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**The EITI in Tanzania – Transparency in the service of Human Rights and Anti-Corruption in the Mining Sector**

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## **Summary**

The thesis is a regulatory and comparative study of mining in Tanzania, with focus on transparency (of revenues) as a regulatory method in the service of anti-corruption and human rights. The research will focus on the Extractive Industry Transparency Initiative (EITI) by analysing the mining sector in Tanzania in different phases. The aim is to find out if the EITI as transparency tool has combated corruption and increased the protection of human rights in the mining.

Transparency here refers to; oversight of the multi-stakeholder group specifically practice of the civil society organisation, allocations of contracts and licenses, beneficial ownership, production and exports volume and value and revenues received and allocated.

The thesis will compare Tanzania with Nigeria and Ghana as co-participants to the EITI by analysing their laws and regulations with the EITI system to determine effectiveness regarding anti-corruption and human rights.

## **Preface**

A Special tribute to the Swedish Institute Fellowship Scholarship for financing my studies for two years I have spent in Lund.

I thank my family for their prayers, and I will always cherish their love and support.

I am indebted to my supervisor Dr Radu Mares who ceaselessly kept his eye on my work. I thank you for the most prompt responses to my work.

## **Abbreviations**

CAG	The Controller and Auditor General
CCM	Chama Cha Mapinduzi
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
MDAs	Mineral Development Agreements
TNCs	Transnational Companies
EITI	Extractive Industry Transparency International
TEITA Act, 2015	The Tanzania Extractive Industry (Transparency and Accountability) Act, 2015
STAMICO	State Mining Corporation
IMF	International Monetary Fund
WB	World Bank
MSG	Multinational Stakeholder Group
DFID	Department of International Development
EOCCA	The Economic and Organized Crime Control Act, 1984
FATF	Financial Action Task Force
GHEITI	Ghana Extractive Industry Transparency Initiative
MCO	Mining Cadastre Office
MNCs	Multinational Corporations
NEITI	Nigeria Extractive Industry Transparency Initiative
NSC	National Steering Committee
NSWG	National Stakeholder Working Group
OASL	Office of the Administrator of the Stool Lands
PCCA	The Prevention and Combating of Corruption Act, 2007
PEPs	Public Exposed Persons
PWYP	Publish What You Pay
TEITI	Tanzania Extractive Industry Transparency Initiative
TMAA	The Tanzania Minerals and Audit Agency
TRA	Tanzania Revenue Authority
VAT	Value Added Tax

## **Chapter One**

### **Introduction**

Tanzania is blessed with various minerals such as gold, diamonds and tanzanite to mention a few. Despite the endowment of these minerals, there is insufficient progress regarding economic or social development nationally. That makes Tanzanians to raise their voices in connection with contracts and revenue from the mining sector; - they do not see any benefits and believe arrangements are in favour of the investors (multinationals companies). Furthermore, the lack of transparency in mining contracts has caused suspicions regarding the terms agreed between the state and company. Moreover, Tanzanians raised accusation that income from the mining operation is enjoyed solely by investors and other revenue diverted to few government officials working in the mining sector through corruption which violates human rights.

The allegations foreign companies take advantage of revenue from mining started in 2006. The ex-President Kikwete by then formed a committee to review mining contracts. The committee came up with recommendations for amending minerals, and fiscal laws and renegotiation of various Mineral Development Agreements (MDAs) signed with the companies.<sup>1</sup> However, their suggestions were never implemented by then.

Surprisingly a mining contract between the Tanzania government and Barrick was concluded in February 2007 for a new mine at Buzwagi, like previous mining agreements this was not made publicly instead was secret.<sup>2</sup> This contract leaked and the Commissioner for the Minerals, by then Dr Peter Kafumu said the contract is a government document, and it bears a confidential stamp, and they are investigating who leaked the agreement, and the person who stole will be fired and face legal action.<sup>3</sup> Further, the Commissioner agreed the Minister did not inform the parliament when clause in the contract was removed because they knew nobody would lay hands over the deal since it was confidential and accessible between the parties to it.<sup>4</sup>

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<sup>1</sup> M Curtis and T Lissu, 'Golden Opportunity: How Tanzania is Failing to Benefit from Gold Mining' (2008) Christian Council of Tanzania, National Council of Muslim in Tanzania and Tanzania Episcopal Conference 27.

