

**EVALUATING MINERAL REVENUE TRANSPARENCY IN ESWATINI AGAINST THE EXTRACTIVE
INDUSTRIES TRANSPARENCY INITIATIVE**

by

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ABSTRACT

In June 2007, the Government of Eswatini in its “Poverty Reduction Strategy and Action Plan” (PRSAP) committed to exercising fiscal prudence; prioritizing expenditures; improving infrastructure; human capital investment; removing obstacles to private investment, and implementing a conducive taxation system. In terms of the PRSAP, Eswatini aimed to ultimately eradicate poverty by 2022.

However, Eswatini has been struggling to make judicious use of its natural resource wealth as a vital engine for sustainable economic growth that contributes to sustainable development and poverty reduction. To counteract this problem, the Government — in its National Strategic Roadmap 2019/2022 — called upon the Ministry of Natural Resources and Energy (MNRE) to unlock the mining sector and enhance economic activity within the country. While the targeted average contribution of the mineral sector to the gross domestic product (GDP) is 0.1 percent by 2022, scant information is available about the performance of the mining sector and its contribution to the country’s GDP. Due to the COVID-19 pandemic, the African Economic Outlook report of 2021 indicates that the economy of Eswatini has contracted by an estimated 3.2% in the year 2020 – after growing by 2.2% in 2019. It also states that investment has weakened in Eswatini. In terms of the Central Bank of Eswatini’s (CBE) “Annual Integrated Report 2019/2020”, all sectors reportedly recorded slower economic activity compared to the previous year.

Therefore, it is not surprising that Eswatini was also among the jurisdictions that were excluded from the Fraser Institute’s 2020 annual survey of mining companies – a strong indicator that the country’s mining regulatory regime is unstable and deters investment. Confirming this, the “World Bank Ease of Doing Business Report” of 2020, reflects that Eswatini occupies number 121 in the world rankings, while the Government had tasked the Ministry of Commerce, Industry and Trade (MCIT) to improve the country rankings in the World Bank Ease of Doing Business index from 123 to 50 by 2022.

Against this backdrop, this study examines the general and sectoral laws relating to the mining sector in Eswatini. In particular, the study examines the regulatory framework in light of the Extractive Industries Transparency Initiative (EITI). It appraises the extent to which the

country's mining laws embed transparency and accountability – which are key pillars of the EITI.

The findings of the study suggest that the current mining legal framework does not sufficiently promote the degree of transparency and accountability required within the 2019 EITI Standard. The findings further indicate that the general and sectoral laws do not require companies in the mining sector and the government to publish and publicly disclose payments made and account for mining revenue received.

The findings support recommendations that Eswatini should consider adopting the EITI to address the existing oversights relating to transparency and accountability in the country's extractives sector. The study further supports the integration of the EITI Standard into the sectoral legislation dealing with mining, revenue and tax regimes, safety and health, and environmental regulation.

Keywords: Extractive Industries Transparency Initiative (EITI); extractives industry; transparency and accountability; COVID-19; Eswatini.

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“I can do all things through Christ who strengthens me,”

(Apostle Paul in Philippians 4:13)

LIST OF ACRONYMS

AFS	Annual Financial Statements
AG	Auditor General
AGM	Annual General Meeting
CBE	Central Bank of Eswatini
CG	Commissioner General
ECC	Environmental Compliance Certificate
EEA	Eswatini Environmental Authority
EEF	Eswatini Environment Fund
EIA	Environmental Impact Assessment
EIPA	Eswatini Investment Promotion Authority
EITI	Extractive Industries Transparency Initiative
EMA	Environmental Management Act 5 of 2002
ERA	Eswatini Revenue Authority
EY	Ernst & Young
FC	Finance Committee
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
ICSID	International Convention for the Settlement of Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
IFRS	International Financial Reporting Standards
IPA	Investment Promotion Act 1 of 1998
IR	Integrated Reporting
ITO	Income Tax Order 21 of 1975 (as amended)
JSE	Johannesburg Stock Exchange
KPCS	Kimberly Process Certification Scheme
MCIT	Ministry of Commerce Industry and Trade
MMA	Mines and Minerals Act 4 of 2011

MMB	Minerals Management Board
MNRE	Ministry of Natural Resources and Energy
MSGs	Multi-Stakeholder Groups
MSIs	Multi-Stakeholder Initiatives
NRGI	Natural Resource Governance Institute
NWA	National Water Authority
OECD	Organisation for Economic Cooperation and Development
OSH	Occupational safety and health
OSHA	Occupational Safety and Health Act 9 of 2001
PAC	Public Accounts Committee
PRSAP	Poverty Reduction Strategy and Action Plan
PWYP	Publish What You Pay
RGI	Resource Governance Index
SEZs	Special Economic Zones
UNCITL	United Nations Commission on International Trade Law
VAT	Value Added Tax Act 12 of 2011

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CHAPTER 1: INTRODUCTION

1.1. Background to the research problem

The Government of Eswatini has, in the country's "National Strategic Roadmap 2019-2022", called upon the Ministry of Natural Resources (MNRE) to unlock the mining sector to enhance economic activity within the country.¹ The Government also acknowledged that Eswatini had not been fully exploiting its membership in economic formations to attract investment inflows and improve exports.² In particular, mineral resources have not been fully exploited.³ Consequently, the contribution by the sector to the gross domestic product (GDP) of Eswatini is limited.⁴

As part of its public accountability and responsibility to a broad range of stakeholders, the Central Bank of Eswatini (CBE) annually publishes its "Integrated Annual Report"⁵ and "Annual Economic Review Report."⁶ The latter report contains a brief summary of the mining industry. According to the Annual Economic Review Report for 2018-2019, the mining and quarrying subsector performed poorly in 2018.⁷ The report also noted that gold mining, after two years of operational challenges, was gaining stability. Apart from that, the Mining Department of

¹ See *The Kingdom of Eswatini Strategic Roadmap: 2019-2022*. Available at: <http://www.gov.sz/images/CabinetMinisters/STRATEGIC-ROADMAP-2018-2023---MAY-2019.pdf> (last accessed 18 September 2021), at 23.

² *Idem.*, at 6.

³ *Ibid.*

⁴ Thomas, G *Swaziland: Mining, minerals and fuel resources*, (2012). Available at: <https://www.azomining.com/Article.aspx?ArticleID=81> (last accessed 18 September 2021). Thomas also reports that Eswatini's proven and known mineral resources include coal, asbestos, diamond and gold deposits, talc and quarry stones. Gold, diamond, coal, kaolin and silica are the chief economically beneficial minerals.

⁵ The "Integrated Annual Report" provides a holistic account of the CBE's strategy, performance and outlook and its ability to create and sustain value. See, for example, the CBE's (2018/2019 Integrated Annual Report). Available at: <https://www.centralbank.org.sz/about/annual/2018-2019.pdf> (last accessed 18 September 2021), at 5.

⁶ The "Annual Economic Review Report" provides the broader economic context on the global and domestic economy to the CBE's stakeholders (i.e., the public and the economic policy community). Available at: <https://www.centralbank.org.sz/about/annual/2018-2019ERR.pdf> (last accessed 18 September 2021), at 1.

⁷ Available at: <https://www.centralbank.org.sz/about/annual/2018-2019ERR.pdf> (last accessed 15 September 2021), at 26 (para. 3.3.4).

the MNRE publishes general information about the mining industry in Eswatini.⁸ As a result, scanty information about the performance of the sector and its impact on the economy is available. There appears to be no peremptory requirement on the part of all the stakeholders to be publicly accountable for mining revenue.

Releasing transparent information about the extraction of mineral resources and how the revenues derived therefrom are expended could enhance economic activity in the country. Access to information can empower the citizens of Eswatini to monitor the quality of government services and the use of public resources.⁹ However, in the absence of transparency and accountability in respect of the revenue derived from mining activity, sustainable development based on resource riches cannot be achieved.¹⁰

In order to secure revenue transparency, many countries have voluntarily opted for compliance and candidacy under the Extractive Industries Transparency Initiative (EITI).¹¹ According to Friedman, membership under the EITI engenders a variety of benefits to both the countries and companies.¹² Compliant and candidate countries use their membership to strengthen the investment climate.¹³ Membership under the EITI serves as a signal to investors and financial institutions that there will be increased transparency, accountability and governance.¹⁴ To the companies and investors, the major advantage is that doing business in EITI compliant countries reduces political and reputational risk – thus decreasing the cost of risk insurance.¹⁵ The general public enjoys easy access to information readily

⁸ See the Eswatini Government website under the Ministry of Natural Resources and Energy (Mining Department). Available at: <http://www.gov.sz/index.php/departments-sp-623334762/84-natural-resources-a-energy/natural-resources-a-energy/405-mining-department> (last accessed 18 September 2021).

⁹ B.K. Sovacool *et al*, "Energy governance, transnational rules, and the resource curse: Exploring the effectiveness of the Extractive Industries Transparency Initiative (EITI)", *World Development* 83 (2016): 179-192, at 180.

¹⁰ N. Barma, K. Kaiser, and T. Minh Le (eds), *Rents to riches?: The political economy of natural resource-led development*, (World Bank Publications, 2012), at 1.

¹¹ See Sovacool *et al* (2016), *supra* n.9, at 181.

¹² A. Friedman, "Operationalizing the Rio principles: Using the success of the extractive transparency initiative to create a frame work for Rio implementation", *University of Botswana Law Journal* 12 (2011): 73-86, at 74.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

available in the public arena through transparency.¹⁶ Membership under the EITI also engenders benefits associated with greater foreign direct investment (FDI).¹⁷

Despite the many advantages associated with membership under the EITI, it has been argued that there is no compelling evidence to suggest that the EITI has an overwhelming advantage as a global norm.¹⁸ Some scholars argue that the EITI plays an insignificant role in affecting key governance and development indicators.¹⁹ To buttress the point, four explanations are advanced by scholars. First, they submit that the EITI is constrained by a limited mandate.²⁰ The scholars also argue that since the EITI is voluntary, it is non-binding.²¹ They further argue that public and private actors often resist EITI implementation.²² Finally, it is also argued that the EITI appears unable to catalyse strong civil society institutions.²³

Notwithstanding the above, it appears that the benefits of the EITI outweigh its failures. The consensus among scholars is that the initiative has benefitted governments.²⁴ It is argued that the EITI has enabled governments to follow a globally recognized transparency standard that signifies a commitment to reform and anti-corruption.²⁵ The publication of EITI reports has strengthened public knowledge about extractive industries and established a foundation for improvements.²⁶

1.2. Aim and objectives of the study

The study aims to analyse the present Eswatini mining legal framework to determine whether it can accommodate the principles of the EITI. In particular, whether such integration can

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ N. Andrews, "A Swiss-Army Knife? A Critical Assessment of the Extractive Industries Transparency Initiative (EITI) in Ghana", *Business and Society Review* 121.1 (2016): 59-83, at 60.

¹⁹ See Sovacool *et al* (2016), *supra* n.9, at 186.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ B.K. Sovacool, and N. Andrews, "Does transparency matter? Evaluating the governance impacts of the Extractive Industries Transparency Initiative (EITI) in Azerbaijan and Liberia", *Resources Policy* 45 (2015): 183-192, at 184. See also S.A. Rustad, B.L. Philippe and P. Lujala, "Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals", *Resources Policy* 51 (2017): 151-162, at 151; and Friedman (2011), *supra* n.12, at 75-76.

²⁵ *Ibid.*

²⁶ *Ibid.*

promote transparency and accountability in respect of revenue derived from mining activities in the country.

To achieve the aim of the study, the research will be supported by certain objectives. These objectives will be dealt with consecutively in the substantive chapters, and include:

- To determine how transparency and accountability can contribute to economic growth. This is important within the context of the research because it will demonstrate why transparency and accountability could enhance economic activity within the mining sector in Eswatini.
- To determine what the EITI and its principles entail. The nature and principles of the EITI will be examined in detail to determine how the initiative can assist Eswatini to secure transparency and accountability with respect to mining revenue.
- To determine what the current legal framework governing the mining sector in Eswatini entails, particularly as it provides for transparency and accountability.
- To determine whether any deficiencies in the legal framework may be present, particularly as it relates to transparency and accountability in the extractives sectors.

1.3. Research Questions

1.3.1. Primary question:

The primary question associated with this study is whether the mining law in Eswatini reflects the transparency and accountability principles espoused by the EITI.

1.3.2. Secondary questions:

To facilitate addressing the primary question, the study will consider a series of secondary questions related to underlying concepts and criteria. These secondary questions will be addressed in the substantive chapters of this study, and include:

- How does transparency and accountability in the mining sectors contribute to economic growth?
- What do the EITI and its principles entail?
- What does the current legal framework in Eswatini entail with respect to transparency and accountability in the mining sector?

- What are the deficiencies, if any, in the legislative framework with respect to transparency and accountability in the mining sector?

1.4. Research methodology

1.4.1. Methodology

The research methodology employed in this study constitutes a desktop legal analysis of established primary legal sources in Eswatini. These sources include general and sectoral laws applying to the mining sector in Eswatini, as well as selected government policy documents. In order to identify how the EITI operates and how revenue reporting is conducted, secondary sources — including journal articles, books, dissertations and other articles — will also be analysed. The analysis will be done from a socio-legal perspective.

Botswana’s mining legal framework has been used as an example because, according to the Fraser Institute’s survey, it has a stable mining regulatory regime adequately promoting transparency and accountability. Besides that, SA has also been used as an example of a country promoting these aspects through its integrated reporting system. It is hoped that the study will help and motivate Eswatini to consider adopting and joining the EITI as an implementing member country –to make good use of its natural resource wealth for sustainable development and poverty reduction.

1.4.2. Parameters of study

Although there is a wealth of illuminating research on the EITI globally, the study is limited to the salient aspects of the initiative; particularly how it promotes transparency and accountability in respect of natural resource wealth in the mining sector has been used. The evaluation of the EITI principles was only limited to the general and sectoral laws relating to mining in Eswatini – and not the petroleum sector. As a result, this study did not consider the Petroleum Act.²⁷ The dissertation also does not consider any development of the mining law that occurred after 30 August 2021.

