (March 2013) 2 Working Paper No. 142, Botswana Institute for Development Policy Analysis (BIDPA). [www.ecdpm.org/dp142](http://www.ecdpm.org/dp142) (accessed 14 January 2014).

<sup>64</sup> Grynberg (n 63 above) 2.

The work of Innis and Mackintosh lies at the very heart of much of the early economic literature about African development and indeed much of the ‘Dependency Theory’ literature of the 1960’s is based on these works and that the works of Professor Hirschman on linkages in development have sparked the contemporary policy debate over beneficiation.<sup>65</sup>

### **3.3 What is beneficiation?**

Hausmann et al, define beneficiation as ‘vertical relationships in production chains, known as linkages which have had a profound impact on economic policy in developing countries, geared towards stimulating structural transformation.’<sup>66</sup> They posit that ‘such policies have been termed differently, such as ‘promoting downstream processing; completing value chains; increasing value-added; and beneficiation, but they are all based on the same idea: that it is a logical, natural progression for countries exporting raw materials to move into the processing of such materials, and therefore policies encouraging that progression can accelerate growth,’ they observe.<sup>67</sup>

Beneficiation is defined in the South African Minerals and Mining Policy 1998 White paper as meaning the ‘successive processes of adding value to raw materials from their extraction through to the sale of finished products to consumers, covering a wide range of very different activities. These include large-scale and capital-intensive operations like smelting and technologically sophisticated refining as well as labour-intensive activities such as craft jewellery.’<sup>68</sup> Beneficiation legislation would therefore facilitate and enable minerals to go beyond just mere processing but allow value addition and downstream linkages.

#### **3.3.1 Downstream beneficiation v side-stream beneficiation**

Beneficiation can either be said to be downstream or side-stream. Downstream is more common and mostly pursued by states than side-stream beneficiation. Side-stream beneficiation refers to the spill over effects of downward beneficiation such as establishment

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<sup>65</sup> Grynberg (n 63 above) 2.

<sup>66</sup> Hausmann et al (n 17 above) 2.

<sup>67</sup> Hausmann et al (n 17 above) 2-7.

<sup>68</sup> White Paper ‘A Minerals and Mining Policy for South Africa’ (October 1998) 30.

[http://www.polity.org.za/polity/govdocs/white\\_papers/minerals98.html](http://www.polity.org.za/polity/govdocs/white_papers/minerals98.html) (accessed 12 January 2014).



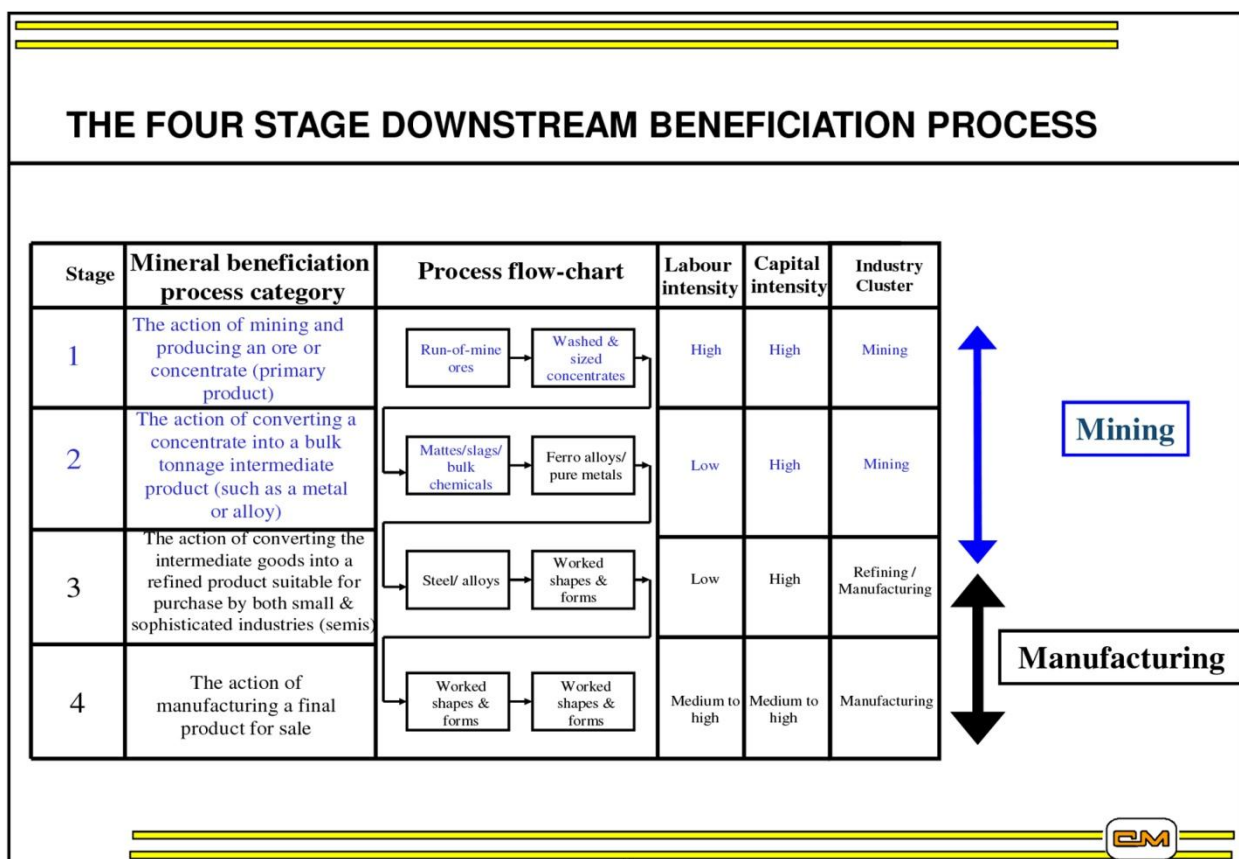
of industries vital for the operation of full diamond production.<sup>69</sup> This study is, however, concerned primarily with downstream beneficiation.

### 3.3.2 Downstream beneficiation

Traditionally, downstream beneficiation has been regarded as being the most logical natural progression for a mineral-rich country to leverage off its comparative advantage to attain competitive advantage.<sup>70</sup> Downstream beneficiation involves the transformation of raw materials to finished products which would sell at a price higher compared to what the unprocessed raw material would sell for.<sup>71</sup> This is illustrated in the figure below.

### 3.3.3 Stages of downstream beneficiation

**Figure 3.3.3.1-** Source: Chamber of Mines of South Africa, GIBS Forum Presentation (22 May 2013)



<sup>69</sup> R Baxter 'Facilitating further Minerals Beneficiation in South Africa' (22 May 2013) 5 Presentation to GIBS Forum.

<http://www.bullion.org.za/documents/COM%20presentation%20on%20Beneficiation%2022%20May%202012%20handout.pdf> (accessed 14 March 2014).

<sup>70</sup> Southern African Institute of Mining and Metallurgy (SAIMM) 'The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets or the Legitimate Search for a New Equilibrium?' (February 2012) 274.

<sup>71</sup> SAIMM (n 70 above) 274.

Downstream beneficiation can be understood in four main stages as shown in the diagram above.<sup>72</sup> These are:

- Stage 1 involves the process of mining and producing an ore or concentrate;
- Stage 2 converts the concentrate into a bulk tonnage intermediate product;
- Stage 3 transforms intermediate goods into a refined product for purchase by both small and sophisticated industries; and
- Stage 4 is the action of manufacturing a final product.<sup>73</sup>

### 3.4 Opportunities and challenges explored

#### 3.4.1 Opportunities

It is axiomatic that beneficiation has advantages. Firstly, with each successive stage of beneficiation, value is added.<sup>74</sup> The South African White Paper (1998) noted that the beneficiation policy would develop South Africa's mineral wealth to its full potential and to the maximum benefit of the entire population.<sup>75</sup> It has been established that this would be achieved through the promotion of secondary and tertiary mineral-based industries aimed at adding maximum value to raw materials.<sup>76</sup>

Beneficiation has the potential to increase of the ratio of beneficiation extent to mineral production, and thereby increasing the export revenue, employment opportunities and economic growth.<sup>77</sup> This therefore means that the exports are of better quality and can be competitive in the global market. It therefore facilitates economic diversification, expedites progress to a knowledge based economy with specialist skills and creates opportunities for new enterprise development resulting in poverty reduction.<sup>78</sup>

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<sup>72</sup> Deloitte 'Positioning for Mineral Beneficiation Opportunity Knocks' (2011) 6. [www.deloitte.com/](http://www.deloitte.com/) (accessed 15 August 2013).

<sup>73</sup> SAIMM (n 70 above) 274.

<sup>74</sup> IC Robinson & MA Van 'The Role of the Domestic Market in Promoting the Beneficiation of Raw Materials in South Africa' (April 1990) 2 Journal of The South African Institute of Mining and Metallurgy.

<sup>75</sup> DMR Presentation 'Mineral Beneficiation in South Africa' (26 Feb 2013). <http://www.pmg.org.za/report/20130226-mineral-beneficiation-south-africa-department-briefing> (accessed 14 February 2014).

<sup>76</sup> DMR presentation (n 75 as above).

<sup>77</sup> Robinson & Van (n 74 above). This was distilled by the Department of Minerals Resources in the South African beneficiation Strategy as one of its visions.

<sup>78</sup> Robinson & Van (n 74 above) 2.



Increased employment opportunities through beneficiation are more visible at the labour-intensive fourth stage as shown in the diagram, at which fabricated articles are produced.<sup>79</sup> In addition to the advantages of the value added and new jobs created, fabrication provides much greater scope for product diversification, which facilitates the choice of products best-suited to penetrate export markets.<sup>80</sup>

The Minerals Minister of Zimbabwe, Moses Mpfu, observed that polished diamonds sell far more than rough diamonds, and that Zimbabwe was keen to increase the tax revenues it earns from diamond sales.<sup>81</sup> This goes on to cement the fact that at each stage of beneficiation, value is added and hence transforming the mining industry's comparative advantage to what is usually deemed 'competitive advantage'.