<sup>2</sup> 'The confession of Nazir Karamagi', Sunday Citizen Newspaper, 30 September 2007.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

In November 2007, the ex-president formed a commission to investigate the nature of the mining laws and contracts; the commission named the Bomani Commission, led by the former Judge Mark Bomani. The commission reported to the President in April 2008.<sup>5</sup> Report of the commission suggested tax incentives were excessive, thus depriving the country income and proposed for an increase of percentage in gold royalty, the calculation has to be the proportion of gross sales, not netback value, and the government should own 10% of shares in every mining company.<sup>6</sup>

Extraction of minerals in Tanzania is done by MNCs which the government sought to attract investors, stimulate growth and fight poverty by exemptions of taxes and duty, which have been harmful to rich resource countries' economy and their governments' treasury which cause loss of revenue. Tanzania to enjoy the revenue from the mining sector has to improve investment and business climate. The purpose is to boost growth, increase revenue and fight poverty through efficiency, transparency, eliminate corruption, developing a dull and predictable tax regime, invest in public and social infrastructures, and stable and safe political and social environment.<sup>7</sup>

Tanzania joined EITI in 2009, a transparency scheme which requires companies and the government publicly report the revenue they received from the mining companies and how they have allocated the income.

Tanzania is the sole producer of Tanzanite in the world. Unfortunately, the country is not benefiting, as a single producer due to severe smuggling activities caused by corruption which certificate of origin is not a prerequisite and insufficient patrols at border posts.<sup>8</sup> Also, the authority concerned does not keep data on the volume of production and export as provided in the EITI standards.

This kind of behaviour and tension over mineral contracts and revenue collections caused a debate in the community and public in general in 2017. This led Finnish ambassador in Tanzania Pekka Hukk to advise the government, to be transparent when entering into

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<sup>5</sup> M Curtis and T Lissu, (n 1) 28.

<sup>6</sup> Ibid.

<sup>7</sup> CRC Sogema, 'Tanzania: Per Tax Exemptions Study' (2013) the Ministry of Finance Tanzania 5.

<sup>8</sup> Controller and Auditor General, *Report of Public Authorities and other Bodies 2015/2016*, 83.



contracts with MNCs in the mining sector, awareness raising to the members of public of their resources.<sup>9</sup>

### **1.1 Objective and Research Questions**

This thesis aims to analyse EITI as a tool in anti-corruption and human rights compliance. The study will use several primary regulatory sources: EITI as a soft law, and the laws of Tanzania, Nigeria and Ghana, as well as supporting literature on the governance and impacts of the mining sector.

The study will review critically policy and laws governing transparency in the mining sector such as Tanzania Extractive Industries (Transparency and Accountability) Act, 2015 (TEITA Act, 2015) and the Mining Policy, 2009.

The following research questions guide the thesis;-

- Are the laws and regulation on transparency in the mining sector in Tanzania in accordance with the EITI standards?
- How effective has the EITI been in promoting transparency in Tanzania, Nigeria and Ghana?

### **1.2 Delimitations**

The thesis will examine transparency in the mining industry through national legal and policy framework of Tanzania. The purpose is to find out the progress if any, of Tanzania since joining the EITI and its (non) compliance record as a participant in the EITI transparency scheme.

The study will focus on the four following EITI transparency aspects; contracts and licenses, beneficial ownership, production and export volumes and values and revenues received and allocated.

This research will compare transparency mechanisms on anti-corruption and human rights in the extractive sector of Tanzania, Nigeria and Ghana. There are several reasons for selecting two countries for comparison with Tanzania; they are giant countries in the extractive industry in Africa and are members of EITI. Also, the two nations have domesticated EITI in their national laws and have started to enforce the law before Tanzania. Nigeria has accused of

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<sup>9</sup> The Citizen, Make mining contracts transparent, the government urged 21 October 2017.

being a most corrupt country in different aspect including extractive industry while Ghana is alleged to perform better.

### **1.3 Methods and Sources**

Research about EITI has been carried out primarily on revenue collections and allocations. However, the analysis of transparency from the perspective of human rights and anti-corruption in the extractive industry through policy and domestic laws in Tanzania has not conducted. Therefore, this thesis will contribute to transparency by examining national legislation and policy, which use EITI as its guide.<sup>10</sup> Tanzania has law and policy but the disclosure as stated in the TEITA Act, 2015 appears not to be complied with. The public cannot access the mining information. Therefore, the thesis will look if the domestic law(s) has addressed the issue of access to information in the extractive industry and if the institutions concerned disclose.

### **1.4 Outline**

Chapter 2 will discuss different phases of mining history in Tanzania before colonialism, during colonialism, after independence and on economic liberalisation. The purpose is to find out what are the changes in the mining sector before the EITI adoption and after becoming an implementor of the EITI.

This chapter will find out what kind of corruption is in the mining sector, its causes, analysis of corruption, human rights and environmental impacts in the mining industry in Tanzania as EITI member. The study will discuss the connection between corruption and human rights.

### **Chapter 3**

Discusses the evolution of EITI since 2002 to date and evaluate insights of EITI performance globally both positive and negative views and offers a general overview of different transparency mechanisms such as transparency on oversight by the multi-stakeholder group specifically civil society organisation, contracts and licenses, beneficial ownership, production and export volumes and values and revenues collections and allocated.