²⁷ Act 18 of 2020.

1.5. Relevance of the study

This study contributes to the body of academic knowledge concerning responsible resource regulation and management, and will serve as a useful foundation for future research in higher-degree studies. The findings of the study are noteworthy, since very little critical academic research has been done on the EITI, transparency and accountability and its relevance to mining revenue transparency in Eswatini.

1.6. Chapter exposition

The dissertation comprises six chapters. The substantive part of this study will commence in Chapter 2. This chapter will explore transparency and accountability, and how both can contribute to economic growth and affect foreign direct investment (FDI). A particular focus will be placed on Botswana since it is rated by the Fraser Institute as one of the best countries in Africa with policies based on best practices and a fully stable mining regime. A focus will also be placed on South Africa since its mining sector has attracted valuable FDI for many years.²⁸ South Africa will also be considered as it is regarded as a pioneer of Integrated Reporting²⁹ (IR), has secured transparency and accountability in respect of mining revenue within the extractive industries.³⁰

Chapter 3 will focus on the EITI and what its principles entail. This chapter will also examine how the 2019 EITI Standard has permitted flexible reporting of data, and how this has facilitated transparency and accountability.

Chapter 4 will examine the current legal framework in Eswatini, particularly as it relates to the mining sector. In this chapter, the general and sectoral laws relating to mining will be discussed in connection with other domestic laws dealing with environmental matters, water,

²⁸ P.P. Silima, "Fact sheets on mining sector industry in Southern Africa-Mozambique and South Africa", *Иновации и инвестиции* 2 (2020): 61-65, at 61.

²⁹ A. Marrone, and L. Oliva, "The Level of Integrated Reporting Alignment with the IIRC Framework: Evidence from South Africa", *International Journal of Business and Management* 15.1 (2020): 99-108, at 99.

³⁰ See the Ernst & Young report (2018) at 16. Available at: <http://integratedreportingsa.org/ircsa/wp-content/uploads/2018/08/ey-excellence-in-integrated-reporting-awards-2018.pdf> (last accessed 15 February 2021). See also N.N. Zulu, *Integrated reporting in the South African mining sector and the King Report IV on Corporate Governance 2016*. Diss. University of Pretoria, 2018, at 7 – 18.

tax and investment. The objective being to determine to what extent the domestic legal framework provides for transparency and accountability.

Chapter 5 will seek to determine whether there are deficiencies within the current legal framework with respect to mining. In other words, it will analyse whether the existing laws adequately promote transparency and accountability principles in comparison to the EITI principles. A discussion of the provisions of the law relating to the disclosure of information and revenue accountability will be made.

Finally, the study will conclude in Chapter 6 by summarising the findings of the study and addressing the primary question of the dissertation.

CHAPTER 2: TRANSPARENCY AND ACCOUNTABILITY AND THEIR CONTRIBUTION TO ECONOMIC GROWTH

2.1. Introduction

The objective of this chapter is to examine the question of how transparency and accountability can contribute to economic growth and affect FDI of a resource-rich country. Accordingly, Section 2.2 will examine the foundational concepts of transparency and accountability, followed by a discussion of the benefits associated with these concepts in Section 2.3. In turn, Section 2.4 will analyse the established benefits of these concepts, as well as some of the common challenges associated therewith. In this context, specific reference will be made to Botswana and South Africa to demonstrate how both countries have secured transparency and accountability within their respective jurisdictions. The chapter will conclude in Section 2.5 by reflecting on the findings of this chapter.

2.2. Contextualising transparency and accountability

According to Abdulatova, transparency and accountability are essential principles of good governance in the extractive industries sector.³¹ The principle of transparency requires that decisions should be taken and implemented in accordance with the rules and regulations in the existing legal framework.³²

Transparency must be implemented through legal instruments, in particular concerning the decision-making to extract; licensing procedures; establishment of experienced and non-corrupt institutions with clear mandates in the regulation and monitoring of operations; and

³¹ N. Abdulatova, *Transparency in the extractive industries sector as a legal tool for strengthening good governance: The EU's approach*, (No. 01/2021. Discussion Paper, 2021), at 8. See also J.C. Quiroz, "Measuring up to Transparency and Accountability Standards: Challenges and Opportunities for Effective Governance." *Transparent Governance in an Age of Abundance: Experiences from the Extractive Industries in Latin America and the Caribbean* (2014): 39-76, at 41.

³² *Ibid.*

transparent revenue management.³³ It is therefore clear that transparency applies to all the stages along the extractive industries value chain.³⁴

Although it is often argued that transparency may not necessarily lead to accountability,³⁵ it is generally accepted that accountability is the central purpose of transparency.³⁶ This means that transparency should be translated into accountability.³⁷ Accountability cannot be enforced and observed without a principle of transparency being applied. Transparency in the form of increased information disclosure by the government and companies in the extractive industries unavoidably leads to enhanced accountability and reduced corruption.³⁸

The concept of transparency can be applied to both the private and public sectors.³⁹ In respect of the public sector, it is connected with the open democratic values of state accountability and public participation.⁴⁰ In the private sector, it is regarded as the fundamental solution for guaranteeing the proper performance of financial markets.⁴¹ Therefore, transparency and accountability addresses both developmental failures and democratic deficits.⁴²

It is clear that transparency, as applicable in both sectors, endorses the element of the active participation of all the relevant stakeholders through multi-stakeholder initiatives (MSIs).⁴³ The MSIs contribute innovatively to improving the social situation of people and communities involved in mining by integrating various stakeholders to tackle sustainability issues together.⁴⁴

³³ *Idem.*, at 9.

³⁴ P.D. Cameron, and M.C. Stanley, *Oil, gas, and mining: A sourcebook for understanding the extractive industries*, (World Bank Publications, 2017), at 222.

³⁵ *Idem.*, at 233.

³⁶ *Idem.*, at 234.

³⁷ *Idem.*, at 236.

³⁸ A. Ejiogu, C. Ejiogu, and A. Ambituuni, "The dark side of transparency: Does the Nigeria extractive industries transparency initiative help or hinder accountability and corruption control?", *The British Accounting Review* 51.5 (2019): 100811, at 3.

³⁹ T.M. Van Straaten, *Partners not adversaries: adopting the EITI towards effective collective governance to improve the extractive industry in South Africa*, (Diss. University of Pretoria, 2016), at 10.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² J. Gaventa, and R. McGee, "The impact of transparency and accountability initiatives." *Development Policy Review* 31 (2013): s3-s28, at s4.

⁴³ See Van Straaten (2016), *supra* n.39, at 8.

⁴⁴ P.C. Sauer, and M. Hiete, "Multi-stakeholder initiatives as social innovation for governance and practice: A review of responsible mining initiatives", *Sustainability* 12.1 (2020): 236, at 2.

transparency and accountability have been described as “cross-cutting topics” in the extractive industries value chain – since these concepts apply to all stages.⁴⁵ The lack of transparency at any stage of the extractive industries value chain causes the spread of misinformation.⁴⁶ This then spreads mistrust in the management of the natural resources sectors.⁴⁷ In such circumstances, the inevitable consequence is instability leading to conflict.⁴⁸

2.2.1. *Indicators for measuring transparency and accountability*

In 2013, the Natural Resource Governance Institute (NRGI) published the Resource Governance Index (RGI) to define and measure transparency and accountability in the oil, gas and mineral sectors.⁴⁹ The RGI describes resource governance as the presence of rules and mechanisms to promote transparency and accountability.⁵⁰ The indicators include core elements such as the publication of reports about mining operations and fiscal revenue; competitive bidding for exploration and production licenses and the existence of protections against arbitrary power and conflict of interest.⁵¹ Other indicators include corruption, budget transparency, accountability and democracy.⁵²

The RGI evaluates legislation and rules that limit discretionary power, promote the disclosure of periodic and timely information, and prevent conflicts of interest. In other words, in order to establish the level of transparency and accountability in the context of the RGI, the general and sectoral laws in a country’s mineral regulatory framework should promote the disclosure and publication of information about mining operations. In addition, it should promote the disclosure of revenue by the governments and companies in the extractive industries sector and prevent the misuse of mining revenue through corruption.

⁴⁵ See Cameron & Stanley (2017), *supra* n.34, at 222.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ See Quiroz (2014), *supra* n.31, at 40.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

2.3. Reported benefits of Transparency and Accountability

2.3.1. Benefits of transparency

Transparency primarily ensures Government effectiveness, since it could be a major contributor to public policy effectiveness and proficiency.⁵³ It has been argued that public scrutiny based on transparency can prevent wasteful expenditure and encourage the development of the required institutional capacity.⁵⁴ It also reduces the risk of corruption and rent-seeking.⁵⁵ Both corruption and rent-seeking are said to be prevalent in resource revenue management and allocation.⁵⁶

Apart from that, it encourages information disclosure. To achieve this, Cameron and Stanley submit that there should be clearly defined company requirements for timely and detailed reporting to regulators and the local community.⁵⁷ The company requirements should be accompanied by public reporting of obligations and related performance; public debate and dialogue; and the government provision of regulatory requirements that can lead to performance improvement.⁵⁸

Moreover, Cameron and Stanley further submit that these concepts promote democracy. In this regard, it is argued that transparency plays a fundamental role in building more stable and accountable institutions to overcome the poor governance that characterises most monocratic regimes.⁵⁹ It further promotes fundamental human rights, particularly the right to access to information.⁶⁰ In the event that the right of access to information is not missing or is not enforced, it has been argued that the resource curse plagues the extractive industries

⁵³ See Cameron & Stanley (2017), *supra* n.34, at 223.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* See also Ejiogu *et al* (2019), *supra* n.38, at 3.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Idem.*, at 224.

⁶⁰ *Ibid.*

progress across the value chain.⁶¹ As such, transparency can be regarded as promoting democratic debate about policies and priorities, and enriching political development.⁶²

In turn, accountability within political institutions ensures that leaders or authorities concentrate on reforming the sector and curtails their ability to “engage in substantial rent-seeking.”⁶³ Accountability provides people an opportunity to participate in the decision-making process and removes the temptation on the part of the authorities to hide revenues.⁶⁴

2.3.2. *Challenges to transparency*

Despite the many advantages of transparency and accountability, it is also reported that entrenched interests and corruption is reportedly the chief obstacle to the progress on transparency.⁶⁵ Even though transparency and accountability seeks to prevent conflicts of interest and promote revenue transparency in the extractive sector, corruption defeats the whole purpose of transparency and accountability. The interplay between the two is that, while transparency and accountability contributes to fighting corruption, the latter can pervert the former when payments and revenues received are squandered and not disclosed by companies and governments for public consumption and scrutiny.

However, it is submitted that transparency and accountability still support the contemporary idea of collective governance in the mining resources sector.⁶⁶ They both allow for stakeholder participation in the extractive industries value chain. It is therefore submitted that transparency, accountability and stakeholder participation are the major contributory factors to the ultimate success of collective governance.⁶⁷ It is further submitted that there can be no good governance without transparency and there can be no sustainable development without good governance.⁶⁸

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ See K. Öge, "Transparent autocracies: The Extractive Industries Transparency Initiative (EITI) and civil society in authoritarian states", *The Extractive Industries and Society* 4.4 (2017): 816-824, at 820.

⁶⁴ *Ibid.*

⁶⁵ See Cameron & Stanley (2017), *supra* n.34, at 224.

⁶⁶ Van straatén (2016), *supra* n.39, at 12.

⁶⁷ See E. Rich, and J. Moberg, *Beyond Governments: Making Collective Governance Work: Lessons from the Extractive Industries Transparency Initiative*, (Routledge, 2017), at 3.

⁶⁸ See Abdulatova (2021), *supra* n.31, at 9.

2.4. Transparency and economic growth through FDI

The mining industry plays a vital role in the global economy.⁶⁹ A vibrant mining sector should provide significant opportunities for a country's economic growth.⁷⁰ It is for that reason that the extractive industries sector is considered a primary area for investment, particularly FDI.⁷¹ The major hallmark of the extractive industries is that it creates wealth where there was no wealth.⁷² FDI within the mineral sector results in economic development.⁷³

Investment in the extractives is largely influenced by the objectives of mining regulation, perceived from two perspectives.⁷⁴ The first is the State's perspective and the other is the investors' perspective.⁷⁵ It is also undisputed that FDI has become an important source of capital globally and, even more so, in developing economies.⁷⁶ Consequently, jurisdictions with large domestic markets and/or natural resources tend to attract more FDI flows.⁷⁷

2.4.1. FDI in the perspective of the Fraser Institute's annual mining survey

The Fraser Institute notes that the impact of government policies can also play a crucial role in encouraging or discouraging investment within the mining sector.⁷⁸ The result is that countries with attractive geology and competitive policies cause exploration investment to be moved away from those with unattractive policies. In other words, as posited by Younis

⁶⁹ I. Dorin, C. Diaconescu, and D. Topor, "The role of mining in national economies", *International Journal of Academic Research in Accounting, Finance and Management Sciences* 4.3 (2014): 155-160, at 156.

⁷⁰ M. Weber-Fahr, "Treasure or trouble? Mining in developing countries, Washington DC", *International Finance Corporation, World Bank Group's Mining Department* (2002), at 2.

⁷¹ See Dorin *et al* (2014), *supra* n.69, at 156.

⁷² See Sauer & Hiete (2020), *supra* n.44, at 1.

⁷³ J. Switzer, "Armed conflict and natural resources: The case of the minerals sector", *London: International Institute for Environment and Development* (2001), at 8.

⁷⁴ H. Besada, and P. Martin, "Mining codes in Africa: emergence of a 'fourth' generation?", *Cambridge Review of International Affairs* 28.2 (2015): 263-282, at 22.

⁷⁵ L. Starke, *Breaking new ground: mining, minerals, and sustainable development: the report of the MMSD project*. Vol. 1. Earthscan, 2002, at 193.

⁷⁶ E. Loots, and A. Kabundi, "Foreign direct investment to Africa, dynamics and challenges", *South African journal of economic and management sciences* 15.2 (2012): 128-141, at 128.