Hausmann et al posit that proponents of beneficiation most often point out that physical proximity to raw materials provides downstream processors with advantages due to freight costs.<sup>82</sup> They cite an example where raw cotton from Africa is shipped to Europe to be processed when it could be processed locally.<sup>83</sup> They argue that such an observation is more convincing for mineral resources with higher transportation costs, such as logs.<sup>84</sup> They add that often-times transportation costs of local supply may be more secure as well as cheaper and could also be more precisely matched to downstream producer needs.<sup>85</sup>

Deloitte team presents beneficiation law benefits in a simpler manner to comprehend. They interestingly group them under a few headings. Firstly, they identify economic benefits, and state that beneficiation could increase a ratio of beneficiation extent to mineral production and increase export revenue, facilitate economic diversification, expedite progress towards a knowledge based economy, create opportunities for new enterprise development and contribute to creation of decent jobs and poverty alleviation.<sup>86</sup>

Under the heading dubbed 'potential job creation/sustainable employment', advantages are stated as taking advantage of governments GDP for employment creation, creation of

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<sup>79</sup> Robinson & Van (n 74 above) 2.

<sup>80</sup> Robinson & Van (n 74 above) 2.

<sup>81</sup> 'New Zimbabwe Law to Require Diamond Beneficiation' *The Israeli Diamond Industry Newspaper* 11 March 2013. <http://www.israeliamond.co.il/english/news.aspx?boneid=918&objid=12692> (accessed 18 March 2014).

<sup>82</sup> Hausmann et al 'Examining Beneficiation' (May 2008) 5 CID Working Paper No. 162 Centre for International Development.

<sup>83</sup> Hausmann et al (n 82 above) 5.

<sup>84</sup> Hausmann et al (n 82 above) 5.

<sup>85</sup> Hausmann et al (n 82 above) 5.

<sup>86</sup> DMR (n 75 above).

sustainable employment through the creation of long term projects and increased industrialisation will facilitate access to skills, increased expertise and improved technology.<sup>87</sup>

With regard to ‘revenue potential’ beneficiation could increase tax revenue for government through business creation, increased integration benefits and also potential cost cutting in a number of ways.<sup>88</sup> In terms of ‘saving on import/export costs of beneficiated products’ they anticipate reduced transportation costs of raw materials, reduced costs and fees associated with import and export and that this could reduce the delay costs associated with the lack of infrastructure around import/export hubs.

### 3.4.2 Challenges

One must hasten to state that beneficiation is not without challenges, hence the observation by some that it is not a panacea.<sup>89</sup>

Firstly, beneficiation requires high level skills. A warning has been raised that although beneficiation is expected to create significant employment opportunities within the country, substantial investments will have to be poured into developing the required skills and expertise for the aforementioned job opportunities.<sup>90</sup> Failure to build the required talent pipeline could be deadly as it could result in depending on high-skilled expatriate labour.<sup>91</sup> Hence the saying goes, ‘the success of establishing a local mineral beneficiation sector will also depend on how well the nation is able to develop the required skills and talent pool’.<sup>92</sup>

Hausmann et al are very critical of beneficiation. Their view is that beneficiation, in the sense of incentivizing the domestic processing of natural resources, is not a sensible policy.<sup>93</sup> They

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<sup>87</sup> Deloitte (n 72 above) 7.

<sup>88</sup> Deloitte (n 72 above) 7.

<sup>89</sup> MJ Morgan ‘Beneficiation -- the pros and cons: Is Africa giving away the value of its minerals by exporting them unrefined?’ (April 2013) 66 African Business, 01413 Issue 396.  
<http://web.b.ebscohost.com.proxy.uba.uva.nl:2048/ehost/detail?sid=7fc4bae-0d5e-43d4-b51f-e549773f816e%40sessionmgr110&vid=5&hid=117&bdata=JnNpdGU9ZW9Whvc3QtbG12ZQ%3d%3d#db=buh&AN=87317182> (accessed 23 March 2014).

<sup>90</sup> ‘Local Mineral Beneficiation to Present Challenges’ *Mining Weekly* 9th December 2013  
<http://www.miningweekly.com/article/local-mineral-beneficiation-to-present-challenges-2013-12-09> (accessed 22 March 2014)

<sup>91</sup> Mining Weekly (n 90 above).

<sup>92</sup> Mining Weekly (n 90 above).

<sup>93</sup> Hausmann et al ‘Reconfiguring Industrial Policy: A Framework with an Application to South Africa’ (June 17-20 2008) 17. Conference Paper 2008 on Entrepreneurship and Innovation - Organizations, Institutions, Systems and Regions Copenhagen, CBS, Denmark.

argue that capabilities developed through mining can be exploited in other ways.<sup>94</sup> In a nutshell, they see beneficiation as a nonsensical concept with a narrow focus as mineral resources could be explored differently. However, they do not offer a concrete and convincing explanation as to why beneficiation, as an option, should not be pursued.

It is argued that one of the questions countries pursuing beneficiation should have been advised to ponder on is which markets will they sell their manufactured products to?<sup>95</sup> It is further suggested that the world's mineral beneficiating companies are located in the developed world where an established and mature market consumes the products that the industry manufactures.<sup>96</sup> The argument goes that as a result there will be limited regional (sub-Saharan Africa) demand for the beneficiation industry's manufactured products, as the country's mineral beneficiation sector may want access to these international markets to sustain its growth objectives.<sup>97</sup>

A brief produced by the Centre for International Development at Harvard University on beneficiation for the government of South Africa concluded that 'beneficiation is a bad policy paradigm and should be dropped from South Africa's development strategy'.<sup>98</sup> While the reports acknowledges that 'the exporting of raw natural resources is a legacy of colonialism, in which countries were precluded from developing their own processing capacities in order to supply the motherland with cheap raw materials', it provides a 'detailed evidence' that countries do not experience export development downstream.<sup>99</sup> The report, in essence, posits that there should not be an upright presumption in favour of beneficiation and that each case is to be considered on its merits.<sup>100</sup>

These results of the report further suggested that policies which enhance downstream processing are misguided.<sup>101</sup> A focus on beneficiation, the argument goes, is necessarily at the expense of policies that would enable other potential sectors to emerge.<sup>102</sup> Their findings depict beneficiation as 'a bad trade-off' as there are better opportunities which are more often

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<sup>94</sup> Hausmann et al (n 93 above) 17.

<sup>95</sup> Mining Weekly (n 90 above).

<sup>96</sup> Mining Weekly (n 90 above).

<sup>97</sup> See (n 90 above). However, regional integration could be looked at for markets and with the African tripartite regional integration underway, the future looks more appealing.

<sup>98</sup> Morgan (n 89 above).

<sup>99</sup> Morgan (n 89 above).

<sup>100</sup> Morgan (n 89 above).

<sup>101</sup> Hausmann et al (n 17 above) 5.

<sup>102</sup> Hausmann et al (n 17 above) 5.

‘lateral’ than downstream.<sup>103</sup> They conclude that beneficiation is simply a bad policy paradigm.<sup>104</sup>

Another flaw of the concept is that it may require more research and development and hence this could be costly than not beneficiating.<sup>105</sup>

### **3.5 Conclusion**

Beneficiation is about value addition to minerals to enhance their value. It has been shown that beneficiation derives its roots in the Staples Thesis which was propounded by two great scholars Innis and Mackintosh. In addition it flagged the fact that beneficiation can be understood from a number of perspectives. It could be downstream or side-stream. This study is concerned with downstream beneficiation.

Moreover, a vigorous debate as advanced by various scholars on this concept was presented. There are those who see beneficiation as viable and to be pursued by countries which want to translate their comparative advantage to competitive advantage. However, beneficiation is not without wrinkles. Those against it argue that it is a bad policy paradigm which is not only myopic but narrowly focused. They argue that those in pursuit of it tend to overlook other policies which could be more profitable. The ‘other policies’ contemplated by these scholars are not mentioned with precision and it is interesting to note that there seem to be an assumption that they are without downfalls. The discussion revealed that opportunities of beneficiation far outweigh the challenges of coming up with same.

The next chapter will seek to unravel the interface between beneficiation legislation and protection of foreign investments.

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<sup>103</sup> Hausmann et al (n 17 above) 5.

<sup>104</sup> Hausmann et al (n 17 above) 5.

<sup>105</sup> Deloitte (n 72 above) 7.

## CHAPTER 4

### THE INTERFACE BETWEEN BENEFICIATION LAW AND PROTECTION OF FOREIGN INVESTMENTS

#### 4.1 Introduction

In chapter 3, the concept of beneficiation was explored and the controversial debate surrounding it was interrogated. The origin of the concept was traced to the Staples Thesis and the conclusion was that beneficiation is about value addition to minerals to enhance their value. In addition, it was stated that beneficiation as a concept can be understood from two perspectives: downstream or side-stream.

This chapter seeks to explore the interface between beneficiation law and protection of foreign investments. It attempts to provide an answer to the question ‘what are the likely impacts of enactment of beneficiation legislation on protection of foreign direct investments?’ In so doing, it attempts to strike a balance between the powers of the state to regulate investments in its territory and affording foreign investments the required minimum protection.

#### 4.2 Foreign investment defined

The term investment has been attributed various meanings in different Bilateral Investment Treaties (BITs). There is no definition of investment in the International Convention for Settlement of Investment Disputes (ICSID). One is inclined to believe this was a deliberate move to enable parties to an investment agreement to agree as to what would be deemed an investment in their circumstances. However, there is consensus to the effect that the word “investment” has an ‘inherent common meaning.’<sup>106</sup> The ‘salini test’ is perhaps more illustrative on this point. In this case, it was held that there would be an investment if four elements are satisfied.<sup>107</sup> These are, a contribution, certain duration, participation of risk involved, and lastly, there must be economic development in the host state.<sup>108</sup>

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<sup>106</sup> *Pantechniki v. Albania* Award (30 July 2009) para 46.

<sup>107</sup> *Salini v. Morocco* (23 July 2001).

<sup>108</sup> *Salini* (n 107 above).

Sornarajah defines foreign investment as “transfer of tangible and intangible assets from one country to another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.”<sup>109</sup>

### 4.3 The powers of states to regulate foreign investments

State sovereignty is a concept that is well accepted under international customary law. It is not surprising therefore that states have continued to retain exclusive control and the power to regulate the investments within their borders. The right of states to regulate foreign investments has been reiterated in a number of international instruments.<sup>110</sup> States have the right to control admission of foreign investors and investments under customary international law.<sup>111</sup> Article 2 of the Charter of Economic Rights and Duties of States (CERDS) provides that states have the right to ‘regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.’<sup>112</sup>

The host state thus can employ controls necessary to derive the desired benefits from its exclusive power over foreign investments in its territory thereby retaining its policy space. The argument is that states should be allowed to regulate onshore foreign investments and external encroachment of such would be interference with state sovereignty. This is better explained in India’s submission to the WTO, when it stated that ‘...developing countries, therefore, need policy space so that they can determine for themselves how the process of economic development can be speeded up and the welfare of their citizens enhanced. This also includes the policy space to determine the manner in which investment shall be regulated and channeled...’<sup>113</sup>

It has been argued that regulation of investments from entry to exit is particularly seen to be essential to developing countries, as such right lies with the host state.<sup>114</sup>

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<sup>109</sup> M Sornarajah *The International Law on Foreign Investment* (2010) 4Cambridge University Press, London.