⁷⁷ *Ibid.*

⁷⁸ J. Younis, and E. Aliakbari, "Annual Survey of Mining Companies 2020. Fraser Institute, Vancouver." (2021): 3. Available at: <https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2020.pdf> (last accessed 07 July 2021).

and Aliakbari, FDI largely depends on a country's mineral regulatory framework.⁷⁹ A jurisdiction with a good mineral law regime can easily attract FDI.

Loots and Kabundi observe that a good mineral regulatory framework should reflect current international best practices for the award of mining and exploration rights –to attract FDI.⁸⁰ The following section will examine how Botswana has employed best practice principles and competitive government policies to secure transparency and accountability for economic growth and to attract FDI. The section will further consider the use of integrated reporting by South African mining companies to secure transparency for economic growth and to attract FDI.

a) Republic of Botswana

According to the Fraser Institute's Mining survey results for the years 2016 to 2020, Botswana is the best country in the African continent with a stable mining regulatory regime.⁸¹ The results indicate that Botswana has a world-class regulatory environment; highly competitive taxation; no political risk or uncertainty and has a fully stable mining regime.⁸²

Botswana introduced a new Mines and Minerals Act of 1999.⁸³ The Department of Minerals, Energy and Water Resources regularly publishes the timeframe for actions. The country ensured fiscal discipline by adopting key structural reforms and political commitment.⁸⁴ As a result, the transparency of international governance indicators and the World Bank indicate that Botswana has a very high level of governance and institutional quality than most resource-rich countries.⁸⁵

⁷⁹ *Idem.*, at 31.

⁸⁰ See also the three pillars of mining sector reforms advocated by the World Bank in Starke (2002), *supra* n.75, at 178.

⁸¹ See Younis & Aliakbari (2021), *supra* n.78, at 10.

⁸² *Ibid.* See also Cameron & Stanley (2017), *supra* n.34, at 187.

⁸³ Act 17 of 1999.

⁸⁴ See Cameron & Stanley (2017), *supra* n.34, at 187.

⁸⁵ *Idem.*, at 187-188.

b) Republic of South Africa

The provisions of section 29 of the Mineral Petroleum Resources Development Act (MPRDA)⁸⁶ appear to endorse some of the principles of transparency in the extractive sector.⁸⁷ The MPRDA is supported by the fundamental right to access information embodied under section 32 of the Constitution of SA.⁸⁸ Everyone has the right to access information held by the government of SA and by any other person.⁸⁹ The right is enforced through the Promotion of Access to Information Act (PAIA).⁹⁰

It is also submitted that SA, through the integrated reporting system, has managed to secure greater transparency. According to the Ernst and Young (EY) survey on integrated reports from SA's top one hundred (100) companies listed in the Johannesburg Stock Exchange (JSE), the integrated reporting model compels juristic persons to report on their environmental impacts, employee-related issues and corporate social responsibility issues in a separate report known as a sustainability report – accompanying the financial information circulated to stakeholders.⁹¹

The integrated reports play a crucial public interest role in building market confidence and public trust.⁹² The integrated reports are also used by investors and other stakeholders to get a comprehensive picture of mining companies in SA. Since bigger companies are more exposed to scrutiny from stakeholders, transparency is a way to mitigate pressures and reduce the risk of government interference in their business activities.⁹³

Despite any criticism,⁹⁴ it is submitted that the integrated reports provided by SA companies have assisted to facilitate investment decisions of capital providers and provision of information to all other categories of stakeholders.

⁸⁶ Act 28 of 2002.

⁸⁷ See section 29 (a)-(c) of the MPRDA, 2002, *supra* n.86.

⁸⁸ Act 108 of 1996.

⁸⁹ See s 32 (1) (a) & (b) of the Constitution of SA, 1996, *supra* n.88.

⁹⁰ Act 2 of 2000.

⁹¹ Available at: <http://integratedreportingsa.org/ircsa/wp-content/uploads/2018/08/ey-excellence-in-integrated-reporting-awards-2018.pdf> (last accessed 06 August 2021) at 4.

⁹² *Ibid.*

⁹³ Marrone & Oliva (2020), *supra* n.29, at 105.

⁹⁴ See Zulu (2018), *supra* n.30, at 35.

2.5. Conclusion

In this chapter, the concepts of transparency and accountability as applicable in the extractive industries were discussed in detail, and their benefits and disadvantages were outlined.

The literature reviews reflect that these concepts apply to all the segments along the extractive industries value chain. Moreover, that transparency in the form of increased information disclosure by the government and companies in the extractive industries inevitably lead to enhanced accountability and reduced corruption.

Further, transparency and accountability should be measured using the NRGIs RGI to test whether reports about mining operations and fiscal revenue are published; and whether there is competitive bidding for exploration and production licences. Corruption, open budget and accountability and democracy are also other important indicators to be used.

In light of the above discussion, it can be concluded that transparency and accountability play a notable role in the establishment and attractiveness of resource sectors, thus contributing to economic growth. The literature review reflects that greater transparency in mineral law regulatory frameworks for countries like Botswana and SA has assisted in attracting FDI to these countries. Results published in the Fraser Institute Survey for Mining companies indicate that Botswana's mineral law regime reflect principles of best international practice and encourages FDI into the country. Apart from that, the EY's integrated reporting survey indicates that SA, through its IR has been able to ensure more transparency. It was also highlighted that the multiplier-effect of the extractive industries makes it a great contributor to economic growth.

The next chapter provides an overview of the EITI, what its principles entail. It also indicates how the EITI infuses transparency and accountability in the collection of revenues within the extractive industries.

CHAPTER 3: THE EITI AND ITS FOUNDATIONAL PRINCIPLES

3.1. Introduction

The objective of this chapter is to examine the question of what the EITI and its foundational principles entail. This enquiry relates to the main aim of the study, particularly whether the mining law in Eswatini echoes the principles of the EITI. Accordingly, section 3.2 will examine the nature and operation of the EITI; membership; the EITI Standard 2019 – followed by a discussion of the principles of the EITI. In turn, section 3.3 will discuss the reported benefits associated with the EITI as well as some of the common challenges to its implementation. The chapter will conclude in section 3.4 with a summary of the examination, and concluding thoughts to the chapter discussion.

3.2. The Extractive Industry Transparency Initiative

The EITI seeks to ensure, through good accounting and improved accountability, that revenue from company payments to resource producers go to their citizens for their human development – rather than to individuals in ruling regimes for personal or familial accumulation and aggrandizement.⁹⁵ The overall objective of the EITI is to increase transparency over payments by companies to governments and government agencies and transparency over revenues by those host state governments.⁹⁶

The Organisation for Economic Co-operation and Development (OECD) adds that the EITI is the universal standard to promote the open and accountable management of oil, gas and mineral resources.⁹⁷ Besides that, Rustad *et al* observe that it is a public-private partnership intended to assist resource-rich states to prevent corruption in the management of extractive

⁹⁵ T.M. Shaw, *Commonwealth: inter-and non-state contributions to global governance*, (Routledge, 2007), at 96. See also Van Straaten (2016), *supra* n.39, at 15-16.

⁹⁶ See Andrews (2016), *supra* n.18, at 60.

⁹⁷ OECD (2020): Promoting coherence between standards on responsible mineral supply chains: The OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-affected and High-risk areas and the Extractive Industries Transparency Initiative Standard, at 3. Available at: <https://www.oecd.org/corporate/promoting-policy-coherence-between-the-oecd-and-eiti.pdf> (last accessed 21 August 2021).

industry revenues.⁹⁸ It, therefore, came about as a result of a collaboration between extractive industry companies, civil society activists and policy makers in developing countries.⁹⁹

Scholars agree that the EITI engendered transparency and accountability within the extractive industry sector.¹⁰⁰ According to Sovacool *et al*, it brought about more transparency and accountability to the collection of revenues within the extractive industries.¹⁰¹ It has become a global standard for transparency in the extractive sectors.¹⁰² Murombo concludes that it also constitutes a transparency and accountability initiative.¹⁰³

The objectives of the EITI are demonstrated through the seven requirements listed in the 2019 EITI Standard.¹⁰⁴ The EITI Standard requires countries and companies to disclose information on the following key steps in the governance of oil, gas and mining revenues. Information disclosure should be made in respect of natural resources; contract and licences; production; revenue collection; revenue allocation; social and economic spending; and public benefit.¹⁰⁵

Below are two pictographs showing: **how the EITI works** and **how it achieves impact**:

⁹⁸ Rustad *et al* (2017), *supra* n.24, at 50.

⁹⁹ S. Aaronson, "Limited partnership: Business, government, civil society, and the public in the Extractive Industries Transparency Initiative (EITI)", *Public Administration and Development* 31.1 (2011): 50-63, at 50.

¹⁰⁰ See Cameron & Stanley (2017), *supra* n.34, at 221; Sovacool & Andrews (2015), *supra* n.24, at 185. See also P.D. Ocheje, "The Extractive Industries Transparency Initiative (EITI): Voluntary codes of conduct, poverty and accountability in Africa", *Journal of sustainable development in Africa* 8.3 (2006): 222-239, at 222.

¹⁰¹ See Sovacool *et al* (2016), *supra* n.9, at 179.

¹⁰² Rustad *et al* (2017), *supra* n.24, at 151. See also Sovacool *et al* (2016), *supra* n.9, at 179.

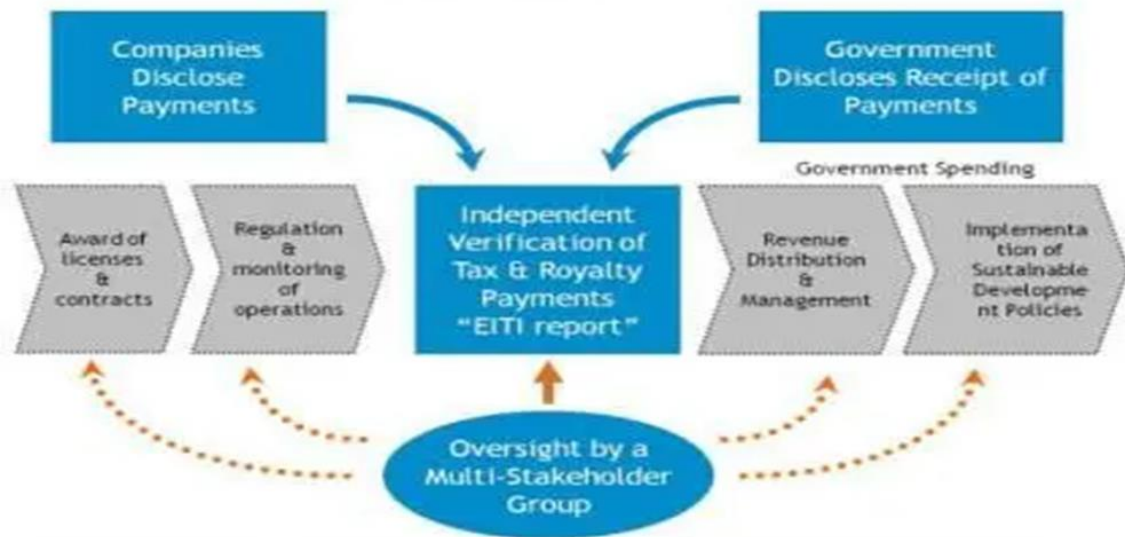
¹⁰³ See T. Murombo, "The Extractive Industries Transparency Initiative (EITI) in Zimbabwe: an appraisal of prospects and challenges", *Journal of Energy & Natural Resources Law* (2021): 1-21, at 11.

¹⁰⁴ See EITI International Secretariat, *The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources*, eds 2 (2019) at 6. Available at: https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf (last accessed 26 December 2021).

EITI Standard (2019), at 9-31. See also Van Straaten (2016), *supra* n.39, at 16.

¹⁰⁵ See: <https://eiti.org/> (last accessed 26 December 2021).

How the EITI works



The EITI provides a Forum for dialogue and a Platform for broader reforms.

Figure 1: How the EITI Works (Source: <https://mneguidelines.oecd.org/promoting-policy-coherence-between-the-oecd-and-eiti.pdf>).

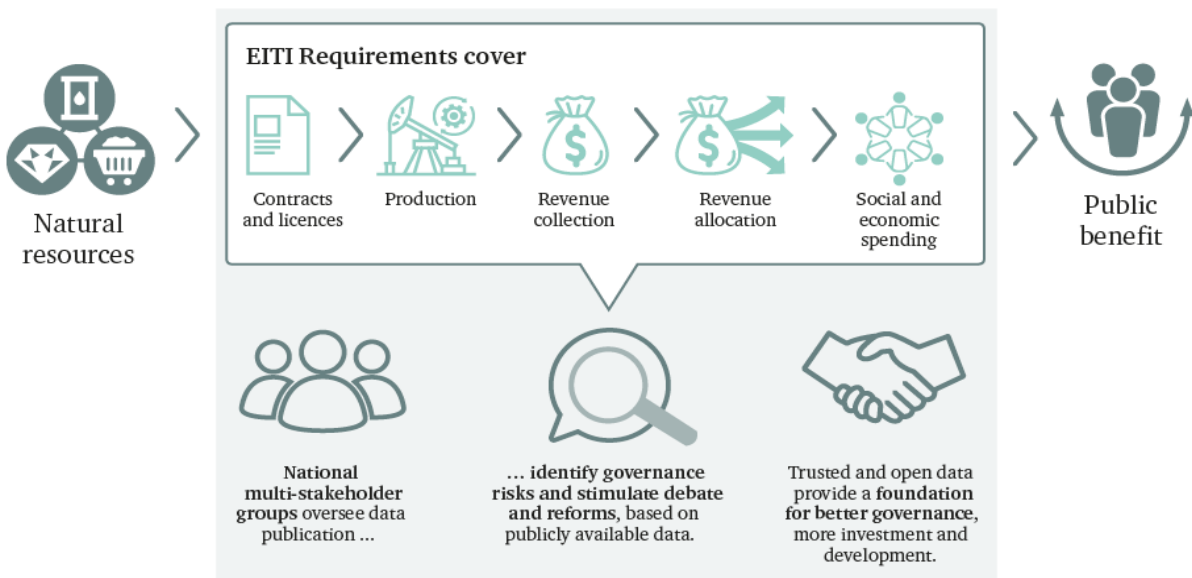


Figure 2: How EITI achieves Impact (Source: <https://www.acode-u.org/uploadedFiles/EITI2019.pdf>).