<sup>110</sup> See UN GA Res. 1803 (XVII) (1962), GA Res. 3281 (XXIX) (1974), GA Res. 3201 (1974).

<sup>111</sup> Gerard Kreijen ‘The Definition of Investment and Aspects of Nationality Planning’ (7 March 2014) University of Amsterdam Guest lecture.

<sup>112</sup> Article 2 CERDS 1964.

<sup>113</sup> Submission by India to the WTO WGTI (October 2002).

<sup>114</sup> Sornarajah (n 109 above) 276.

## 4.4 International minimum standards of protection of foreign investments

Foreign investments can be protected in numerous ways within the host state. International investment law requires that foreign investments should not be arbitrarily interfered with, through amongst other things, legislation enactments. The right of the state to regulate investments in their countries and the protection of foreign investments should always be balanced. Below is a discussion of protection measures available to foreign investments both existing and potential investments.

### 4.4.1 Protection of existing investments

#### 4.4.1.1 Compensable expropriation

Gradual enactment of legislation detracting from foreign investments can be said to be tantamount to creeping expropriation. Creeping expropriation is a form of indirect expropriation. Indirect expropriation refers to ‘measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights.’<sup>115</sup> Creeping expropriation has been defined as the ‘slow and incremental encroachment on one or more of the ownership rights of a foreign investor that diminishes the value of its investment. The legal title to the property remains vested in the foreign investor but the investor’s rights of use of the property are diminished as a result of the interference by the state’.<sup>116</sup>

Section 8 of the Constitution of the Republic of Botswana provides that expropriation should be adopted for public purposes, in accordance with the applicable law and it should be against compensation.<sup>117</sup> It follows therefore that should beneficent law be found to have interfered with foreign investments, the state would be liable to give prompt and adequate compensation. The Constitution and the BITs entered into by Botswana allow foreign investors redress in the local courts should they feel

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<sup>115</sup> *Middle East Cement Shipping and Handling Co. v. Egypt* (2002) ICSID Case No. ARB/99/6 (2002) para. 107.

<sup>116</sup> P Leon ‘Creeping Expropriation of Mining Investments: An African Perspective’ (2009) *Journal of Energy & Natural Resources Law* vol 27 No 4.

<sup>117</sup> Section 8 Constitution of Botswana 1966.

aggrieved by the state's acts.<sup>118</sup> International law is also clear that an injured (investor) state is entitled to reparations for the internationally wrongful acts committed against it.<sup>119</sup>

However, international law is not yet settled on the distinction between non-compensable regulations which are to be considered as falling within the purview of the police or regulatory power of the state and thus permissible and on the other hand measures that actually deprive foreign investors of their property rights and thus unlawful and compensable.<sup>120</sup> Beneficiation unlike nationalisation, does not seek to take away foreign investments but to ensure mineral value addition onshore by investors. It is highly unlikely that such a measure can be found to be interfering with the rights of the investors.

#### **4.4.1.2 Fair and Equitable Treatment (FET)**

The origins of FET can be traced to the Havana Charter for International Trade Organisation (ITO).<sup>121</sup> In terms of the Havana Charter, Article 11 (2), foreign direct investments in host countries are to be accorded FET.<sup>122</sup> FET is a customary international law standard and thus not prerogative of the host state.<sup>123</sup> This is an absolute and non-contingent standard of treatment.<sup>124</sup> The standard is not without problems. It has been accorded various interpretations by scholars and investment tribunals. The bone of contention is whether 'the standard of treatment required is measured against the customary international law minimum standard, a broader international law standard including other sources such as investment protection obligations generally found in treaties and general principles or whether the standard is an autonomous self-contained concept in treaties which do not explicitly link it to international law.'<sup>125</sup> Nevertheless, this is a debate for another day.

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<sup>118</sup> See BIT between Botswana and China or Luxembourg.

<sup>119</sup> *Hungary v Slovakia (Gabcikovo-Nagymaros Project)* (1997) ICJ Reports 7 para 152.

<sup>120</sup> *Saluka Investments BV v. Czech Republic* (2006) Partial Award.

<sup>121</sup> 1948

<sup>122</sup> This standard has been reiterated in numerous BITs, the 1985 MIGA Convention, Lome IV Convention for the ACP and the EEC.

<sup>123</sup> *Mondev International Ltd v. United States of America* (11 October 2002) ICSID Case No.ARB(AF)/99/2.

<sup>124</sup> OECD 'Fair and Equitable Treatment Standard in International Investment Law' (September 2004) 2

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<sup>125</sup> OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2005).



The standard is all host states are required under international customary law to accord foreign investments FET protection. Lack of due diligence and due process, including denial of justice, violation of legitimate expectations and arbitrariness are elements which depict a violation of the FET standard.<sup>126</sup> Some tribunals have extended and broadened the standard further and thus found that lack of good faith and transparency to be tantamount to FET standard violation.<sup>127</sup>

Consequently, the argument for enactment of beneficiation legislation in Botswana is not to frustrate foreign investments. Clearly, Botswana has no reputation for such. In any event foreign investments will be accorded the FET standard under international customary law, or better still, under the various treaties or BITs entered into.

#### 4.4.1.3 Full Protection and Security (FPS)

The host state is expected to provide full security and protection for foreign investments. It is believed that this standard is firmly anchored in customary international law.<sup>128</sup> It is a well established principle of customary international law that a violation of this standard results in invocation of the responsibility of the host state.<sup>129</sup> The host state's obligation is to ensure full protection of foreign investments from adverse effects.<sup>130</sup> Unlike FET, FPS is not absolute. The standard required of the host state is not that of strict liability but exercise of due diligence.<sup>131</sup> Thus, the host state is only required to take all measures necessary and reasonable in the circumstances.<sup>132</sup>

Historically, FPS was limited to protection of the investor against physical violence.<sup>133</sup> This position has developed over the years. It is now believed that the 'duty of protection and security extends to providing a legal framework that offers legal protection to investors. Substantive provisions protecting investments and appropriate procedures enabling investors to vindicate their rights are now envisaged

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<sup>126</sup> Sornarajah (n 109 above) 349-359.

<sup>127</sup> *Maffezini v. Kingdom of Spain* (November 2000) ICSID Award No ARB/97/7.

<sup>128</sup> Sornarajah (n 109above) 359

<sup>129</sup> Sornarajah (n 109above) 359.

<sup>130</sup> C Schreuer 'Investments, International Protection' para52.

[http://www.univie.ac.at/intlaw/wordpress/pdf/investments\\_Int\\_Protection.pdf](http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf)

<sup>131</sup> Schreuer ( n130 above) para 55.

<sup>132</sup> *Noble Ventures Incorporation v Romania* (October 2005) ICSID Award para164.

<sup>133</sup> *Saluka* (n 120 above).

under FPS.’<sup>134</sup> The jurisprudence has developed to cover any unlawful infringement of foreign investors’ rights.<sup>135</sup> Changes of legislation with the effect of substantially interfering with foreign investments have also been brought under the purview of this standard.<sup>136</sup>

From the foregoing, should enactment of beneficiation legislation be found to substantially alter the rights or make their investments vulnerable, the investors would have recourse against such violations.

#### **4.4.1.4 Non-arbitrariness**

The host state is further under an obligation not to exert foreign investments to arbitrary measures. The *Elettronika* case held that a measure is arbitrary if it is done with ‘willful disregard of due process of law, an act which shocks or at least surprises, a sense of judicial propriety’.<sup>137</sup> An arbitrary measure would therefore have to be one which is despotic and derived from mere opinion and capricious.<sup>138</sup>

Surely, proportionate and reasonable measures cannot be said to be arbitrary. Should the investors establish that enactment of beneficiation legislation is arbitrary and done with wilful disregard of the law then the government of Botswana would have failed in its responsibility to offer investors non-arbitrary environment.

#### **4.4.1.5 Non-discrimination**

Non-discrimination envisages two limbs, namely national treatment (NT) and Most Favoured Nation (MFN). Non-discrimination is not limited to nationality.<sup>139</sup> Case-law reveals that state conduct would be discriminatory if ‘similar cases are treated differently and without reasonable justification.’<sup>140</sup>

With respect to NT, the *United States-Mexico Claims Commission* held that ‘when aliens are admitted into the host state they should be accorded the degree of protection of life and property consistent with the standards of justice recognized by the law of

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<sup>134</sup> C Shreuer ‘Full Protection and Security’ (2010) 10 Journal of International Disputes Settlement.

<sup>135</sup> *Azurix Corporation v Argentina* Award (July 2006) para 406.

<sup>136</sup> *CME v Czech Republic* (September 2001) Partial Award para 613.

<sup>137</sup> Paragraph 128.

<sup>138</sup> *Siemens AG v Argentina* Award (February 2007).

<sup>139</sup> *Campbell v. Zimbabwe* (2008) SADC Tribunal Award.

<sup>140</sup> *Saluka* (n 120 above).

nations.’<sup>141</sup> In NT a comparison to be made is between the foreign investor and local investors engaged in the same business.<sup>142</sup> Discrimination will be found to exist if these two investors are treated differently in like circumstances.<sup>143</sup>

The MFN is not an obligation for host states under customary international law.<sup>144</sup>

#### **4.4.1.6 Diplomatic protection**

Diplomatic protection is ‘the invocation by a state, through diplomatic action or other means of peaceful dispute settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.’<sup>145</sup>

Diplomatic protection is premised on the notion that injury to nationals of one state is basically an injury to that state and hence a state taking up the matter for its national is actually asserting its own right.<sup>146</sup> The disadvantage with this however, is that there is no obligation on the part of the national state to take up the matter on behalf of its injured national.