3.2.1. Operation of the EITI standard

The EITI operates exclusively in the extractive industries domain – and it is commonly accepted as the most comprehensive representation of collective governance towards

transparency and accountability in the sector.¹⁰⁶ However, there are other international norms that have contributed to the promotion of transparency and accountability in the extractive industries sector.¹⁰⁷ These are the: ‘Publish what you pay’ (PWPY) coalition; the NRGI; International Monetary Fund Guide on Resource Revenue Transparency; International Finance Corporation Social and Environmental Performance Standards; Equator Principles; International Council on Mining and Metals Principles for Sustainable Mining; UN Conventions on Human rights and corruption; and mandatory disclosure laws.¹⁰⁸

A multi-stakeholder group (MSG) – consisting of representatives from government, companies and civil society – monitors the EITI implementation and produces annual EITI reports at the national and/or subnational level.¹⁰⁹

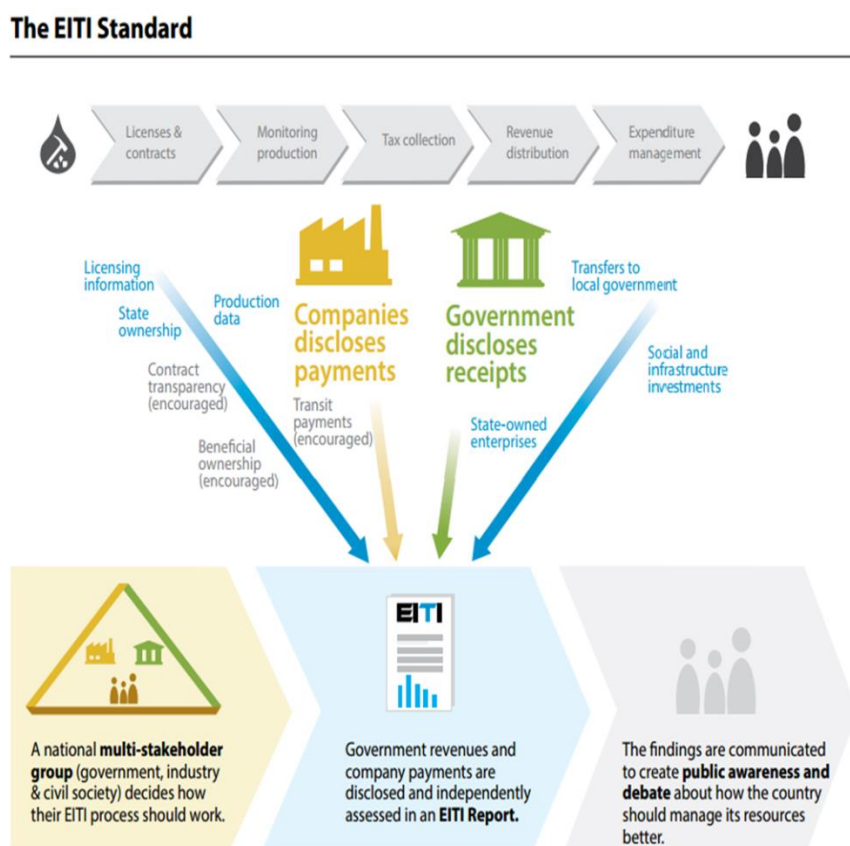


Figure 3: The EITI Standard (Source: <https://eiti.esdm.go.id/the-eiti-standard/>)

¹⁰⁶ See Van Straaten (2016), *supra* n.39, at 12. See also A. Mejia, "The impact and effectiveness of accountability and transparency initiatives: The governance of natural resources." *Development Policy Review* 31 (2013): s89-s105, at s92.

¹⁰⁷ See J. Van Alstine, "Critical reflections on 15 years of the Extractive Industries Transparency Initiative (EITI)", *The Extractive Industries and Society* 4.4 (2017): 766-770, at 769.

¹⁰⁸ *Ibid.* See also Van Straaten (2016), *supra* n.39, at 11.

¹⁰⁹ OECD (2020), *supra* n.97, at 13.

3.2.2. EITI Membership

Before applying to become an EITI implementing country, a country must undertake the following crucial steps relating to government commitment; company engagement; civil society engagement; establishment of a multi-stakeholder group and agreement on an EITI work plan.¹¹⁰ The detailed provisions are set out in the 2019 EITI Standard.¹¹¹

There are seven areas of commitment and compliance needed to ensure EITI membership.¹¹² These include effective oversight by the MSG – which should involve the government, companies and the civil society.¹¹³ Implementing countries must also disclose a clear description of the legal and institutional framework – including allocation of contracts and licenses – governing the extractive industries.¹¹⁴ There should be a disclosure of information related to exploration and production (e.g., exploration activities, production and export data).¹¹⁵

Company payments and government revenue from the extractive industries must also be fully disclosed.¹¹⁶ Information related to revenue allocations should also be fully disclosed (e.g., distribution of revenues and revenue management and expenditure).¹¹⁷ The disclosure of information in respect of revenue management and expenditures leading to the desirable social and economic and environmental impacts and outcomes is also encouraged.¹¹⁸ Lastly, the outcomes and impact disclosure requirements require that all stakeholders are engaged in dialogue about natural resource revenue management.¹¹⁹

¹¹⁰ *EITI Standard* (2019), *supra* n.104, at 7. See also V.k. Okeiyi, *Flagship or pipedream: a critical analysis of the Nigerian Extractive Industries Transparency Initiative (NEITI)*, Diss. University of Pretoria, 2016 at 20-23.

¹¹¹ *Idem.*, at 10-14.

¹¹² See Murombo (2021), *supra* n.103, at 10. See also the *EITI Standard* (2019), *supra* n.104, at 10-31.

¹¹³ See *EITI* (2019), *supra* n.104, at 10.

¹¹⁴ *Idem.*, at 15.

¹¹⁵ *Idem.*, at 21.

¹¹⁶ *Idem.*, at 22.

¹¹⁷ *Idem.*, at 27.

¹¹⁸ *Idem.*, at 29.

¹¹⁹ *Idem.*, at 31.

Once all the relevant steps have been completed, the government should submit an EITI application to the EITI Board – if the country desires to be recognized as an EITI implementing country.¹²⁰

3.2.3. *The EITI Standard 2019 – The global standard for the good governance of oil, gas and mineral resources*

The 2019 EITI Standard breaks new ground in that it advances the degree of good governance in the oil, gas and mining sector.¹²¹ It provides a framework and process for promoting greater transparency and accountability in the oil, gas and mining sectors.¹²² It is a vital document designed by the fifty-five (55) countries currently implementing it.¹²³

Unlike the previous EITI Standards, it contains a set of expectations for EITI supporting companies and provisions on environmental, social and gender impacts.¹²⁴ As of 01 January 2021, implementing countries of the EITI have been encouraged to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals.¹²⁵

3.2.4. *Principles of the EITI*

Rustad *et al* point out that the EITI Principles were approved by a group of countries, companies and civil society organisations at the Lancaster House Conference in 2003 and are the foundation of the EITI.¹²⁶ The EITI Standard contains twelve (12) principles.¹²⁷

Principle 1 entails that natural resource wealth should be used wisely as an important engine for sustainable economic growth that contributes to sustainable development and poverty

¹²⁰ *Idem.*, at 7.

¹²¹ *Idem.*, at 4.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Idem.*, at 17.

¹²⁶ See Rustad *et al* (2017), *supra* n.24, at 152.

¹²⁷ See Murombo (2021), *supra* n.103, at 9. See also *EITI (2019)*, *supra* n.104, at 6.

reduction. However, if not properly managed, this can create negative economic and social impacts.¹²⁸

Principle 2 implores sovereign governments to manage natural resource wealth for the benefit of a country's citizens to promote their national development.¹²⁹

Principle 3 emphasises that the benefits of resource extraction occur as revenue streams over many years and can be highly dependent on commodity prices.¹³⁰

Principle 4 emphasises that a public understanding of government revenues and expenditure over time could help public debate and inform the choice of appropriate and realistic options for sustainable development.¹³¹

Principle 5 underscores the importance of transparency by governments and companies in the extractive industries – and the need to enhance public financial management and accountability.¹³²

Principle 6 requires the respect of contracts and laws in order to achieve greater transparency.¹³³

Principle 7 confirms that financial transparency may bring a conducive environment for domestic and FDI.¹³⁴

Principle 8 requires Government to adopt the principle and practice of accountability to all citizens for the careful management of revenue streams and public expenditure.¹³⁵

Principle 9 requires that high standards of transparency and accountability are promoted in public life, government operations and business.¹³⁶

¹²⁸ *EITI Standard (2019)*, *supra* n.104, at 6.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

Principle 10 requires the adoption of a broadly consistent and workable approach to the disclosure of payments and revenues – which is simple to undertake and use.¹³⁷

Principle 11 underscores that payments’ disclosure in a given country should involve all extractive industry companies operating in that country.¹³⁸

Principle 12 emphasises that all stakeholders – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors and non-governmental organisations – have crucial and pertinent contributions to make.¹³⁹

In summary, all the EITI Principles endorse transparency and accountability as required by the RGI. The Principles underscore the publication of information about mining operations at all stages of the extractive industries value chain; the disclosure of payments by all companies and revenues received by governments; accountability and democracy; respect for contracts and laws as well as prevention of the misuse of natural resource wealth through corruption.

3.3. Reported benefits of the EITI Standard

3.3.1. Benefits of the EITI

There are a variety of proclaimed benefits advanced for the EITI. It is argued that the EITI enhances access to information through the creation of reliable and timely information about the oil, gas and mining sectors in a specified country.¹⁴⁰ The EITI has also enabled the achievement of governmental responsibility by aiding them to follow an internationally recognized transparency standard that indicates a commitment to reform and anti-corruption.¹⁴¹ Moreover, it increases revenue transparency through publicly available annual reports.¹⁴² It also benefits companies by creating a level playing field and enabling them to easily engage with community leaders and civil society groups.¹⁴³

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ See Sovacool & Andrews (2015), *supra* n.24, at 184.

¹⁴¹ *Ibid.* See also Murombo (2021), *supra* n.103, at 2.

¹⁴² See Rustad *et al* (2017), *supra* n.24, at 160.

¹⁴³ See Sovacool & Andrews (2015), *supra* n.24, at 184.

Apart from that, the EITI can promote economic development and reduce poverty.¹⁴⁴ It also attracts FDI in the oil, gas and mineral sector¹⁴⁵ – and beyond.¹⁴⁶ Furthermore, it encourages community dialogue which can allow citizens to become active participants.¹⁴⁷

In summary, all the benefits of EITI reflect that they promote transparency and accountability at all the stages of the extractive industries value chain – as required by the NRGIs RGI.

3.3.2. Challenges raised by the implementation of the EITI

The major reported challenges to the implementation of the EITI are said to be that it focuses only on revenues from the extractive industries.¹⁴⁸ It is also unable to track illicit financial flows.¹⁴⁹ Moreover, it is purely a voluntary approach – where governments are encouraged but not required to adhere to the principles of transparency.¹⁵⁰ In the same vein, Weak institutions in countries susceptible to corruption are also an impediment to the EITI's implementation.¹⁵¹ It also appears that the EITI has been rendered worthless by the COVID-19 crisis.

In summary, the above challenges confirm that the EITI is sector-specific and cannot be used to compel governments and companies to disclose and publish information about their activities in general. Moreover, the voluntary nature of the EITI encourages governments not to strictly comply with the requirements of transparency and accountability – thus promoting corruption and tax evasion.

Despite the reported challenges mentioned above, it is submitted that additional tools have been introduced in the 2016 and 2019 EITI Standards to counteract these challenges.¹⁵² As stated above, the 2019 EITI Standard increases the bar for good governance in the oil, gas and mining sectors – in that it contains a set of expectations for EITI supporting companies and

¹⁴⁴ See Murombo (2021), *supra* n.103, at 2.

¹⁴⁵ *Ibid.*

¹⁴⁶ See Sovacool & Andrews (2015), *supra* n.24, at 185.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Idem.*, at 186.

¹⁴⁹ *Ibid.* See also OECD (2020), *supra* n.97, at 15.

¹⁵⁰ *Ibid.* See also OECD (2020), *supra* n.97, at 15.

¹⁵¹ *Ibid.* See also OECD (2020), *supra* n.97, at 15.

¹⁵² See OECD (2020), *supra* n.97, at 15.

provisions on sustainability. Moreover, the 2019 EITI Standard has permitted flexible reporting of data that is most relevant to the stakeholders during the COVID-19 crisis. The EITI 2021 Progress Report provides more details about the EITI's response to the COVID-19 crisis.¹⁵³

3.4. Conclusion

In this chapter, the EITI and its foundational Principles were discussed in detail. It was highlighted that the EITI, as a voluntary initiative conceived by multiple stakeholders, is a global standard to promote transparency and accountability in the management of oil, gas and mineral resources. The literature review confirmed that the EITI is also another transparency and accountability initiative.

It emerged that the EITI was traditionally focussed on two core principles: to disclose and reconcile extractive industries revenues paid to and received by governments (e.g., royalties, taxes and signature bonuses); and to promote and strengthen the multi-stakeholder dialogue approach. It was also highlighted that the objectives of the EITI are outlined as the seven requirements listed within the 2019 EITI Standard.

EITI membership was also discussed. The literature review confirmed that to become an EITI implementing country, a country must undertake the crucial steps relating to government commitment; company engagement; civil society engagement; establishment of a multi-stakeholder group and agreement on an EITI work plan. That the government is then required to submit an EITI application for recognition as an EITI implementing State to the EITI Board. The EITI Board then approves the application – after satisfying itself that all the requirements have been met.

The foundational Principles of the EITI were discussed. It was highlighted that the 12 EITI Principles were agreed upon by a group of countries, companies and civil society organisations at the Lancaster House Conference in 2003 and are the cornerstone of the EITI.