### **4.4.2 Protection of potential investments**

In addition to the safeguards above, potential investors can firmly secure their investments in a number of ways. Well drafted BITs which insist on having internationalized foreign investment contracts to ensure substantial detachment from the whims and caprices of the host state are desirable. For instance, dispute settlement is through a clause on independent arbitration, choice of law and even investment insurance, should be pursued vigorously.

#### **4.4.2.1 Internationalisation of investments agreements**

Sornarajah postulates that placing an investment agreement on an immutable and supranational system detached from the host state is vital for protection of foreign

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<sup>141</sup> 1917-1926.

<sup>142</sup> Sornarajah (n 109 above) 337.

<sup>143</sup> Sornarajah (n 109 above) 337.

<sup>144</sup> Schreuer (n 130) para 71.

<sup>145</sup> Article 1 of the draft Articles on Diplomatic Protection, 2006.

<sup>146</sup> *Mavrommatis Palestine Concessions Case* (1924) PCIJ Series No 2.

investments.<sup>147</sup> Such agreements tend to be more stable as the host state cannot tamper with them.<sup>148</sup> The popular belief is that internationalized contracts somehow neutralize the ability of the host state to interfere with foreign investments.<sup>149</sup> Greater protection is attained if foreign investments removed from the host state's legislative powers.

#### **4.4.2.1.1. Independent arbitration**

Strengthened arbitration clauses on BITs offer better safety valves. Settlement of investment disputes should also be removed from the internal sphere of the host state. The local courts tends to be biased towards the host state should the investment dispute be placed before its judiciary. It would seem a neutral settlement mechanism is to be sought. Independent arbitration can offer sufficient protection to foreign investments. This argument is neatly articulated by Brower. He posits thus:

By and large, parties to international transactions choose to arbitrate eventual disputes not because arbitration is simpler than litigation, not because it is cheaper, not because it is 'final and binding' and therefore substantially unreviewable, and not because arbitrators may have greater relevant expertise than national judges, although any of those factors may be of interest; they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party's state of nationality.<sup>150</sup>

#### **4.4.2.1.2 Choice of law clause**

This is anchored on the principle of party autonomy, where parties are free to determine which law is to govern their contracts. Contracts governed by some other law other than that of the host state are advisable. Party autonomy gives the parties an opportunity to adopt some neutral legal system to govern the investment contract. This may bring about some stability in the investment agreement.

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<sup>147</sup> Sornarajah (n 109 above) 289.

<sup>148</sup> Sornarajah (n 109 above) 289.

<sup>149</sup> Sornarajah (n 109 above) 289.

<sup>150</sup> C.N. Brower *Introduction in International Arbitration in the 21<sup>st</sup> Century* (1994) (R.B. Lillich & C.N. Brower eds.).

#### 4.4.2.1.3 Investment insurance

Outwards investments are usually exposed to more risks as opposed to when investors invested in their countries. As a result, it is always prudent to take investment insurance to cushion any risks that are likely to affect their investments offshore.

#### 4.5 Striking the balance

States coming up with beneficiation regulations need to proceed cautiously lest they be found to be interfering with investors' rights. They should always be aware not to substantially encroach into foreign investments.

The primary question really is whether enactment of beneficiation legislation in Botswana can be equated to creeping expropriation or any other unlawful interference with foreign investments? Justice Brennan identified three factors which determine whether the foreign investment is being interfered with.<sup>151</sup> He states that one is to look at the governmental actions; the economic impact of the regulation and the extent to which the regulation has interfered with distinct investment-backed expectations.<sup>152</sup> Nevertheless, sight is never lost of the host state's right to regulate foreign investments and not to confuse this with indirect expropriation.<sup>153</sup>

From the foregoing, one thing remains clear, beneficiation unlike nationalisation or expropriation does not seek to infringe on foreign investments and as such should not be equated to any of the latter measures. Indeed, enactment of beneficiation legislation may have an effect on existing foreign investments. The sole impact is an obligation to do more by beneficiating locally. For potential investors, this would mean 'be prepared, the bar has been raised higher.'

#### 4.6 Conclusion

This chapter examined the interface between beneficiation legislation and protection of foreign investments. It established that a balance is to be struck between the powers of states to regulate the foreign investments within its territories and protection of same. The power to

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<sup>151</sup> *Penn Central Transportation Co. v New York City* (1978) US Reports.

<sup>152</sup> *Penn Central Transportation Co.* (n 151 above).

<sup>153</sup> *Renée Rose Levy de Levi v Republic of Peru* (February 2014) ICSID Case No. ARB/10/17.

regulate the foreign investments still lies with the host state. This power has been recognized in a number of international instruments such as the CERDS and the General Assembly Resolution 1803 (XVII) (1962) on permanent sovereignty over natural resources.

A discussion on cushioning foreign investments from arbitrary measures such as expropriation and nationalisation ensued. The international minimum standards of protection of foreign investments were laid down. The discussion of these standards was not in any way an admission that enactment of beneficiation law could interfere with foreign investments. It was merely to illustrate the fact that the investors' rights are secure, but should an interpretation be reached, which is highly unlikely that beneficiation is tantamount to creeping expropriation then investors still have recourse against the state.

As said earlier on in the study, Botswana does not have any foreign investment law and has concluded only four BITs.<sup>154</sup> She is thus highly dependent on its past dealings and track records with foreign investments which are unimpeachable.<sup>155</sup> Interviews and independent surveys have always singled Botswana as one of the shining examples of Africa and corroborate her adherence to the rule of law for contract and property rights protection.<sup>156</sup> Consequently, any conclusion that beneficiation legislation is likely to scare away investors, with due respect, is without basis.

The next chapter seeks to establish if there are any lessons to be learnt from South Africa and Indonesia on enactment of beneficiation legislation.

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<sup>154</sup> Kluwer arbitration website. <http://www.kluwarbitration.com/>.

<sup>155</sup> Investment Policy Review Botswana (2003) 38 United Nations Conference on Trade and Development Investment.

<sup>156</sup> Investment review (n 155above) 38.

## CHAPTER 5

### LESSONS FROM SOUTH AFRICA AND INDONESIA

#### 5.1 Introduction

In the last chapter, the interface between beneficiation law and protection of foreign investments was explored. It attempted to provide an answer to the question of the likely impacts of enactment of beneficiation legislation on protection of foreign direct investment. In pursuit of this objective, attempt was made to strike a balance between the powers of the state to regulate investments in its territory and according foreign investments the required minimum protection. It was argued that the power to regulate the foreign investments still lies with the host state.

This chapter investigates whether or not there are any lessons to be learnt from South Africa and Indonesia respectively. It further highlights and assesses the beneficiation regulatory regime in these jurisdictions before offering concluding remarks.

#### 5.2 Lessons from South Africa

The economic development in South Africa has always been possible due to its mining industry.<sup>157</sup> Mining remains at the heart of South Africa's economy, as a result it's a sector that has always been prioritized.<sup>158</sup> It is ranked fifth in the world, following China, USA, Australia and Brazil, and one of the richest in terms of in-situ mineral resources which are estimated at around US\$2, 5 trillion, with more than a century remaining in terms of exploitable life.<sup>159</sup>

South Africa is committed to promotion of downstream beneficiation.<sup>160</sup> It has a beneficiation strategy of 2011.<sup>161</sup> The objective of this strategy is to transform the country's sheer comparative advantage to a national competitive advantage through legislation.<sup>162</sup> It identifies

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<sup>157</sup> SAIMM (n 70 above) 270.

<sup>158</sup> SAIMM (n 70 above) 271.

<sup>159</sup> P Leon 'SA's Mining Industry in Decline: An analysis' (1 September 2010).

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654/page71656?oid=196410&sn=Detail&pid=71616> (accessed 23 March 2014).

<sup>160</sup> SAIMM (n 70 above) 271.

<sup>161</sup> South Africa's Beneficiation Strategy (2011).

<sup>162</sup> Beneficiation strategy (n 161 above) 6.

ten strategic mineral commodities.<sup>163</sup> In this regard, beneficiation can be said to be sector specific as the strategy targets only a handful minerals.

Worth mentioning is the fact that the strategy is based on already existing legislations.<sup>164</sup> These incentives, policies and legislation are identified as instruments necessary as an enabling environment for beneficiation.<sup>165</sup> Some of these instruments include the Minerals and Mining Policy for South Africa,<sup>166</sup> the Minerals and Petroleum Resources Development Act (MPRDA),<sup>167</sup> the Broad-Based Socio-economic Empowerment Charter (BBSEE),<sup>168</sup> the Precious Metals Act<sup>169</sup> and the Diamonds Second Amendment Act.<sup>170</sup>

A closer glance at and review of some of these instruments is warranted.

### **5.2.1 The Mineral and Petroleum Resources Development Act of 2002 (MPRDA)**

This is Botswana's MMA equivalent. Section 3 of this Act can be equated to section 3 of Botswana's MMA, in that both acts require the Ministers to ensure sustainable development of mineral resources.<sup>171</sup> However, the MPRDA, unlike the MMA, goes further than that. The MPRDA has a section dedicated to beneficiation, a provision the MMA lacks. In fact, section 26 of this Act stipulates that the Minister may prescribe ways promoting beneficiation in South Africa, acting on the advice of the Board, if such a move would be economical.<sup>172</sup> The Act provides that no external beneficiation is to occur without a written notice and consultation with the Minister.<sup>173</sup>

Through section 26 it has been possible to pursue beneficiation of minerals and petroleum in South Africa. The South African government has been pushing for further amendments to the Act for three years and this was finally achieved in March

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<sup>163</sup> Beneficiation strategy (n 161 above) 6.

<sup>164</sup> SAIMM (n 70 above) 272.

<sup>165</sup> Beneficiation strategy (n 161 above) 6.

<sup>166</sup> 1998.

<sup>167</sup> Act 26 of 2002.

<sup>168</sup> 2004.

<sup>169</sup> 2005.

<sup>170</sup> 2005.

<sup>171</sup> Section 3 MPRDA.

<sup>172</sup> Section 26 (1)-(2) MPRDA.

<sup>173</sup> Section 26 (3) MPRDA.



2014.<sup>174</sup> This places South Africa in a somewhat stronger position compared to Botswana. A section 26 equivalent or better in the MMA would enable Botswana to ensure beneficiation of its precious diamonds.

### 5.2.2 The South African Mining Charter of 2004 (BBSEE)

In terms of this Charter mining companies are to bind themselves to identify their current levels of beneficiation and to further make it known to what stages of beneficiation they can go.<sup>175</sup> It would appear they are to agree to state to what extent they are able and willing to take local beneficiation to.