¹⁵³ See: <https://eiti.org/> (last accessed 23 August 2021). The Report is available at: https://eiti.org/files/documents/en_eiti_progressreport_2021.pdf (last accessed 23 August 2021), at 6.

The potential benefits and challenges of the EITI were examined, with the literature review reflecting that, even though the EITI can attract FDI and promote economic development and transparency in the extractive sector, the COVID-19 crisis was an example of a factor that weakened this initiative. However, the 2019 EITI Standard counteracted this trend since it has permitted the flexible reporting of data that is most relevant to the stakeholders – such as the impact of COVID-19 on extractive revenues, production, exports and employment.

The next chapter examines what the current mining legal framework in Eswatini entails, particularly when considered against the backdrop of transparency and accountability. Principles 1, 2, 4, 5, 10, 11 and 12 of the EITI have been selected to analyse the laws of Eswatini.

CHAPTER 4:

MINING LEGAL FRAMEWORK OF ESWATINI: GENERAL AND SECTORAL LAWS

4.1. Introduction

The next chapter examines what the established mining legal framework in Eswatini entails, particularly when considered against the backdrop of transparency and accountability.¹⁵⁴ Accordingly, section 4.2 will examine the constitutional duty towards transparency and accountability. This will be followed in section 4.3 with an analysis of the sectoral laws associated with mining to determine how it provides for transparency and accountability – as measured by the NRGi's RGI established in Chapter 2.¹⁵⁵ In turn, section 4.4 will consider laws of general application with a bearing to mineral extraction activities, and how this intermesh with the mining law. The objective of these sections being to determine how transparency and accountability is provided for in the sector. The chapter will conclude in section 4.5 by summarising the chapter discussion and addressing the question to what extent the national framework provides for transparency and accountability.

4.2. Constitution of Eswatini

Transparency in Eswatini can be inferred from the Preamble to the Constitution,¹⁵⁶ the supreme law in the land.¹⁵⁷ The preamble underscores the need to blend the institutions of traditional law and custom with those of an open and democratic society to promote transparency – and the social, economic and cultural development of the nation.¹⁵⁸ In addition, as part of its social objectives listed under the directive principles of State policy and duties of the citizen contained in Chapter V,¹⁵⁹ the State has a duty to ensure transparency in the conduct of public affairs.¹⁶⁰ The directive principles are regarded as the guiding principles for all organs and agencies of the State, citizens, organisations and other bodies and persons

¹⁵⁴ By Legal Notice 80 of 2018, His Majesty King Mswati III of Eswatini changed the country's name from "Swaziland" to "Eswatini" – under section 3 thereof.

¹⁵⁵ See *infra*, Subsection 2.2.1., at 10.

¹⁵⁶ Act 001 of 2005.

¹⁵⁷ See s 2 (1) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁵⁸ See paragraph 5 of the Preamble to the Constitution of Eswatini, 2005, *supra* n.156.

¹⁵⁹ See secs 56 – 63 of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁰ See s 60 (12) of the Constitution of Eswatini, 2005, *supra* n.156.

in applying or interpreting the Constitution or any other law and implementing any policy decision.¹⁶¹

Further, the directive principles require the distribution of powers and functions as well as checks and balances among the different organs and institutions of Government to be supported through the provision of adequate resources for their effective functioning at all levels.¹⁶² In this regard, transparency and accountability appears to be recognised.¹⁶³

The Constitution also recognizes transparency and accountability by creating the office of the Auditor General (AG) to audit public accounts of Eswatini, all offices, courts and authorities of the Government.¹⁶⁴ However, only the AG or any person authorized by him may have access to all books, records, reports and other documents relating to those accounts.¹⁶⁵ The AG is accountable to the Minister responsible for Finance since he is required to submit reports to the Minister – who then presents those reports to both Houses of Parliament.¹⁶⁶

Furthermore, the Constitution establishes the Finance Committee (FC).¹⁶⁷ The FC is empowered to consider and report to the House on any matter relating to public finance.¹⁶⁸ Apart from that, it also establishes the Public Accounts Committee (PAC).¹⁶⁹ The PAC is empowered to examine and report to the House on the accounts of the Government as contained in the AG's reports.¹⁷⁰

There is also the Bill of Rights under chapter 3 of the Constitution, guaranteeing: equality before the law;¹⁷¹ the right to administrative justice;¹⁷² the rights of workers;¹⁷³ protection

¹⁶¹ See s 56 (1) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶² See s 56 (4) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶³ *Ibid.*

¹⁶⁴ See s 207 (1) & (3) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁵ See s 207 (3) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁶ See s 207 (5) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁷ See s 209 (1) (a) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁸ See s 209 (2) (b) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁶⁹ See s 209 (1) (b) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷⁰ See s 209 (3) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷¹ See s 20 (1) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷² See s 33 (1) & (2) of the Constitution of Eswatini, 2005, *supra* n.156. See also Murombo (2021), *supra* n.103, at 15.

¹⁷³ See s 32 (1)-(4) of the Constitution of Eswatini, 2005, *supra* n.156.

from deprivation of property;¹⁷⁴ and the security of tenure.¹⁷⁵ The Executive, Legislature, Judiciary and other organs or agencies of Government – and all natural and legal persons in Eswatini – must respect and uphold those rights.¹⁷⁶ It is submitted that the rights contained in the Bill of Rights promote the spirit of transparency desired in the Constitution – and acts as a safeguard against arbitrary power.

To ensure transparency in the making of grants, leases or other dispositions conferring rights or interests in respect of minerals or mineral oils in Eswatini, the Constitution also establishes the Minerals Management Board (MMB) to advise the King and *iNgwenyama* on the same.¹⁷⁷ The MMB comprises the Commissioner of Mines, a mine engineer, an economist, a legal practitioner and three other persons appointed by *iNgwenyama* on the advice of the Minister responsible for minerals.¹⁷⁸

4.3. Sectoral legislation

Sectoral laws focus directly and are specialized pieces of legislation that address all the requirements, obligations and rights in terms of the extractive industries. As Cameron and Stanley put it, “...the laws are sector-specific, treating hydrocarbons and mining separately, but intermeshing with other domestic laws dealing with tax, investment and environmental matters – and also any bilateral and multilateral treaties to which the state is party”.¹⁷⁹ Water protection legislation is also included. The African Mining Legislation Atlas (AMLA Guide) presents a clear and detailed picture of the mining legal framework in Eswatini.¹⁸⁰

4.3.1. *Mines and Minerals Act 4 of 2011*

The Mines and Minerals Act (MMA),¹⁸¹ provides in its preamble that it is “An Act to consolidate the law on mining and provide for the management and administration of

¹⁷⁴ See s 19 (1) & (2) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷⁵ See s 211 (3) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷⁶ See s 14 (2) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷⁷ See s 214 (1) of the Constitution of Eswatini, 2005, *supra* n.156.

¹⁷⁸ *Ibid.*

¹⁷⁹ Cameron & Stanley (2017), *supra* n.34, at 66-67.

¹⁸⁰ See the AMLA Guide at: <https://extractiveshub.org/servefile/getFile/id/7705> (last accessed 18 September 2021).

¹⁸¹ Act 4 of 2011.

minerals, mineral oils and incidental matters”. The Act also imposes an obligation on a mining licence holder to conduct mining operations in accordance with standards of good mining practice.¹⁸² Standards of good mining practice embrace transparency and accountability principles.¹⁸³ At present, the Mining Department of the MNRE is responsible for the administration of the mineral sector in Eswatini – since it receives all enquiries, applications or renewals for the minerals sector.¹⁸⁴ The Mining Department’s mandate includes enforcement of the terms and conditions of mineral rights, leases or licenses issued through the MMB for reconnaissance, prospecting and mining.¹⁸⁵

The MMA prohibits any person from carrying out reconnaissance, prospecting, and mining operations without a licence.¹⁸⁶ The Act also imposes an obligation on a mineral licence holder to register it with the Registrar of Deeds as a real right.¹⁸⁷

The MMB is accountable to the Minister responsible for mines and minerals (i.e., the MNRE) – after every six months of the beginning of each financial year about the discharge of their functions.¹⁸⁸ The report should also be submitted after the end of each financial year by the MMB to the Minister, who in turn tables it before both Houses of the Parliament of Eswatini.¹⁸⁹

The types of mineral rights that may be granted for large-scale operations include a: reconnaissance licence, prospecting licence, mining licence and retention licence.¹⁹⁰ Mineral rights may be granted subject to conditions relating to the protection of the: environment, mineral interest and protection of the lawful interest of the mineral right holder.¹⁹¹ The conditions must be endorsed on the licence, to form part of the licence.¹⁹²

¹⁸² See s 62 (a) of the MMA, *supra* n.181.

¹⁸³ See Quiroz (2014), *supra* n.31, at 41.

¹⁸⁴ See *infra* Section 1.1., fn.8 at 2.

¹⁸⁵ *Ibid.*

¹⁸⁶ See s 3 of the MMA, *supra* n.181.

¹⁸⁷ See s 4 of the MMA, *supra* n.181.

¹⁸⁸ See s 15 (1) of the MMA, *supra* n.181.

¹⁸⁹ See s 15 (2) of the MMA, *supra* n.181.

¹⁹⁰ See s 35 (a)-(d) of the MMA, *supra* n.181.

¹⁹¹ See s 25 (3) (a), (b) & (d) of the MMA, *supra* n.181.

¹⁹² See s 25 (4) of the MMA, *supra* n.181.

The holder of a reconnaissance licence is required to keep complete and accurate records of the reconnaissance operations relating to the licence.¹⁹³ The same applies to holders of a prospecting licence,¹⁹⁴ and mining licence.¹⁹⁵ The records must include financial statements and such other books of account as the Commissioner of Mines may require.¹⁹⁶ The records must be submitted to the Commissioner – as determined by him.¹⁹⁷ A reconnaissance licence may not be renewed more than twice and the term of renewal shall not exceed six months.¹⁹⁸

Further, section 63 (4) of the MMA imposes a reporting obligation on the mining licence holder. The holder is required to provide to the Commissioner of Mines an audited annual financial report at the end of each financial year that shows the profit or loss of the holder and the state of the holder's financial affairs.¹⁹⁹ An application for the renewal of a mining licence should be made by the holder not later than one year before the expiry of the term of the mining licence.²⁰⁰ The mining licence cannot be renewed more than once.²⁰¹ The term of renewal of a mining licence shall not exceed fifteen years or the forecasted remaining life of the mine.²⁰²

Part VIII of the MMA deals with the financial provisions relating to the payment of fees,²⁰³ royalties²⁰⁴ and area rental.²⁰⁵ Royalties and area rentals are all payable to the *iNgwenyama* in terms of the Act.

¹⁹³ See s 40 (1) of the MMA, *supra* n.181.

¹⁹⁴ See s 49 (1) of the MMA, *supra* n.181.

¹⁹⁵ See s 63 (1) of the MMA, *supra* n.181.

¹⁹⁶ See secs 40 (2) (d) & 49 (2) (d) of the MMA, *supra* n.181.

¹⁹⁷ See secs 40 (3) & 63 (3) of the MMA, *supra* n.181.

¹⁹⁸ See s 43 (1) & (2) of the MMA, *supra* n.181.

¹⁹⁹ See s 63 (4) (a) & (b) of the MMA, *supra* n.181.

²⁰⁰ See s 67 (1) of the MMA, *supra* n.181.

²⁰¹ See s 67 (2) of the MMA, *supra* n.181.

²⁰² See s 69 of the MMA, *supra* n.181.

²⁰³ See s 131 of the MMA, *supra* n.181.

²⁰⁴ See s 132 of the MMA, *supra* n.181.

²⁰⁵ See s 134 of the MMA, *supra* n.181.

4.3.2. *Diamonds Act 3 of 2011*

The Diamonds Act²⁰⁶ implements the Kimberley Process Certification Scheme (KPCS). The KPCS is another transparency and accountability initiative that seeks to establish minimum requirements so that member countries can certify the trade in diamonds as conflict-free.²⁰⁷ It brings together Governments, industry and civil society to prevent the flow of “conflict diamonds” – i.e., rough diamonds used by rebel groups to finance the wars they wage against the State.²⁰⁸ It provides for the control of the production, processing, sale, purchase, import and export of diamonds and other related matters.²⁰⁹

To give effect transparency and accountability, the Act provides for record-keeping and improved data collection by requiring a producer, contractor, sub-contractor, holder of a diamond prospecting licence, holder of a permit or licence, to keep a register within which all particulars in respect of rough diamonds are recorded.²¹⁰ Entries within the register should be made 24 hours after the occurrence event.²¹¹ A true copy of the register is required to be submitted to the Commissioner of Mines within 14 days after the end of each month.²¹² The register should also be retained for 5 years (at the minimum) after the date on which the last entry was made.²¹³

To ensure transparency and accountability in the exportation of conflict-free diamonds, signatories of the Kimberley Process Certificate are the Governor of the CBE; the Commissioner General (CG) of the Eswatini Revenue Authority (ERA); and the Commissioner of Mines.²¹⁴

²⁰⁶ Act 3 of 2011.

²⁰⁷ See Mejía (2013), *supra* n.106, at s92.

²⁰⁸ *Ibid.*

²⁰⁹ See Part III of the Diamonds Act, 2011, *supra* n.206.

²¹⁰ See s 13 (1) of the Diamonds Act, 2011, *supra*, n.206.

²¹¹ See s 13 (2) of the Diamonds Act, 2011, *supra*, n.206.

²¹² See s 13 (4) of the Diamonds Act, 2011, *supra*, n.206.

²¹³ See s 13 (5) of the Diamonds Act, 2011, *supra*, n.206.

²¹⁴ See s 21 (a)-(c) of the Diamonds Act, 2011, *supra* n.206.

4.3.3. Occupational Safety and Health Act 9 of 2001

The Occupational Safety and Health Act (OSHA)²¹⁵ was enacted to provide for the safety and health of persons at work and the workplace. It also provides for the protection of persons against hazards to safety and health arising in connection with the activities of persons in the workplace. To promote transparency and accountability, the Act empowers the Minister of Labour to set up a tripartite advisory technical committee – known as the Experts Committee.²¹⁶ The Experts Committee collects information on standards of occupational safety and health (OSH) in all branches of economic activities and proposes national standards.²¹⁷ It also coordinates legislation in OSH at the national level – and also recommends the creation and review of the national policy on OSH.²¹⁸

4.4. Other domestic laws interlinking with the MMA

The MMA interlink with other domestic laws dealing with tax, investment, water and environmental matters – and also any bilateral and multilateral treaties to which Eswatini is a party.

4.4.1. Environmental laws

Section 122 (1) of the MMA makes it mandatory for any person granted a mineral right to comply with environmental laws and regulations. Any holder of a mineral right may not commence large-scale mining operations unless and until the Eswatini Environmental Authority (EEA) has issued an Environmental Compliance Certificate (ECC) – endorsed by the Commissioner.²¹⁹ This is derived from the Environmental Management Act (EMA).²²⁰ The EMA proscribes any person from undertaking any project having an effect on the environment without the written approval of the EEA.²²¹

²¹⁵ Act 9 of 2001.

²¹⁶ See s 19 (1) of the OSHA, *supra* n.215.

²¹⁷ See s 19 (2) (a) of the OSHA, *supra* n.215.

²¹⁸ See s 19 (2) (b) & (c) of the OSHA, *supra* n.215.

²¹⁹ See s 125 (a) & (b) of the MMA, *supra* n.181.

²²⁰ Act 5 of 2002.

²²¹ See s 32 (1) of the EMA, *supra* n.220.

The EMA provides for and promotes the enhancement, protection and conservation of the environment – as well as the sustainable management of natural resources.²²² In this regard, the Act could promote accountability in the extractive sector by preventing companies from deserting degraded environments without rehabilitating and mining without environmental impact assessments (EIA) or water permits as well as land use permits.²²³ Though not securing total transparency in terms of revenue, the EIA can enable the public to access decisive information regarding the rights that mining companies have secured from the state, the extent of mining claims, methods used, costs involved – and the financial viability of environmental mitigation measures.²²⁴

4.4.2. *Water Laws*

The Water Act²²⁵ promotes transparency and accountability through the National Water Authority (NWA). The NWA, established in terms of section 3 of the Act, is empowered to prepare a Water Resources Master Plan containing an inventory of the total water resources of Eswatini.²²⁶ The water resources master plan also contains a detailed programme of action within which maximum value can be obtained from the water resource for the benefit of the people of Eswatini.²²⁷ During the development of the framework for the water resource plan, the NWA is obliged to consult the public.²²⁸ The Act also restricts the Water Apportionment Board from declining any application for the renewal of a permit without a valid reason.²²⁹

4.4.3. *Tax Laws*

Though directly not mentioning transparency and accountability, some provisions in the Tax laws administered by the CG of the ERA promote transparency and accountability. The Income Tax Order (ITO)²³⁰ and the Value Added Tax (VAT) Act²³¹ empower the CG of the ERA to require any person (whether or not liable for tax) by notice to provide information to him

²²² See s 4 of the EMA, *supra* n.220.

²²³ See Murombo (2021), *supra* n.103, at 15.

²²⁴ *Ibid.*

²²⁵ Act 7 of 2003.

²²⁶ See s 10 (1) & (2) of the Water Act, 2003, *supra* n.225.

²²⁷ *Ibid.*

²²⁸ See s 10 (7) of the Water Act, 2003, *supra* n.225.

²²⁹ See s 37 (2) of the Water Act, 2003, *supra* n.225.

²³⁰ Order 21 of 1975 (as amended).

²³¹ Act 12 of 2011.

in the manner and time so requested.²³² In addition, the CG or officers of the ERA authorised by him in writing, have unlimited access to taxpayers' books, records and computers – and can also seize them.²³³ The ITO also requires companies or any person to submit to the ERA Income tax returns (together with annual financial statements) for the assessment of the tax.²³⁴ Moreover, the VAT Act requires taxable persons to submit VAT returns – stating the amount of tax payable for the period, the amount of output tax and input tax – to the ERA.²³⁵ It is submitted that all these provisions have to be complied with by mining companies in Eswatini.

4.4.4. *Investment*

While not providing total transparency in terms of revenue, the information provided by the Eswatini Investment Promotion Authority (EIPA) could enable investors to access decisive choices before investing in Eswatini. The EIPA reports that the government encourages foreign and local investment in all business sectors and offers tax incentives, non-tax incentives and special economic zones incentives (SEZs) –to lessen the cost of doing business in Eswatini.²³⁶

As non-tax incentives, the government promises an “export credit guarantee scheme” provided by the CBE (granting security to loans provided by commercial banks); legal protection of investments from undue expropriation under the Investment Promotion Act (IPA)²³⁷ and Constitution.²³⁸

To promote accountability, section 21 of the IPA refers to investment disputes between the investor and government. It also recognises international investment arbitration in the settlement of investment disputes – as a safeguard against arbitrary power and conflicts of interest. In the case of an investment dispute between the government and a foreign investor, the foreign investor may elect to submit the dispute either “to arbitration under the

²³² See s 38 of the ITO, *supra* n.230 and s 53 of the VAT Act, *supra* n.231.

²³³ See s 35 of the ITO, *supra* n.230 and s 52 of the VAT Act, *supra* n.231.

²³⁴ See s 33 of the ITO, *supra* n.230.

²³⁵ See s 32 (1) & (2) of the VAT Act, *supra* n.231.

²³⁶ See EIPA website at: <https://investeswatini.org.sz/incentives/> (last accessed 01 September 2021).

²³⁷ Act 1 of 1998. See s 20 (1) & (2) – which protects investment in Eswatini.

²³⁸ See s 211 (3) of the Constitution of Eswatini, 2005, *supra* n.156.

International Convention for the Settlement of Investment Disputes (ICSID) between States and Nationals of other States”.²³⁹

The Act also recognises the jurisdiction of the High Court of Eswatini; the process of arbitration under the Arbitration Act of 1904 and the “Arbitration Rules of the United Nations Commission on International Trade Law” (UNCITL).²⁴⁰

4.5. Conclusion

In this chapter, the mining legal framework in Eswatini was discussed to determine what it entails – particularly as it provides for transparency and accountability as required by the NREGI’s RGI.

A review of the general and sectoral laws, as well as other domestic laws interlinking with the mining legislation, revealed that – while they do provide for transparency and accountability to a degree – the laws do not adequately embed the transparency and accountability principles of information disclosure and revenue transparency envisaged in the NREGI’s RGI.

Based on the above observation, the next chapter will consider potential gaps in the mining legal framework of Eswatini with respect to transparency and accountability, when compared to the EITI principles.

²³⁹ See s 21 (d) of the IPA, *supra* n.237.

²⁴⁰ See s 21 (a)-(c) of the IPA, *supra* n.237.

CHAPTER 5:

EVALUATION OF TRANSPARENCY AND ACCOUNTABILITY IN ESWATINI LEGAL FRAMEWORK IN COMPARISON TO THE EITI

5.1. Introduction

In the preceding chapters, chapter 2 showed clearly that transparency and accountability are important elements of the EITI and that the NRGIs RGI is used to measure transparency and accountability in the extractive industries sector. Chapter 3 also showed that the EITI Standard contains a set of 12 Principles which all promote transparency and accountability through the publication of information, disclosure of payments and revenue transparency – as required by the RGI. Chapter 4 exposed that the general and sectoral laws in Eswatini do not sufficiently embed the transparency and accountability principles of information disclosure and revenue transparency envisaged in the RGI. The objective of this chapter is to examine what the oversights are in Eswatini’s mining legal framework, in light of what the EITI provides. Accordingly, section 5.2 will evaluate any possible constitutional oversights with respect to transparency and accountability, as compared to that provided for by the EITI principles. In turn, Section 5.3 will consider possible deficiencies present in the legislative framework governing mining. The chapter will conclude in section 5.4 by summarising any possible legislative deficiencies.

5.2. Constitutional deficiencies

In light of the findings of Chapter 4, when compared to the standards provided for by the EITI, the Constitution of Eswatini does not sufficiently provide for the right to access information. The Constitution is limited to a recognition of the right of freedom of expression,²⁴¹ receiving and communicating information without interference.²⁴² As a result, it does not guarantee the right to access information held by juristic persons like extractive companies. The right to access information can be used to access information held by extractive companies where

²⁴¹ See s 24 (1) of the Constitution of Eswatini, 2005, *supra* n.156.

²⁴² See s 24 (2) (b) & (c) of the Constitution of Eswatini, *supra* n.156.

their activities are detrimentally affecting the rights of communities or the public.²⁴³ It is submitted that the right can also be used to access information required by the EITI standard.²⁴⁴

Although the Constitution, under section 33, provides for the right to administrative justice, which could be used as a useful tool for implementing procedural transparency in the application for and granting of mineral licences and environmental approvals,²⁴⁵ it lacks support due to the absence of the right to access information. It can therefore be difficult to obtain information that the EITI standard requires to be put in the public domain.

Apart from that, though section 198 (1) of the Constitution establishes the Consolidated Fund where all revenue or other monies raised or received for the purposes or on behalf of the government should be deposited, no mention is made of revenue received from mining activities. It is further provided in terms of section 199 of the Constitution that money can only be withdrawn from the consolidated fund only upon legislative authorization by Parliament. It seems encouraging that the Parliament of Eswatini is constitutionally empowered to play an oversight role on the consolidated fund. The reality on the ground is that such oversight is certainly not up to the degree of transparency and accountability envisaged in the EITI principles.

The Constitution also excludes the public and/or civil society from accessing information about public accounts. Only the AG is empowered to have access to all books, records, reports and other documents relating to all public accounts.²⁴⁶ This means that the right to access government information is only limited to the AG and not open to civil society or multi-stakeholder groups in Eswatini. This does not advance transparency – as required by the EITI standard. The ordinary person might have no understanding of government revenues and expenditures. The net effect of this is that the government largely remains unaccountable to the nation. This is contrary to principle 4 of the EITI Standard, which recognizes the need for

²⁴³ See Murombo (2021), *supra* n.103, at 15.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ See s 207 (3) of the Constitution of Eswatini, 2005, *supra* n.156.

the public to understand government revenues and expenditures to help public debate and promote sustainable development.

5.3. Deficiencies in the legislative framework governing mining in Eswatini

While the MMA is the principal mining law in Eswatini, there are numerous other laws that directly or indirectly regulate mining activities.²⁴⁷ These laws do not promote the degree of transparency and accountability contemplated within the EITI standard. The right to access information administered by these laws and the accessibility of the data reports remains a hurdle.²⁴⁸ For example, the MMA prohibits the disclosure of information provided by an applicant for a mineral right or the holder of a mineral right.²⁴⁹ Information disclosure can only be justified if it relates to legal proceedings;²⁵⁰ administration of the MMA;²⁵¹ preparation of Government statistics and tax.²⁵²

The MMA also requires the holder of a mineral dealer's licence to keep a register of mineral transactions – which should be delivered to the Commissioner at the end of each quarter.²⁵³ The holder of a retention licence is required to keep full and accurate records of prospecting operations, including financial statements and such other books of accounts as the Commissioner may require.²⁵⁴ The holder also has to submit the records to the Commissioner, as determined by him.²⁵⁵ In terms of section 158 of the MMA, the Commissioner of Mines is required to provide an annual report to the Minister of Natural Resources and Energy in three months after the expiry of each financial year and such other information as may be required by the Minister.²⁵⁶

²⁴⁷ See *infra* Section 4.4., at 34-37.

²⁴⁸ See *infra* Section 4.5., at 37.

²⁴⁹ See s 145 (1) of the MMA, *supra* n.181.

²⁵⁰ See s 145 (3) (c) of the MMA, *supra* n.181.

²⁵¹ See s 145 (3) (a) of the MMA, *supra* n.181.

²⁵² See s 145 (3) (d) of the MMA, *supra* n.181.

²⁵³ See s 110 of the MMA, *supra* n.181. See also s 114 (3) & (4) of the MMA.

²⁵⁴ See s 75 (2) (d) of the MMA, *supra* n.181.

²⁵⁵ See s 75 (3) of the MMA, *supra* n.181.

²⁵⁶ See s 158 of the MMA, *supra* n.181.

The Diamonds Act also restricts the accessibility of the data contained in the register. The holder of a diamond prospecting licence or holder of a permit is required to keep a register containing the particulars of rough diamonds.²⁵⁷ The register must be transmitted or delivered to the Commissioner of Mines within fourteen days after the end of each month.²⁵⁸ The public is excluded from accessing the register.

Apart from that, the MMA does not promote revenue transparency since mining royalties,²⁵⁹ and area rental²⁶⁰ are all payable to *iNgwenyama*. Holders of prospecting, retention and mining licences pay area rental to *iNgwenyama*. Mining royalties should ordinarily be collected in terms of section 132 of the MMA, read together with section 32B (1) of the ITO – which requires any amount of royalty to be taxed. However, since royalties are payable to the *iNgwenyama*, they cannot be taxed because His Majesty the King and *iNgwenyama* is constitutionally immune from taxation in respect of his civil list and all income accruing to him.²⁶¹ The *iNgwenyama* is constitutionally defined as the “traditional head of the Swazi State”.²⁶² He enjoys the same legal protection and immunity from legal suit or process as the King.²⁶³

The mining royalties and area rental in Eswatini do not contribute to the fiscus. They do not assist in poverty reduction. In this regard, the MMA does not echo principle 1 of the EITI standard which promotes that natural resource wealth should be used for sustainable economic growth that contributes to sustainable development and poverty reduction.

The Companies Act²⁶⁴ also imposes an obligation on all mining companies in Eswatini to keep accounting records that explain the transactions and financial position of the company.²⁶⁵ Although these financial records should show in sufficient detail revenues received and

²⁵⁷ See s 13 (2) of the Diamonds Act, 2011, *supra* n.206.

²⁵⁸ See s 13 (4) of the Diamonds Act, 2011, *supra* n.206.