The Charter makes it possible for these companies to offset the value of the level of beneficiation achieved by the company against its Historically Disadvantaged South Africans (HDSA) ownership commitments.<sup>176</sup> The latter objective can be understood by recourse to the objectives of the Charter. One of the objectives of this Charter is to ensure that the HDSA participate in the nation's mineral resources wealth. As a result, some level of beneficiation in these mining companies can be compromised and allowed provided the HDSA are part of these companies. One thing remains clear, the aim is to have South Africans participate in nation's mineral resources.

### 5.2.3 The Diamonds Amendments Act

The Diamonds Act of 1986 was amended in 2005. The aim behind the amendment was to enhance access of rough diamonds for jewellery manufacturing locally, as well as facilitate beneficiation of diamonds.<sup>177</sup> Chapter II, Part 1 of the Amendment Act is more illustrative in that it introduces South Africa's Diamond and Precious Metals Regulator.<sup>178</sup> According to the Act the Regulator is to ensure that the diamonds are exploited and developed in a manner that is beneficial to the nation and also ensure equitable access and local beneficiation promotion.<sup>179</sup> The Regulator is also expected

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<sup>174</sup> D McKay 'SA Parliament Approves MPRDA Amendments' *Miningmx* 6 March 2014. <http://www.miningmx.com/page/news/markets/1640257-SA-parliament-approves-MPRDA-amendments#.UOLoZ2bNtdg> (accessed 27 March 2014).

<sup>175</sup> Clause 4.8 BBSEE.

<sup>176</sup> Clause 4.8 BBSEE.

<sup>177</sup> DMR 'Economics of Beneficiation in SA' (12 July 2013) <http://www.dmr.gov.za/beneficiation-economics.html> (accessed 24 February 2014).

<sup>178</sup> Section 3 (1).

<sup>179</sup> Section 3 (1) (a)-(b).

when evaluating applications of interested investors to ensure equitable access to and local beneficiation of the diamonds.<sup>180</sup> Also, introduced in the Act is the definition of beneficiation, as the ‘polishing of diamond or the setting of a diamond in a tool in an article or in jewellery’.

Botswana does not have the equivalent Diamond Act. Instead the industry is regulated by the MMA. It does however, have the Diamond Cutting and Polishing Act which is incomparable to the South African Act in that none of the Botswana Acts mention beneficiation in clear, concise and explicit terms let alone in an evasive manner.

#### **5.2.4 The Precious Metals Act**

The objective of this Act is to provide for the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals.<sup>181</sup> Just like the Diamonds Amendment Act it establishes and sets out the objects of the Regulator in the exact same terms as the latter Act.<sup>182</sup> It further provides for the issuance and renewal of precious metal beneficiation license.<sup>183</sup> This license is basically issued to those who can display ability to beneficiate the precious metals. This position, also, compared to Botswana legislation is progressive in that issuance of licenses is only made to those with the ability to beneficiate locally.

### **5.3 Lessons from Indonesia**

#### **5.3.1 Background to the Indonesian mineral and mining law**

Indonesia’s mining system was traditionally based on Contracts of Work (CoW), established in 1967.<sup>184</sup> CoW is basically an agreement between the Indonesian government and the investor company, which company should be incorporated in Indonesia.<sup>185</sup> Such a contract would set out the rights and obligations of the parties concerning mining operations.<sup>186</sup> This contract was specific, in the sense that it applied to a certain designated mining area, known

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<sup>180</sup> Section 5 (1) (a).

<sup>181</sup> Act No.37 of 2005.

<sup>182</sup> Section 2 (a) and (b).

<sup>183</sup> Section 8 (1) (b).

<sup>184</sup> PwC ‘Mining in Indonesia: Investment and Taxation Guide’ (April 2012) 33 4<sup>th</sup> ed. [www.pwc.com/id](http://www.pwc.com/id) (accessed 1 April 2014).

<sup>185</sup> PwC (n 184 as above).

<sup>186</sup> PwC (n 184 as above).

as the contract area.<sup>187</sup> The investor company had exclusive authority in the contract area, responsible for the management and all mining activities in the area.<sup>188</sup> Interestingly, the law governing CoWs has over the time been agreed to be *lex specialis* in consonance with the maxim *lex specialis derogate legi generali*.<sup>189</sup> As a result if there was any conflict between the provisions of the CoW and other laws or regulations, the CoW would prevail.<sup>190</sup>

The CoW system has since been abolished and replaced with the Minerals and Coal Mining Act (MCMA).<sup>191</sup> The MCMA is now the primary text regarding mineral and coal mining in Indonesia. Consideration C of this Act recapitulates Indonesian position, namely, that in light of national and international developments, CoWs are now irrelevant, but regulations and laws to ensure maximum yield, sustainable development are needed.<sup>192</sup> This Act is supplemented by a number of regulations and these also form part of the discussion below.

## 5.3.2 Analysis of the main features of the mining regulatory framework in Indonesia

### 5.3.2.1 The MCMA and its regulations

#### 5.3.2.1.1. CoWs replaced

First of all the introduction of the MCMA replaced the previous system of CoWs as captured by consideration C of the Act. This effectively revoked the law of 1967 and all its supplementary regulations on CoWs.<sup>193</sup>

#### 5.3.2.1.2 Status of CoWs

The Act provides that despite change of laws the CoWs shall remain in place and only come to an end on their expiry date.<sup>194</sup> These CoWs are to be subjected to the new law

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<sup>187</sup> Pwc (n 184 as above).

<sup>188</sup> Pwc (n 184 as above).

<sup>189</sup> H Juwana 'Amending Contracts of Work: Rectifying Past Misconstruals' *The Jakarta Post* 19 March 2014. <http://www.thejakartapost.com/news/2014/03/19/amending-contracts-work-rectifying-past-misconstruals.html>

<sup>190</sup> Juwana (n 189 above).

<sup>191</sup> 2009.

<sup>192</sup> Consideration C MCMA.

<sup>193</sup> Section 173 MCMA.

<sup>194</sup> Sections 169 (a) and 172 MCMA.

after a year of coming into effect.<sup>195</sup> Many of the CoWs are being renegotiated to ensure that they align to the beneficiation requirements. Many companies have shown willingness to renegotiate their contracts.<sup>196</sup> The law further provides aid on how these companies may transform, for instance the law makes it possible for investor under CoW to start beneficiating or to cooperate with other companies once the transition period has lapsed to attain the minimum beneficiation requirements.<sup>197</sup>

### 5.3.2.1.3 New forms of mining businesses

In terms of Article 34 of the MCMA mining businesses are classed into two, namely, mineral mining and coal mining. These mining businesses can take the form of the Mining Business Permit (IUP), Smallholder Mining Permit (IPR) or the Special Mining Permit (IUPK).<sup>198</sup> The IUP and IUPK licenses come in two different forms.<sup>199</sup> One may be for exploration purposes, general inspection and feasibility study and the other for operation production.<sup>200</sup> Investors can carry out these functions in part or as a whole, which means it is possible to have two different investors holding IUP licenses for the same contract area.<sup>201</sup> Investors would have to secure any of these licences to conduct any mining activities in Indonesia. They would then have to comply with the minimum requirements which are attached to each of them. Transition of the CoW into either of the abovementioned permits is provided for in the law.<sup>202</sup>

### 5.3.2.1.4 Distinction between categories of metals

The law distinguishes between minerals which can and cannot be exported.<sup>203</sup> The first category comprises of certain minerals which can only be exported once certain minimum requirements of processing have been met.<sup>204</sup> These minerals are listed in Annex I of the Trade Regulation, and these minerals may be exported without the

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<sup>195</sup> Section 169 (b) MCMA.

<sup>196</sup> 'Government concludes renegotiations with 25 miners' *Jakarta Post* 7 March 2014.

<http://www.thejakartapost.com/news/2014/03/07/govt-concludes-renegotiations-with-25-miners.html>

<sup>197</sup> Article 12, Permen ESDM Regulation 01 of 2014.

<sup>198</sup> Section 35 MCMA.

<sup>199</sup> Article 36 (1) and 76 MCMA.

<sup>200</sup> Article 36 (1) MCMA.

<sup>201</sup> Article 36 (2) MCMA.

<sup>202</sup> Article 112 (8) Government Regulation of the Republic Of Indonesia Number 1 Year 2014.

<sup>203</sup> Articles 2 and 3 of Permenday (Trade Regulation) 04/2014.

<sup>204</sup> Article 2 (n 203 as above).

prior approval of the Trade Minister.<sup>205</sup> Included in the first category are minerals which they are to be exported after specific minimum processing requirements have been met, the approval of the Trade Minister for each shipment is to be sought to enable their exportation.<sup>206</sup> These minerals are contained in Annex II of the Trade Regulation. The second category comprises of those metals whose exportation is totally prohibited.<sup>207</sup> These minerals are contained in Annex III of the Trade Regulation.

#### **5.3.2.1.5 Onshore beneficiation obligations**

The IUP and IUPK holders are required to increase value to the minerals explored.<sup>208</sup> In addition, guidance on beneficiation is provided through government regulations.<sup>209</sup> It would appear that flowing from the above discussion on categorization of minerals that the law is such that no minerals are to leave Indonesia in pure raw form. There are specific minimum requirements that should be satisfied before any minerals may leave the country. The minimum requirements are progressive as beneficiation requirements increase yearly.<sup>210</sup> For instance, Copper which is an Annex II metal the minimum requirement at the end of 2014 is 25%. By the end of 2015 beneficiation expected of copper processing is 40% and by end of 2016 companies are expected to beneficiate at 60%.

In fact, the law provides that as regard Annex II minerals they will only be exported until 2017.<sup>211</sup> The companies are to prepare for on-coming total export ban on Annex II minerals as well. Category two is concerned with total beneficiation onshore.<sup>212</sup> This means minerals such as bauxite and nickel which are found in Annex III can never be exported in raw form but must be processed to the last form. According to the Finance Ministry Press Release the aim is to aid acceleration of local beneficiation with construction of the processing and refining plant (smelter).<sup>213</sup>

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<sup>205</sup> Article 6 (1) (a) (n 203 as above).

<sup>206</sup> Article 6 (1) (b) (n 203 above).

<sup>207</sup> Article 2 (n 203 above).

<sup>208</sup> Section 102 MCMA.

<sup>209</sup> Section 103 MCMA.