²⁵⁹ See s 132 (1) of the MMA, *supra* n.181.

²⁶⁰ See s 134 (1) of the MMA, *supra* n.181.

²⁶¹ See s 10 of the Constitution of Eswatini, 2005, *supra* n.156.

²⁶² See s 228 (1) of the Constitution of Eswatini Act, 2005, *supra* n.156.

²⁶³ See s 228 (2) of the Constitution of Eswatini Act, 2005, *supra* n.156.

²⁶⁴ Act 8 of 2009.

²⁶⁵ See s 245 (1) of the Companies Act, 2009, *supra* n.264.

payments made,²⁶⁶ they are only open for inspection to the Directors of the company.²⁶⁷ Directors of companies also have a duty to make out annual financial statements (AFS) in every financial year of the company – which should be laid before the annual general meeting (AGM).²⁶⁸ It is further provided that the AFS of a company should conform with the domestic and International Financial Reporting Standards (IFRS).²⁶⁹ The Act also obliges Holding companies to lay group AFS before the annual general meeting of the company.²⁷⁰ This means that the company's AFS is not open for public inspection. As a result, the mining company may choose to underreport the revenue received and profits made to the ERA to pay less – or even no – tax.

The ITO imposes no strict requirements compelling companies to disclose payments made since the ERA merely accepts financial statements audited by a registered auditor.²⁷¹ It is submitted that this arrangement works against the spirit and tenor of principle 11 of the EITI standard which explicitly advocates for payments disclosure by all extractive industry companies operating in a country.

The EMA does not provide sufficient participation by the public and revenue transparency, contrary to principle 5 of the EITI which underscores the importance of transparency by governments and the need to enhance public financial management and accountability. The public is excluded since they are barred from scrutinizing the audited income and expenditure prepared by the Eswatini Environment Fund (EEF). The EEF is required to prepare and submit an annual report including an audited balance sheet and an audited income and expenditure for the year to the Minister of Tourism and Environmental Affairs as well as the Minister of Finance.²⁷² Monies and any income generated by the EEF are exempt from tax.²⁷³

Further, the EMA also restricts Information disclosure, since the Minister may not divulge information deemed confidential by the person who provided it.²⁷⁴ This is contrary to the

²⁶⁶ See s 245 (1) (c) & (d) of the Companies Act, 2009, *supra* n.264.

²⁶⁷ See s 245 (3) of the Companies Act, 2009, *supra* n.264.

²⁶⁸ See s 247 (1) of the Companies Act, 2009, *supra* n.264.

²⁶⁹ See s 247 (2) (a) of the Companies, 2009, *supra* n.264.

²⁷⁰ See s 250 (1) of the Companies Act, 2009, *supra* n.264.

²⁷¹ See s 34*bis* (1) of the ITO, *supra* n.230.

²⁷² See s 25 (3) of EMA, *supra* n.220.

²⁷³ See s 26 of the EMA, *supra* n.220.

²⁷⁴ See s 38 (2) of the EMA, *supra* n.220.

spirit and tenor of the EITI which requires that information about the extractive sector should be understood and used by civil society.²⁷⁵ Governments have a duty to explain the technical complexities of the extractives to the public.²⁷⁶

Apart from that, the Water Act restricts information disclosure about its accounts and statement of activities. The Irrigation District is required to maintain genuine accounts of its receipts and expenditures for inspection by the Water Apportionment Board and electors.²⁷⁷ At the end of the year, the Irrigation District has to hold a general meeting of eligible electors and then disclose its accounts and statement of activities.²⁷⁸

5.4. Conclusion

This chapter examined the oversights in the Eswatini mining legal framework based on the degree of transparency and accountability indicators embedded within the general and sectoral legislation. This was done by examining specific provisions of the general and sectoral laws to establish whether they reflect the principles of the EITI standard.

A review of the Constitution of Eswatini, 2005 revealed that it does not sufficiently provide for the right to access information held by juristic persons like extractive companies, where their activities are adversely affecting the rights of communities or the public – which is the cornerstone of the EITI standard.

It was found further that the Constitution also does not induce some degree of transparency and accountability in government expenditure – although it does create oversight bodies like the AG and PAC. Although the Constitution establishes the Consolidated Fund, there is no mention of mining revenue being deposited to the fund.

A review of the sectoral legislation revealed that the reporting provisions of the MMA; Diamond Act; the Companies Act; ITO and the Water Act do not require companies in the mining sector to publish what they pay – contrary to the founding principles of the EITI standard. In the same vein, the government of Eswatini is not required to disclose publicly

²⁷⁵ See Quiroz (2014), *supra* n.31, at 41.

²⁷⁶ *Ibid.*

²⁷⁷ See s 75 (d) of the Water Act, 2003, *supra* n.225.

²⁷⁸ See s 75 (2) (e) of the Water Act, 2003, *supra* n.225.

how the revenues received from mining activities have been spent. Both the government and mining companies have no obligation to provide data or reports about mining revenue to the general public. The right to access information is automatically compromised.

It also emerged that fiscal tools like royalties and area rentals do not contribute to the fiscus to reduce poverty, since they are payable to *iNgwenyama* – who is constitutionally immune from taxation, as the King and Head of State in Eswatini.

The study will conclude in the next chapter, by summarising the findings of the study and addressing the primary research question.

CHAPTER 6: CONCLUSION AND RECOMMENDATION

6.1. Summary of the findings

The aim of this study was to analyse the Eswatini mining legal framework to establish whether it accommodates the principles of the EITI. Accordingly, it considered transparency and accountability in chapter 2; followed by a discussion of the EITI and what its principles entail in chapter 3. Chapter 4 examined the mining legal framework in Eswatini to establish whether the general and sectoral laws embed the core elements used as measures of transparency and accountability – as required by the NRGIs RGI.²⁷⁹ The deficiencies identified in the mining legal framework were discussed in chapter 5.

Chapter two showed conclusively that transparency and accountability are indispensable requirements of the EITI. That, countries like Botswana and SA have embedded international best practice principles within their mineral regulatory frameworks and employed competitive government policies to secure transparency and accountability for economic growth and attracting FDI.²⁸⁰ Results from the Fraser Institute’s Mining survey for the years 2016 to 2020, indicate that Botswana is the best country in the African continent with a stable mining regulatory regime.²⁸¹ In the same vein, the EY survey confirms that all SA companies listed in the JSE are compelled – through the integrated reporting system – to compile sustainability reports accompanying the financial information for all their stakeholders.²⁸²

Chapter 3 confirmed that the EITI and its principles demand transparency and accountability in the extractives sector by requiring governments and companies to disclose information in respect of the governance of oil, gas and mining revenues on all the following key steps: natural resources; contracts and licences; production; revenue collection; revenue allocation; social and economic spending; and public benefit.²⁸³ The EITI 2021 Progress report reveals

²⁷⁹ See *infra* Subsection 2.2.1., at 10.

²⁸⁰ See *infra* Subsection 2.4.1., at 13-14.

²⁸¹ See *infra* Subsection 2.4.1., at 14.

²⁸² See *infra* Subsection 2.4.1., fn.91 at 15.

²⁸³ See *infra* Section 3.2., at 18.

that the 2019 EITI Standard has permitted flexible reporting of data that is most relevant to the stakeholders²⁸⁴ — making the EITI relevant and reliable amidst the COVID-19 crisis.

Chapter 4 demonstrated that the general and sectoral laws relating to the mining sector in Eswatini do not provide for transparency and accountability – as required in the NRGi’s RGI. As a result, the mining legal framework is still not adequate for the purposes of the EITI. It is therefore submitted that the deficiencies identified in the mining legal framework unquestionably provide the answer to the primary research question of whether the mining law in Eswatini echoes the principles of the EITI?

Accordingly, the findings are that the general and sectoral laws relating to mining in Eswatini – as well as the environmental, water, tax and investment laws interlinking with the mining laws – do not promote the core elements recommended as indicators for measuring transparency and accountability by the NRGi’s RGI. All these laws do not promote the publication of reports about mining operations and fiscal revenue. In addition, there are no provisions in those laws compelling the Government to be held accountable to the public for revenue expenditure. Consequently, the deficiencies overwhelmingly confirm that the current mining legal framework does not echo the principles of the EITI. The deficiencies are stated in the next paragraph.

6.2. Deficiencies in the Eswatini framework as it relates to Transparency and Accountability

The Constitution of Eswatini, 2005 does not sufficiently provide for the right to access information held by juristic persons like extractive companies – which is a cornerstone of the EITI Standard. In the same vein, the MMA does not provide adequate mechanisms which the general public can use to access information related to the extractive sector.²⁸⁵ This also equally applies to the EMA, Companies Act, Water Act 2003, OSHA and ITO.

Though establishing oversight bodies like the AG (crucial for promoting transparency and holding state actors accountable) and PAC, the Constitution does not adequately induce the degree of transparency and accountability required of government in terms of the EITI

²⁸⁴ See *infra* Subsection 3.3.2., at 26.

²⁸⁵ See *infra* Sections 5.2 & 5.3., at 38-43.

standard. There is political interference that compromises the AG's work since his report is submitted to the Minister of Finance — a politician — who then tables it to both Houses of Parliament for discussion by the PAC. The PAC is practically not adequately competent to understand and interrogate the AG's report — since any MP can be a member of the PAC.

Even though the Constitution establishes the Consolidated Fund, there is no mention of mining revenue being deposited to the fund. Parliament also appears to have a limited oversight role in monitoring the withdrawal of the money by the government from the fund — since executive authority in Eswatini vests in the *iNgwenyama*. The general public is also excluded from having a say on the management of the fund and government expenditure. As a result, the government remains unaccountable to the nation — contrary to principle 4 of the EITI standard which recognizes the importance of a public understanding of government revenues and expenditure for sustainable development.

The MMA does not require the government to publish information relating to the management of mineral resources — but only places the obligation on companies that are only required to directly share data or information prescribed by the Commissioner of Mines with his office. In terms of section 135 (1) of the MMA, the Commissioner of Mines is required to maintain a Register of Mineral Rights – which is open for public inspection upon the payment of the prescribed fee. This arrangement does not echo principle 5 of the EITI standard which underscores the significance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.

Financial information and/or payments made by companies cannot be shared with the general public. Although section 245 (1) (c) & (d) of the Companies Act 2009 requires companies to keep financial records showing in sufficient detail revenues received and payments made, section 245 (3) of the Act also provides that the financial records are only open for inspection to the Directors of the company – not the general public. In terms of section 247 (1) of the Act, Directors of companies have a duty to make out AFS in every financial year of the company and lay them before the AGM. The AFS is not open for public inspection. These legislative provisions do not echo principle 11 of the EITI Standard which underscores that payments' disclosure in a given country should involve all extractive industry companies operating in that country.

Mining royalties and area rental do not contribute to the fiscus in Eswatini, since they are both payable to *iNgwenyama* in terms of the MMA.²⁸⁶ Even though mining royalties should ordinarily be collected in terms of section 132 of the MMA, read together with section 32B (1) of the ITO, they cannot be taxed – since His Majesty, the King and *iNgwenyama* is immune from taxation in terms of section 10 of the Constitution of Eswatini, 2005. This also equally applies to the area rentals. With respect, it is submitted that this legislative and constitutional arrangement does not echo principle 1 of the EITI Standard which underscores the prudent use of natural resource wealth for sustainable economic growth that contributes to sustainable development and poverty reduction. The management of the revenue derived from the area rentals and mining royalties do not benefit the country's citizens, contrary to principle 2 of the EITI.

The ITO enshrines specific fiscal tools for the taxation of corporate entities and shareholders of companies – which remain privy only to the ERA. For instance, only the ERA can have access to company information regarding the payment of dividends to its shareholders. Likewise, only the ERA can have access to company information regarding the Withholding taxes withheld by a company from shareholders interest paid to non-resident shareholders; and corporate taxes paid by the company to the ERA. Under the current legislative arrangement, there is a great incentive for companies to evade the payment of taxes and/or under-declare revenue received to reduce the taxable income. The tax incentives and non-tax incentives dangled by the Government of Eswatini to potential investors in the mining sector also render the fiscal tools worthless or unworkable. This certainly does not echo principle 10 of the EITI Standard which underscores the importance of a largely consistent and workable approach to the disclosure of payments and revenues.

The aspect of collective governance — which require active participation through MSIs — appears to be excluded. The role of the civil society, labour unions, civil society organizations and local communities to act as a watchdog over the whole extractive industries value chain — is excluded. It is clear from the provisions of the MMA that the local communities and civil society are excluded from any discussions — since mineral rights' awards vest in the *iNgwenyama*, who acts on the advice of the MMB.²⁸⁷ They have no say at all. This

²⁸⁶ See *infra* Section 5.3., at 41. See also secs 132 (1) & 134 (1) of the MMA, *supra* n.181.

²⁸⁷ See s 214 (5) of the Constitution of Eswatini, 2005, *supra* n.156.

arrangement does not echo principle 12 of the EITI Standard which underscores the belief that all stakeholders have important and relevant contributions to make.

6.3. The way forward for Eswatini: Towards EITI membership

In 2019, the government of Eswatini had, in the “National Strategic Roadmap 2019-2022,” called upon the MNRE to unlock the mining sector to enhance economic activity within the country.²⁸⁸ The government also acknowledged that there were areas of improvement that need to be addressed as the country repositions itself for growth.²⁸⁹ The government further acknowledged that Eswatini was not fully exploiting its membership to economic formations to attract investment inflows and improve exports; lacked clear policies which hinders investment; had limited strategies to enhance economic growth and exports and that Private Public Partnerships and mining were not fully exploited.²⁹⁰

It is not surprising that Eswatini was also among the jurisdictions that were dropped in the Fraser Institute’s 2020 annual survey of mining companies.²⁹¹ This means that the country’s mining regulatory regime is unstable and deters investment.

Apart from that, the government had tasked the MCIT to “improve the country rankings in the World Bank Ease of Doing Business index from 123 to 50 by 2022”.²⁹² However, according to the “World Bank Ease of Doing Business Report” of 2020, Eswatini occupies number 121 in the world rankings.²⁹³ Although the Report acknowledges that “Eswatini implemented regulatory reforms to make it easier to do business”,²⁹⁴ the results indicate otherwise.