<sup>210</sup> Press release 'Policy of Export Duty of Mineral Product' (13 January 2014) Ministry of Finance of the Republic of Indonesia Secretary General Communication and Information Services Bureau.

<sup>211</sup> Article 3 Permen ESDM Regulation 01 of 2014.

<sup>212</sup> Annex III minerals.

<sup>213</sup> Press Release (n 210 above).

### 5.3.2.1.6 Non-transferability of shares

Transferability of ownership and /or shares to third parties in the holders of IUP and IUPK is prohibited.<sup>214</sup> Transferability is only possible through the Indonesian Stock Exchange, albeit conditional upon certain stages of exploration having being achieved.<sup>215</sup> The other exception to non-transferability of ownership and/ or shares is possible through the Minister provided such transfer does not go against the legislation.<sup>216</sup>

It seems the Indonesian government has every area covered. With transfer of shares prohibited Indonesia is able to avoid situations where company ownership alters before the next expected stage of beneficiation. Should this be allowed to happen it would work against the aim of beneficiation. This is so because the on-coming shareholders will also be concerned with making money at exploration stage and leaving, and nothing really would ever materialize.

### 5.3.2.1.7 Local content obligations

There is a further obligation on the IUP and IUPK holders to ensure priority is given to locals in terms of employees and mining services generally.<sup>217</sup> They are to involve local businessmen when carrying out the operational production.<sup>218</sup> The government has been accused of being adamant not to leave anything to chance in advancing local beneficiation.<sup>219</sup> It is being attacked for having a sweeping expansion on the definition of mining services, such that even non-traditional services can be subsumed under such a provision through the MoEMR Regulation 24 of 2012.<sup>220</sup>

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<sup>214</sup> Article 93(1) MCMA.

<sup>215</sup> Article 93 (2) MCMA.

<sup>216</sup> Article 93 (3) MCMA.

<sup>217</sup> Article 106 MCMA.

<sup>218</sup> Article 107 MCMA.

<sup>219</sup> B Sullivan 'Expanding the Concept of Mining Services Provider to Include Non-Traditional Mining Services Providers: More Empire Building at MoEMR 1234' (April-may 2013) 1 Christian Teo Purwono & Partners LLP.

<http://news.mitraismining.com/Mining%20Regulations%20Documents/13WAS038%2003%20Coal%20Asia%20-%20Mining%20Industry%20Regulation%20in%20Indonesia%20-%20Mining%20Services%20-%20Article.pdf> (accessed 4 April 2014).

<sup>220</sup> Sullivan (n 219 above).

It is interesting how Indonesia is out to take every opportunity it has. Downstream beneficiation always leads to spill-over effects in other sectors. Not only does it result in mining industry boom but also boosts the services sector.

#### **5.3.2.1.8 Community development obligations**

Development and empowerment of communities where investors are based is also at the heart of this Act. The IUP and IUPK holders are to come up with programs on how to develop their various communities.<sup>221</sup> Further guidance on issues of development as required above is to be given from time to time by way of government regulations.<sup>222</sup> Mining companies have an obligation to improve the livelihoods in their area of operation.

#### **5.3.2.1.9 Divestment**

The law provides for divestment of shares from foreign parties in a sequential manner.<sup>223</sup> The MCMA provides that shares from IUP and IUPK foreign holders should resume being divested at least nine months after 5 years.<sup>224</sup> Priority is to be afforded the government, state owned company, regional government owned company or a national private company.<sup>225</sup> The divestment process is laid out in the procedures for Divestment and Share pricing Changes to Investment in Mineral and Coal Mining Business Regulation.<sup>226</sup>

This regulation provides for divestment is a progressive way such that on the tenth year of production 51% of shares are locally owned.<sup>227</sup> Companies are expected to follow this divestment procedure to the letter. Failure to comply investors risks their licenses being revoked or suspended.<sup>228</sup>

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<sup>221</sup> Article 108 MCMA.

<sup>222</sup> Article 109 MCMA.

<sup>223</sup> Article 112 MCMA.

<sup>224</sup> Article 112 (1) MCMA.

<sup>225</sup> Article 112 (1) MCMA.

<sup>226</sup> MEMR 27 of 2013.

<sup>227</sup> MEMR (n 226 above).

<sup>228</sup> MEMR (n 226 above).

### 5.3.2.1.10 Implementation of beneficiation

As aforesaid, section 103 of the MCMA provides that guidance as to how beneficiation is to be carried out will be done through Government Regulations. One such regulation is the ESDM Regulation concerning the increment added value of mineral through the activities of processing and refining or smelting mineral.<sup>229</sup> The law stipulates that IUP production operation and IUPK metal mineral production holders should process, and/or refine or smelt certain metal mineral commodities domestically.<sup>230</sup> They are expected to do the same with regard to non-metal mineral and rock mining commodities.<sup>231</sup>

Beneficiation of mineral mining commodity may be in three forms.<sup>232</sup> It may either be processing or refining specific kinds of metal mineral mining commodity with its associated minerals.<sup>233</sup> Secondly, it may be processing of specific types of non-metal mineral mining commodity.<sup>234</sup> Lastly, it may be processing of specific types of Rock mining commodity.<sup>235</sup>

Regulation 7 of 2012 further states that this required domestic beneficiation can be achieved directly by the IUP and IUPK holders or through cooperation with license holders same as theirs and this a requirement more particularly for processing and refining or smelting.

In addition, the law is to the effect that in the event the IUP and IUPK operation production holders are compelled to consider cooperation of other licence holders then they should first seek approval of the Director General on behalf of the Minister.<sup>236</sup> The regulation further allows for these holders to engage in partnerships with other entities in the event they are unable to meet domestic beneficiation on their own.<sup>237</sup> The use of the term ‘entities’ tends to suggest this is different from the latter instance where they are to collaborate with other license holders. This is cemented by

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<sup>229</sup> No 7 of 2012.

<sup>230</sup> Article 7 (1) (n 229 above).

<sup>231</sup> Article 7 (2) (n 229 above).

<sup>232</sup> Article 3 of PerMen ESDM Regulation concerning Increase of Mineral Added Value through Mineral Processing and Refining Activity Domestically.

<sup>233</sup> Article 3 (1) (a) (n 232 above).

<sup>234</sup> Article 3 (1) (b) (n 232 above).

<sup>235</sup> Article 3 (1) (c) (n 232 above).

<sup>236</sup> Article 8 (3) (n 229 above).

<sup>237</sup> Article 9 (n 229 above).



the fact that the envisaged partnership may be in the form of shares.<sup>238</sup> In this instance as well, they are expected to seek the consent of the Director General on behalf of the Minister.<sup>239</sup>

Moreover, in the event that both cooperation and partnership are not possible as discussed above due to economic reasons the IUP and IUPK operation production holders may consult the Director General.<sup>240</sup> The Director General may after conducting a feasibility study appoint other license holders to take over from the holders who are unable to discharge their mandate.<sup>241</sup>

## 5.4 Conclusion

This chapter examined the beneficiation regulatory frameworks in South Africa and Indonesia. The findings were that South Africa does not really have an over-arching beneficiation law, but rather beneficiation strategy of 2011. This strategy is anchored in various pieces of legislation as discussed above. It was possible to come up with same because these Acts already had relevant provisions on beneficiation. Although, it is visible that South Africa has achieved a milestone in terms of putting in place the right legislation to facilitate beneficiation than Botswana, it is doubtful if this strategy can be said to be a total success.

In fact, it has been said that it is questionable if the strategy in its current form is able to address the complexities faced by the mining industry in South Africa.<sup>242</sup> It is further argued that this strategy is not sufficiently drafted as it does not deter countries like China from purchasing raw materials and later beneficiate them in their home states.<sup>243</sup> Indeed, such reports are not desirable, as this means that the raw materials from South Africa are used to bolster China's economy. This is so because value addition which is usually labour intensive then occurs in China, and not South Africa as the primary producer. Nevertheless, South Africa is better placed compared to Botswana as none of her legislation come close to mentioning the word beneficiation at least.

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<sup>238</sup> Article 9 (2) (n 229 above).

<sup>239</sup> Article 9 (3) (n 229 above).

<sup>240</sup> Article 10 (1) (n 229 above).

<sup>241</sup> Article 10 (2)-(3) (n 228 above).

<sup>242</sup> SAIMM (n 70 above) 270.

<sup>243</sup> SAIMM (n 70 above) 279.

On the other hand, Indonesia has made strides in ensuring and promoting beneficiation in clear, concise manner through legislation. Although its law is relatively new, it displays commitment as a developing country towards Indonesians by enhancing their lives with their own wealth. A balance is to be struck between the interests of the government and those of investors. It is interesting to note that although Indonesia expects investors under old contracts to adjust to the new law, it did not expropriate nor nationalize their investments. On the contrary, the contracts are to remain valid until expiration, at which time they will be expected to follow the new law. This is to be commended.

Indonesia has however been accused of maximizing in every opportunity it can get. One key area pointed out is the use of local services and goods requirement. The argument is that even non-traditional mining services are covered by the law as services investors are obliged to source locally. Consequently, at all times the need for beneficiation and interests of investors should be placed on a scale of balance.

The question whether or not beneficiation law scares investors lies at the heart of this study. It has been established that beneficiation if properly legislated can be a blessing. In the case of Indonesia it appears beneficiation law did not drive away foreign investors as seems to be the Botswana policy makers' fear. In contrast, companies are rushing to set up smelters in Indonesia. Indonesia like Botswana did not have the ideal infrastructure. However, with this law in place efforts are being made to be up to par infrastructure wise.

The next chapter will offer conclusions as well as recommendations.

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Introduction

Beneficiation of minerals is an approach being pursued and adopted by nations. For instance the African Union Mining Vision has as one of its objectives beneficiation of minerals to ensure competitive advantage. South Africa too, is hard at work trying to ensure that its minerals benefit its locals as evidenced by its 2011 beneficiation strategy. The amendment of the MPRDA was recently approved to ensure efficient and effective beneficiation after three years of going back and forth.

Ensuring beneficiation through legislation, contrary to popular beliefs is not only an African phenomenon but also pursued by some Asian countries as Indonesia. Several lessons are to be learnt from Indonesian mineral beneficiation. There are no reports of investors leaving due to these pieces of legislation, in fact reports are that Australian companies are looking at how they can invest in Indonesia.

This investigation sought to find out how enactment of beneficiation legislation could impact on protection of foreign investments in Botswana and other economies which may wish to pursue beneficiation. This entailed an assessment of the accuracy of the arguments by some members of Parliament who lamented that such legislation could scare away investors both existing and potential.

Given the controversy surrounding enactment of beneficiation laws in economies such as Botswana, the questions which this study has laboured to answer are, how can policy-makers be encouraged to re-think enactment of beneficiation law in Botswana? Is beneficiation the best guarantee for the local community to benefit under Botswana's diamond mining industry, or it is just another flawed concept that will undoubtedly scare investors away?

## 6.2 Summary of conclusions

This study sought to provide an opportunity for policy-makers in Botswana to re-think enactment of beneficiation legislation in Botswana by presenting a balanced debate on the opportunities and challenges of beneficiation. The aim was to contribute to the ever-expanding literature on beneficiation law in light of its linkages to protection of foreign investments. Chapter one provided an introduction to this study.

Chapter two gave a peep into the genesis of the diamond mining industry in Botswana. It reiterated the fact that Botswana is one of the best diamond destinations in Africa and thus affectionately dubbed the ‘Switzerland of Africa’. Although the first diamond discovery was in 1967, little has been done to date to fully explore them. This can be partly attributed to the position previously maintained by De Beers, namely, that it was ideal that diamonds be exported for cutting and polishing purposes as opposed to local beneficiation.

This position has since changed, as at least twenty one companies are licensed to date for cutting and polishing diamonds purpose. The question remains, should Botswana have pushed for more? Indeed, if De Beers was pushed further more beneficiation onshore could have been attained. Findings reveal that it was not a mammoth task to move the London Headquarters to Gaborone, Botswana for purposes of ensuring cutting and polishing of diamonds.

Botswana’s beneficiation strategy is also not ambitious, enough for instance, the target is to have increased the number of cutting factories and improve training and development of the locals by 2021. What about diamond jewellery manufacturing and retailing? Furthermore, thorough perusal of diamond mining legal framework was found to be shallow and hence not pungent enough to advance full diamond beneficiation.

Chapter three discussed beneficiation in depth. It revealed that beneficiation derive its roots in the Staples Thesis as propounded by two great scholars Innis and Mackintosh. It further flagged the fact that beneficiation can be understood from two perspectives, namely, downstream or side-stream, although, study is concerned primarily with downstream beneficiation.

Moreover, a vigorous debate as advanced by various scholars on beneficiation was presented. Findings are that some see beneficiation as viable and to be pursued by countries that yearn to

translate their comparative advantage to competitive advantage. However, beneficiation is not without wrinkles as some scholars argue that it is a bad policy paradigm which is myopic and narrowly focused as it loses sight of other policies which could be more profitable.

Chapter four examined the interface between beneficiation legislation and protection of foreign investments. It established that a balance is to be struck between the powers of states to regulate the foreign investments within its territories and protection of same. The power to regulate the foreign investments still lies with the host state. This power has been recognized in a number of international instruments such as the Charter of Economic Rights and Duties of States (CERDS) and the General Assembly Resolution 1803 (XVII) (1962) on permanent sovereignty over natural resources.

A discussion on cushioning foreign investments from arbitrary measures such as expropriation and nationalisation ensued. The international minimum standards of protection of foreign investments were laid down. The discussion on these standards was not in any way an admission that enactment of beneficiation law could interfere with foreign investments. It was merely to illustrate that the investors' rights are secure, but should an interpretation be reached, which is highly unlikely that beneficiation is tantamount to creeping expropriation, then investors still have recourse against the state.

Botswana does not have any foreign investment law and has concluded only four BITs. She is thus highly dependent on her past dealings and track records with foreign investments which are unimpeachable. Interviews and independent surveys have always singled Botswana as one of the shining examples in Africa and corroborate her adherence to the rule of law for contract and property rights protection. Consequently, any conclusion that beneficiation legislation is likely to scare away investors, with due respect, is without basis.

Chapter five examined the beneficiation regulatory frameworks of both South Africa and Indonesia. The findings were that although, South Africa does not have an over-arching beneficiation law, it has a beneficiation strategy of 2011 in place. This strategy is anchored on various pieces of legislation as discussed above. Although, it is apparent that South Africa has achieved a milestone in terms of putting in place legislation to facilitate beneficiation than Botswana, it is doubtful if this strategy can be said to be a total success.

In fact, it has been said that it is questionable if the strategy in its current form is able to address the complexities faced by the South African mining industry. The argument is that

the strategy is insufficiently couched, as it leaves room for countries such as China to buy raw materials and later beneficiate them in their home states. Indeed, such reports are not desirable, as this means that the raw materials from South Africa are used to bolster China's economy. This is so because value addition which is usually labour intensive occurs in China. The writer herein is nevertheless aware that South Africa is still ahead of Botswana whose legislation does not even mention the word beneficiation.

By contrast, Indonesia has made great strides in ensuring and promoting beneficiation in clear and concise manner through legislation. Although its law is relatively new, it depicts commitment as a developing country towards Indonesians by enhancing their lives with their own wealth. A balance is to be struck between the interests of the government and those of investors. It is interesting to note that although Indonesia expects investors under old contracts to adjust to the new law, it did not expropriate nor nationalize their investments. On the contrary, the contracts are to remain valid until expiration, at which time they will be expected to follow the new law. This is to be commended. No reports of investors leaving Indonesia as a result of the law but rather more investors especially from Australia are coming in to build smelters and are willing to comply with the beneficiation requirements set.

### **6.3 Recommendations**

From the foregoing, it has been revealed that downstream beneficiation has more benefits for both the investors and the local communities. It is axiomatic that if there is no legislation in place to promote beneficiation, investors will merely take advantage of the situation, explore and beneficiate minerals offshore, thus taking employment opportunities and other side-stream benefits away from the host states. Economies such as Botswana if they continue without a law in place to aid onshore beneficiation will never take full advantage of its mineral wealth. As shown above it took Botswana very long to at least have the diamonds cut and polished in Botswana. De Beers swiftly put in place all the necessary logistics and moved its headquarters from London to Botswana. This goes on to show that if there is nothing pushing them, investors will not do more.

As a result, it is highly recommended that the government of Botswana and other similarly placed countries should see beneficiation legislation as a tool that can unlock their mineral wealth and thus contribute significantly to the development of their countries. Through

enhanced beneficiation, the government of Botswana, Botswana and the investors themselves can benefit. For the local communities as seen in the case of South Africa and more illustrative in the case of Indonesia, investors can do more for the local communities where they mine like hiring the services of the locals. Wealth is thus distributed within the community and not concentrated in the investors alone.

An argument can be put that Botswana is a developing country and thus not adequately developed nor have the skills to ensure efficient local beneficiation. It is true that Rome was not built in a day and as a result, the policy-makers need to take a leap of faith in the light of the above discussion to enact beneficiation law for diamonds in the land which will compel both existing and potential investors to build the necessary infrastructure. Transfer of skills would also be assured through such a process.

However, in enacting beneficiation legislation, the policy-makers should exercise caution to ensure there is no substantial encroachment in existing foreign investments. A balance is to be struck between the interests of the government and those of investors. For instance, Indonesia has been accused of trying to take every opportunity to maximize its beneficiation policy. One area pointed out is where the law, imposes an obligation on investors to source local services and goods to be used for mining services and operations. The argument is that the law is couched in such wide and general terms such that even non-traditional mining services are covered by the law as services which investors are obliged to source locally.

In addition, it is highly recommended that should the government of Botswana or any other state in enacting beneficiation legislation should not come up with many pieces of legislation as seen in the case of Indonesia. A single document maybe “beneficiation code,” that contains all the relevant provisions may suffice to ensure that the law is certain and easily accessible. A haphazard number of stand-alone regulations from several ministries create some level of uncertainty and confusion which is undesirable.

#### **6.4 Overall conclusion**

In conclusion, the likely impact of beneficiation legislation on foreign investments can only be an obligation to ensure more value addition to the diamonds. Contrary to the skeptics belief, this does not deflate foreign investments, rather it has the potential to enhance them as both the people of Botswana and the investors are likely to benefit from such an arrangement.

Having found no substantial negative impacts of enactment of beneficiation legislation, it is argued that beneficiation legislation is the best guarantee for local community benefits under Botswana's diamond mining regulatory regime. Beneficiation legislation is not a bad paradigm that is likely to scare away investors, but has the potential to add value to Botswana's economy.

At the conclusion of this paper it was far from clear whether the motion for beneficiation legislation in Botswana will ever find light of day again amongst the policy-makers. However, it can be safely said that beneficiation legislation is the best guarantee for Botswana's local communities, the government of the day and the foreign investors alike. It is not a flawed concept that is likely to scare the foreign investors away. The total death of that motion would be to promiscuously jeopardize the entitlements due to Botswana. We can only hope the policy-makers will re-think enactment of beneficiation legislation.

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## REFERENCES

### ARTICLES

1. Deloitte, 'Beneficiation - Creating more Value Positioning for Mineral Beneficiation Opportunity Knocks' (2011). [www.deloitte.com/](http://www.deloitte.com/) (accessed 15 August 2013)
2. Dr C Kabemba, 'Alternatives on Resource Trade and Access to Information in Africa: A Response to EU Policy on Raw Materials' (2012).
3. IC Robinson & MA Van, 'The Role of the Domestic Market in Promoting the Beneficiation of Raw Materials in South Africa' (April 1990) 2 *Journal of The South African Institute of Mining and Metallurgy*.
4. L Mbayi, 'Linkages in Botswana's Diamond Cutting and Polishing Industry' (March 2011) *MMCP Discussion Paper No. 6*, University of Cape Town and Open University.
5. MJ Morgan, 'Beneficiation -- the Pros and Cons: Is Africa Giving Away the Value of its Minerals by Exporting Them Unrefined?' (April 2013) 66 *African Business*, (01413 Issue 396). <http://web.b.ebscohost.com.proxy.uba.uva.nl:2048/ehost/detail?sid=7fc4abae-0d5e-43d4b51fe549773f816e%40sessionmgr110&vid=5&hid=117&bdata=JnNpdGU9ZWwhvc3QtbG12ZQ%3d%3d#db=buh&AN=87317182> (accessed 23 March 2014).
6. OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (September 2004) 2 *Working Papers on International Investment* (Number 2004/3).
7. OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2005) (Chapter 3, extracted from *International Investment Law: A Changing Landscape a Companion Volume to International Investment Perspectives*)
8. P Leon, 'Creeping Expropriation of Mining Investments: An African Perspective' (2009) *Journal of Energy & Natural Resources Law* Vol 27 No 4.
9. R Grynberg, 'Some like Them Rough: The future of Diamond Beneficiation in Botswana' (March 2013) 2 *Working Paper No. 142 Botswana Institute for Development Policy Analysis*. [www.ecdpm.org/dp142](http://www.ecdpm.org/dp142) (accessed 12 November 2013).