According to the African Economic Outlook Report 2021, investment in Eswatini has weakened.²⁹⁵ Due to the COVID-19 pandemic, Eswatini’s economy contracted by an

²⁸⁸ See *infra* Section 1.1., fn.1 at 1.

²⁸⁹ See *infra* Section 1.1., fn.2 at 1.

²⁹⁰ *Ibid.*

²⁹¹ See Younis & Aliakhbari (2021), *supra* n.78, at 3.

²⁹² Ministries Action Plan 2018 – 2022. Available at: <http://extwprlegs1.fao.org/docs/pdf/swa196188.pdf> (last accessed 30 August 2021), at 101.

²⁹³ Available at: <https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf> (last accessed 11 September 2021), at 4.

²⁹⁴ *Idem.*, at 85.

²⁹⁵ Available at: <https://www.afdb.org/en/countries/southern-africa/eswatini/eswatini-economic-outlook> (last accessed 05 September 2021), at 146.

estimated 3.2% in the year 2020 – after growing by 2.2% in 2019.²⁹⁶ It appears impossible for Eswatini to quickly climb the ranking ladder from 121 to 50 by 2022. The World Bank concludes that a strong connection exists between FDI and ease of doing business – which is driven by the trading across borders component.²⁹⁷

The targeted average contribution of the mineral sector to the GDP is 0.1 percent by 2022.²⁹⁸ However, there is currently no publicly accessible/available data or financial reports from the government or companies in the mining sector regarding the sector’s contribution to the economy – besides the CBE’s “Integrated Annual Report” and “Annual Economic Review Report”. In the financial year 2019/2020, all sectors reportedly recorded slower economic activity compared to the previous year.²⁹⁹

In June 2007, the government in its Poverty Reduction Strategy and Action Plan (PRSAP) committed to exercising fiscal prudence, prioritizing expenditures, improving infrastructure, human capital investment, removing obstacles to private investment and implementing a conducive taxation system.³⁰⁰ In terms of the PRSAP, Eswatini aimed to ultimately eradicate poverty by 2022.³⁰¹

Recent economic development updates from the CBE’ June/July 2021 report, indicate significant growth in the “mining and quarrying sector (mainly gold and other minerals)”.³⁰² While acknowledging the negative effects of the COVID-19 pandemic on the economy, strong positive performance was reportedly observed in the mining and quarrying sectors.³⁰³ However, it is submitted that the CBE’s annual or quarterly review reports are not sufficient to advance the degree of transparency and accountability required by the EITI Standard.

²⁹⁶ *Ibid.*

²⁹⁷ See World Bank Ease of Doing Business Report (2020), *supra* n.293, at 38.

²⁹⁸ *Idem.*, at 244.

²⁹⁹ See the CBE’s Annual Integrated Report 2019/2020. Available at: <https://www.centralbank.org.sz/annual-report/> (last accessed 10 September 2021), at 34.

³⁰⁰ The Eswatini Poverty Reduction Strategy and Action Plan (PRSAP) 2007, 14. Available at: <http://extwprlegs1.fao.org/docs/pdf/swa170050.pdf> (last accessed 09 September 2021).

³⁰¹ *Idem.*, at 11.

³⁰² Available at: <https://www.centralbank.org.sz/recent-economic-developments-red/> (last accessed 19 September 2021), at 7.

³⁰³ *Idem.*, at 4.

It is therefore urgently recommended that Eswatini should hold a big *indaba* (“dialogue”) with all the relevant stakeholders (civil society, corporations, government and local communities) towards the implementation of the EITI Standard in its mining legal framework — to enhance the mining sector and attract more FDI. The EITI Standard could be more effective if integrated into the sectoral legislation dealing with mining, revenue and tax, safety and health, and environmental regulation in Eswatini.

The 2019 EITI Standard could assist all the local mining companies to embrace flexible reporting by disclosing key information — such as the impact of COVID-19 on extractive revenues, production, exports and employment.

BIBLIOGRAPHY

Primary sources

Legislation (Acts, Orders-in-Council, Legal notices and Regulations): Eswatini

Companies Act 8 of 2009

Constitution of Eswatini Act 001 of 2005

Diamonds Act 3 of 2011

Environmental Management Act 5 of 2002

Income Tax Order 21 of 1975 (as amended)

Investment Promotion Act 1 of 1998

Legal Notice 80 of 2018 – (change of “Swaziland” name to Eswatini)

Mines and Minerals Act 4 of 2011

Occupational Safety and Health Act 9 of 2001

Petroleum Act 18 of 2020

Value Added Tax Act 12 of 2011

Legislation (Acts, Orders-in-Council, Legal notices and Regulations): Other

Constitution of South Africa Act 108 of 1996

Mineral and Petroleum Resources Development Act 28 of 2002 – Republic of South Africa

Mines and Minerals Act 17 of 1999 – Republic of Botswana

Promotion of Access to Information Act 2 of 2000

Policy documents: Eswatini

Eswatini Poverty Reduction Strategy and Action Plan (PRSAP) 2007. Available at:

<http://extwprlegs1.fao.org/docs/pdf/swa170050.pdf> (last accessed 09 September 2021).

Eswatini Government Ministries Action Plan 2018 – 2022. Available at:

<http://extwprlegs1.fao.org/docs/pdf/swa196188.pdf> (last accessed 30 August 2021)

The Kingdom of Eswatini Strategic Roadmap: 2019-2022. Available at:

<http://www.gov.sz/images/CabinetMinisters/STRATEGIC-ROADMAP-2018-2023---MAY-2019.pdf> (last accessed 18 September 2021).

Secondary sources

Books

Abdulatova, N., *Transparency in the extractive industries sector as a legal tool for strengthening good governance: The EU's approach*, (No. 01/2021. Discussion Paper, 2021).

Barma, N., Kaiser, K. and Tuan Minh Le, (eds), *Rents to riches?: The political economy of natural resource-led development*, (World Bank Publications, 2012).

Cameron, P.D. and Stanley, M.C., *Oil, gas, and mining: A sourcebook for understanding the extractive industries*, (World Bank Publications, 2017).

Rich, E. and Moberg, J., *Beyond Governments: Making Collective Governance Work: Lessons from the Extractive Industries Transparency Initiative*, (Routledge, 2017).

Shaw, T.M., *Commonwealth: inter-and non-state contributions to global governance*, (Routledge, 2007).

Starke, L., *Breaking new ground: mining, minerals, and sustainable development: the report of the MMSD project*, (Vol. 1. Earthscan, 2002).

Book Chapter

Quiroz, J.C., "Measuring up to Transparency and Accountability Standards: Challenges and Opportunities for Effective Governance." *Transparent Governance in an Age of Abundance: Experiences from the Extractive Industries in Latin America and the Caribbean* (2014), 39-76.

Dissertations

Okeiyi, V., *Flagship or pipedream: a critical analysis of nigerian extractive industries transparency initiative (NEITI)*, (Diss. University of Pretoria, 2016).

Van Straaten, T.M., *Partners not adversaries: adopting the EITI towards effective collective governance to improve the extractive industry in South Africa*, (Diss. University of Pretoria, 2016).

Zulu, N.N., *Integrated reporting in the South African mining sector and the King Report IV on Corporate Governance 2016*, (Diss. University of Pretoria, 2018).

Journal Articles:

Aaronson, A.S., "Limited partnership: Business, government, civil society, and the public in the Extractive Industries Transparency Initiative (EITI)", *Public Administration and Development* 31.1 (2011): 50-63.

Andrews, N., "A Swiss-Army Knife? A Critical Assessment of the Extractive Industries Transparency Initiative (EITI) in Ghana", *Business and Society Review* 121.1 (2016): 59-83.

Besada, H., and Martin, P., "Mining codes in Africa: emergence of a 'fourth' generation?", *Cambridge Review of International Affairs* 28.2 (2015): 263-282.

Chatterjee, K., "Sustainability and Sustainable Development of Mineral Resources." *Macroeconomics of Mineral and Water Resources*. Springer, Cham, 2015. 161-188.

Dorin, I., Cristina D. and Dan, T., "The role of mining in national economies", *International Journal of Academic Research in Accounting, Finance and Management Sciences* 4.3 (2014): 155-160.

- Ejiogu, A., Chibuzo, E., and Ambisisi A., "The dark side of transparency: Does the Nigeria extractive industries transparency initiative help or hinder accountability and corruption control?", *The British Accounting Review* 51.5 (2019): 100811.
- Friedman, A., "Operationalizing the Rio principles: Using the success of the extractive transparency initiative to create a frame work for Rio implementation", *University of Botswana Law Journal* 12 (2011): 73-86.
- Gaventa, J., and McGee, R., "The impact of transparency and accountability initiatives." *Development Policy Review* 31 (2013): s3-s28.
- Loots, E., and Alain, K., "Foreign direct investment to Africa, dynamics and challenges", *South African journal of economic and management sciences* 15.2 (2012): 128-141.
- Marrone, A., and Lara, O., "The Level of Integrated Reporting Alignment with the IIRC Framework: Evidence from South Africa ", *International Journal of Business and Management* 15.1 (2020): 99-108.
- Mejía, A., "The impact and effectiveness of accountability and transparency initiatives: The governance of natural resources." *Development Policy Review* 31 (2013): s89-s105.
- Murombo, T., "The Extractive Industries Transparency Initiative (EITI) in Zimbabwe: an appraisal of prospects and challenges", *Journal of Energy & Natural Resources Law* (2021): 1-21.
- Ocheje, P.D., "The Extractive Industries Transparency Initiative (EITI): Voluntary codes of conduct, poverty and accountability in Africa", *Journal of sustainable development in Africa* 8.3 (2006): 222-239.
- Öge, K., "Transparent autocracies: The Extractive Industries Transparency Initiative (EITI) and civil society in authoritarian states", *The Extractive Industries and Society* 4.4 (2017): 816-824.
- Rustad, S.A., Philippe, L.B. and Päivi, L., "Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals", *Resources Policy* 51 (2017): 151-162.

- Sauer, P.C. and Michael, H., "Multi-stakeholder initiatives as social innovation for governance and practice: A review of responsible mining initiatives", *Sustainability* 12.1 (2020): 236.
- Silima, P., "Fact sheets on mining sector industry in Southern Africa-Mozambique and South Africa", *Инновации и инвестиции* 2 (2020): 61-65.
- Sovacool, B.K. and Andrews, N., "Does transparency matter? Evaluating the governance impacts of the Extractive Industries Transparency Initiative (EITI) in Azerbaijan and Liberia", *Resources Policy* 45 (2015): 183-192.
- Sovacool, B.K., *et al.*, "Energy governance, transnational rules, and the resource curse: Exploring the effectiveness of the Extractive Industries Transparency Initiative (EITI)", *World Development* 83 (2016): 179-192.
- Switzer, J., "Armed conflict and natural resources: The case of the minerals sector", *London: International Institute for Environment and Development* (2001).
- Van Alstine, J., "Critical reflections on 15 years of the Extractive Industries Transparency Initiative (EITI)", *The Extractive Industries and Society* 4.4 (2017): 766-770.
- Weber-Fahr, M., "Treasure or trouble? Mining in developing countries. Washington DC", *International Finance Corporation, World Bank Group's Mining Department* (2002).

Online sources

- African Mining Legislation Atlas (AMLA Guide). Available at: <https://extractiveshub.org/servefile/getFile/id/7705> (last accessed 18 September 2021).
- EIPA website for legal and regulatory framework in respect of investment in Eswatini. Available at: <https://investeswatini.org.sz/legal-and-regulatory-framework/> (last accessed 18 September 2021).
- EITI website. Available at: <https://eiti.org/> (last accessed 23 August 2021).
- Eswatini Government website under the Ministry of Natural Resources and Energy (Mining Department). Available at <http://www.gov.sz/index.php/departments-sp->

[623334762/84-natural-resources-a-energy/natural-resources-a-energy/405-mining-department](https://www.ircsa.org.za/623334762/84-natural-resources-a-energy/natural-resources-a-energy/405-mining-department) (last accessed 18 September 2021).

Eswatini Investment Promotion Authority (EIPA) website on investment incentives. Available at: <https://investeswatini.org.sz/incentives/> (last accessed 01 September 2021).

EY Survey on South African Companies listed in the JSE at: EY Survey report. Available at: <http://integratedreportingsa.org/ircsa/wp-content/uploads/2018/08/ey-excellence-in-integrated-reporting-awards-2018.pdf> (last accessed 06 August 2021).

OECD (2020): Promoting coherence between standards on responsible mineral supply chains: The OECD Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-affected and High-risk areas and the Extractive Industries Transparency Initiative Standard, at 3. Available at: <https://www.oecd.org/corporate/promoting-policy-coherence-between-the-oecd-and-eiti.pdf> (last accessed 21 August 2021).

The EITI Standard 2019: The Global Standard for the Good Governance of Oil, Gas and Mineral Resources, eds 2 (2019) at 6. Available at: https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf (last accessed 22 August 2021).

Thomas, G *Swaziland: Mining, minerals and fuel resources*, (2012). Available at: <https://www.azomining.com/Article.aspx?ArticleID=81> (last accessed 18 September 2021).

Reports

"Fraser Institute Annual Survey of Mining Companies 2020", *Fraser Institute* (2021). Available at: <https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2020.pdf> (last accessed 07 July 2021).

African Economic Outlook Report, 2021. Available at: <https://www.afdb.org/en/countries/southern-africa/eswatini/eswatini-economic-outlook> (last accessed 05 September 2021).

Central Bank of Eswatini's Annual Economic Review Report (2018/2019). Available at:
<https://www.centralbank.org.sz/about/annual/2018-2019ERR.pdf> (last accessed 18
September 2021).

Central Bank of Eswatini's Recent Economic Development updates' June/July 2021 Report.
Available at: <https://www.centralbank.org.sz/recent-economic-developments-red/>
(last accessed 19 September 2021).

World Bank Ease of Doing Business Report 2021. Available at:
[https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-
Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf](https://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf) (last accessed
11 September 2021)