10. R Hausmann, B Klinger & R Lawrence, 'Examining Beneficiation' (2007) *Center for International Development, Harvard University*.
11. Southern African Institute of Mining and Metallurgy, 'The Rise of Resource Nationalism: A Resurgence of State Control in an Era of Free Markets or the Legitimate Search for a New Equilibrium?' (February 2012) 274 *Southern African Institute of Mining and Metallurgy*.
12. T Heersche, 'Making Mines Work Harder – Resource Nationalism Trends in Africa' (November 2011) *Who's Who Legal publication*.

## **BOOKS**

13. CN Brower *Introduction in International Arbitration in the 21st Century (1994)* (R.B. Lillich & C.N. Brower eds.).
14. KN Schefer *International Investment Law: Text, Cases and Materials* (2013) Edward Elgar Publishing.
15. M Sornarajah *The International Law on Foreign Investment* (2010) 4Cambridge University Press, London.

## **ACTS/ LEGISLATION**

16. Broad-Based Socio Economic Empowerment Charter (BBSEE)
17. Constitution of Botswana 1966
18. Diamonds Amendments Acts (South Africa)
19. Diamond Cutting Act (Botswana)
20. Exports and Import of Rough Diamonds Regulations.
21. Government Regulation of the Republic Of Indonesia Number 1 Year 2014
22. Mines and Minerals Act of 1999, Laws of Botswana.
23. Minerals and Mining Policy for South Africa (1998).
24. Minerals and Petroleum Resources Development Act (MPRDA)
25. South African Mining Charter of 2004 (BBSEE)

26. Permen ESDM Regulation 01 of 2014.
27. Permenday (Trade Regulation) 04/2014.
28. Precious Metals Act, the Diamonds Amendment Act.

## **CASELAW**

29. *Azurix Corporation v Argentina* ICSID Award (14 July 2006, para 406).
30. *Campbell v. Zimbabwe* SADC Tribunal Award (2008).
31. *CME V Czech Republic* ICSID Partial Award (13 September 2001 para 613).
32. *Gabcikovo-Nagymaros Project (Hungary-Slovakia) Judgment* I. C. J. Reports (1997) para 152.
33. *Maffezini v. Kingdom of Spain* ICSID case No ARB/97/7 Award (November 13 2000).
34. *Mavrommatis Palestine Concessions Case* (1924) PCIJ Series A No 2.
35. *Middle East Cement Shipping and Handling Co. v. Egypt* ICSID Case No. ARB/99/6 (2002) para. 107.
36. *Mondev International LTD v. United States of America* ICSID Case No. ARB(AF)/99/2 (Award) (11 October 2002).
37. *Noble Ventures Incorporation v Romania* Award (12 October 2005) paragraph 164.
38. *Pantechniki v. Albania* ICSID Award (30 July 2009) para 46.
39. *Penn Central Transportation Co. v. New York City* (US, 1978).
40. *Renée Rose Levy de Levi v The Republic of Peru* ICSID Case No. ARB/10/17 (26 Feb 2014).
41. *Salini v. Morocco* ICSID Decision on Jurisdiction (23 July 2001).
42. *Saluka Investments BV v. Czech Republic* ICSID Partial Award (2006).
43. *Siemens AG v Argentina* ICSID Award (6 February 2007).

## **NEWSPAPER ARICLES**

44. 'Ghaghoo mine nears production after Gem Diamonds hits kimberlite' *Sunday Standard* 30 January 2014. <http://www.sundaystandard.info/article.php?NewsID=18978&GroupID=3> (accessed 12 March 2014).
45. 'Okavango Diamond Company announces that it is open for business' *Mining Weekly.Com* 18 September 2013. <http://www.miningweekly.com/article/okavango-diamond-company-announces-that-it-is-open-for-business-2013-09-18>; (accessed 22 September 2013).
46. 'Local Mineral Beneficiation to Present Challenges' *Mining Weekly* 9 December 2013 <http://www.miningweekly.com/article/local-mineral-beneficiation-to-present-challenges-2013-12-09> (accessed 22 March 2014).
47. 'New Zimbabwe Law to Require Diamond Beneficiation' *The Israeli Diamond Industry Newspaper* 11 March 2013 <http://www.israelidiamond.co.il/english/news.aspx?boneid=918&objid=12692> (accessed 18 March 2014).
48. D McKay 'SA Parliament Approves MPRDA Amendments' *Miningmx* 6 March 2014. <http://www.miningmx.com/page/news/markets/1640257-SA-parliament-approves-MPRDA-amendments#.U0LoZ2bNtdg> (accessed 27 March 2014).
49. H Juwana 'Amending Contracts of Work: Rectifying Past Misconstruals' *The Jarkata Post* 19 March 2014. <http://www.thejakartapost.com/news/2014/03/19/amending-contracts-work-rectifying-past-misconstruals.html>.

## PRESENTATIONS

50. Department Mineral Resources Presentation, 'Mineral Beneficiation in South Africa' (26 Feb 2013). <http://www.pmg.org.za/report/20130226-mineral-beneficiation-south-africa-department-briefing> (accessed 14 February 2014).
51. Dr. Gerard Kreijen, 'The Definition of Investment and Aspects of Nationality Planning' (7 March 2014) University of Amsterdam Guest lecture.
52. R Baxter, 'Facilitating further Minerals Beneficiation in South Africa' (22 May 2013) 5 Presentation to GIBS Forum (Senior Executive, Chamber of Mines of South Africa) <http://www.bullion.org.za/documents/COM%20presentation%20on%20Beneficiation%2022%20May%202012%20handout.pdf> (accessed 14 March 2014).

53. R Hausmann, D Rodrik & CF. Sabel, 'Reconfiguring Industrial Policy: A Framework with an Application to South Africa' (June 2008) Paper to be presented at the 25th Celebration Conference 2008 On Entrepreneurship And Innovation - Organizations, Institutions, Systems And Regions, Copenhagen, CBS, Denmark, June 17 - 20, 2008.

54. Press release 'Policy of Export Duty of Mineral Product' (13 January 2014) Ministry of Finance of the Republic of Indonesia Secretary General Communication and Information Services Bureau.

## MISCELLANEOUS

55. 'All about Botswana', Pangolin Diamonds, Corp. <http://www.pangolindiamondscorp.com/about-botswana.php> (accessed 29 February 2014).

56. Ashurst LLP, International Investment Protection, ref: 9095252 June 2010. [www.ashurst.com](http://www.ashurst.com)

57. African Union Mining Vision (2009).

58. B Sullivan 'Expanding the Concept of Mining Services Provider to Include Non-Traditional Mining Services Providers: More Empire Building at MoEMR 1234' (April-may 2013) 1 Christian Teo Purwono & Partners LLP. <http://news.mitraismining.com/Mining%20Regulations%20Documents/13WAS038%2003%20Coal%20Asia%20-%20Mining%20Industry%20Regulation%20in%20Indonesia%20-%20Mining%20Services%20-%20Article.pdf> (accessed 4 April 2014).

59. Beneficiation law may scare away investors, Ministry of Trade and Industry website, dated 18/02/13. [WWW.GOV.BW](http://WWW.GOV.BW) (accessed 20 August 2013).

60. Beneficiation Strategy for the Minerals Industry of South Africa, Department of Mineral Resources, South Africa (June 2011).

61. Botswana Annex, SACU-Botswana, Trade Policy Review, WT/TPR/S/222/BWA, Bank of Botswana (2009), p. 87.

62. Botswana Diamond Plc 'Botswana Diamond Fact Sheet' (6 June 2013) 2. [www.botswanadiamonds.co.uk](http://www.botswanadiamonds.co.uk) (accessed 15 March 2014).

63. Canadian Encyclopedia. <http://www.thecanadianencyclopedia.com/articles/staple-thesis> (accessed 10 February 2014).
64. ‘Diamond Exploration in Elephant Country’ Botswana Diamond Plc (10 October 2011) 4. [www.botswanadiamonds.co.uk](http://www.botswanadiamonds.co.uk).
65. DeBeers Managing Director interview in 2001, Even-Zohar (2007).
66. DMR ‘Economics of Beneficiation in SA’ (12 July 2013) <http://www.dmr.gov.za/beneficiation-economics.html> (accessed 24 February 2014).
67. Dept. of Mineral Resources’ Strategic Plan (2010/11 – 2011/13).
68. Draft Articles on Diplomatic Protection (2006).
69. European Commission ‘Country Level Evaluation Botswana’ (December 2009) 11 Final Report Volume 1 Main Report Mining.
70. Investment Policy Review Botswana (2003) United Nations Conference on Trade and Development Investment.
71. J Helmer, ‘ALROSA Attacks African Diamond Beneficiation’ <http://johnhelmer.net/?p=289> (accessed 4 March 2014).
72. M Dundek, ‘Diamonds’ [http://www.notablequotes.com/d/diamonds\\_quotes.html](http://www.notablequotes.com/d/diamonds_quotes.html). (Accessed 16 September 2013).
73. Minerals Processing and Beneficiation (MP&B) Transformation, Development and Growth Charter, (June 2010).
74. Ministry of Minerals, Energy and Water Resources, Botswana Mineral Investment Promotion (2008).
75. P Leon ‘SA’s Mining Industry in Decline: An analysis’ (1 September 2010). <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654/page71656?oid=196410&sn=Detail&pid=71616> (Accessed 23 March 2014).
76. Pwc ‘Mining in Indonesia: Investment and Taxation Guide’ (April 2012) 33 4th ed. [www.pwc.com/id](http://www.pwc.com/id) (accessed 1 April 2014).
77. South Africa’s Mineral Industry Report (2008/2009).

78. The Sustainable Growth and Meaningful Transformation of SA 's Mining Industry)'s Commitment NO. 5.

79. White Paper 'A Minerals and Mining Policy for South Africa' (October 1998) 30. Available at [http://www.polity.org.za/polity/govdocs/white\\_papers/minerals98.html](http://www.polity.org.za/polity/govdocs/white_papers/minerals98.html) (accessed 12 January 2014).