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<sup>10</sup> T Murombo, *The Effectiveness of Initiatives to Promote Good Governance: Accountability and Transparency in the Extractives Sector in Zimbabwe*, (2016), Journal of African Law 236.

Chapter 4 will evaluate national legal framework in the mining sector in Tanzania through laws domesticated the EITI standards to find out if they have met the criteria. Analyse how the transparency law and regulation in Tanzania addressed anti-corruption and human rights.

Chapter 5 thesis will examine how Tanzania has adhered to the legal framework in the mining industry through the three EITI mechanisms except for oversight by the multi-stakeholder group and beneficial ownership. The study will discuss challenges Tanzania encounters in implementing the three mechanisms.

Chapter 6 offers a comparative study of Nigeria and Ghana through their national legislation to see how the laws work through EITI standards has addressed corruption and human rights violations. The study will analyse challenges Tanzania, Nigeria and Ghana faced in formulating beneficial ownership standard by reflecting its implementation.

Chapter 7

Presents Conclusions that will wrap up analysis from previous chapters.

## Chapter 2

### Mining Industry in Tanzania: Human Rights and Corruption Aspects

This chapter discussion will be in two parts. Part one: - is a history of the mining sector in Tanzania before, during colonial time, after getting independence and during economic liberalisation. Part two will cover corruption and type of corruption practised by MNCs, the human rights and environmental impacts caused by mining companies and the connection between human rights and corruption.

#### **2.1 History of Mining Sector in Tanzania**

Tanzania has ranges of minerals from precious metals (gold and silver) and other metals such as zinc, lead and precious stones and gemstones like diamonds, sapphires and rubies also it has industrial minerals like graphite and bauxite.<sup>11</sup> Before colonisation and during colonial time minerals were not fully exploited due to non- discovery, lack of experts, lack of capital and modern technology. Colonial governments did not invest much in large mining scale before First World War due to price fluctuations of minerals, and by then few companies were operating in gold mining.

British Colonial rule after the discovery of alluvial gold develops the interest of investing in the mining sector by forming Geological Survey offices. Apart from having various minerals, during the colonial time, gold was mostly exploited mineral because of its demand in their home country or uses in the production of different products. The colonial government sold minerals extracted during the colonial time outside Tanzania, and there was no control of their movement to the colonial government. There are times exploitation of gold dropped due to a decrease in investment capital, language barrier, and field conditions.

The late 1990s there is economic liberalisation and privatisation from the state based economy. During economic liberalisation, MNCs landed and were given fields in Tanzania for exploitation of minerals. These MNCs and government never made contracts they have entered to the public. After MNCs started its operations in Tanzania riots erupted in those minerals fields between small-scale miners and MNCs over trespassing: because before structural adjustment, some small artisanal miners were exploiting minerals.

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<sup>11</sup> SLC Chachage, Liberalized Economy in Tanzania, *“The Meek shall inherit the Earth but not the Mining Rights; The Mining Industry Accumulation in Tanzania”* (Gibbon P ed, Nordiska Afrikainstitutet, Uppsala 1995) 48.

### 2.1.1 Mining Before and During Colonial Time

In pre-colonial time, Arabs who were in Tanzania before making slave trade remained and carried minerals activities. Arabs traders have been working on gold, iron, copper and salt exploitation.<sup>12</sup> Natives in some areas were doing mineral exploitation such as salt, but it was barter trade system as it is business based on hand to mouth activity and production was in small quantity.<sup>13</sup> Arabs used to transport minerals through boats outside Tanzania for sale.

Germany colonised Tanganyika from 1884 to 1917. The word Tanganyika was before the union between Tanzania mainland and Zanzibar Island, the United Republic of Tanzania formed on 26 April 1964. Germany rule discovered gold in Lake Victoria Zone in 1894, mining started in 1909, and colonial rule interest was in mica mining found at Uluguru in Morogoro region for use in electrical insulation and making of casing bombing.<sup>14</sup> Gold was valuable to Germany for making their currency which was standard gold base since 1870.<sup>15</sup> Germany era introduced concession where companies got exclusive rights to large areas.<sup>16</sup> In 1910, there were 76 fields of various minerals with gold domination whereby in 1914 Sekenke Goldmine in Mwanza had mined gold valued GBP 250000.<sup>17</sup>

The British ruled between 1918 to 1961. In the 1920s is remembered for crisis due to minerals accumulation that increased exploitation of minerals especially gold for the central bank reserve from colonies, and led gold prices to rise between 1920 and 1925 and caused gold rush and wealth in 1922.<sup>18</sup> In early 20s artisanal miners became controller of the sector and were competitors to Europeans though Africans number was small fear was their existence would foster illicit dealings in gold between natives and mixed population.<sup>19</sup> Late 1920s illegal transactions in gold between natives and the concealed elements of the diverse population became known.<sup>20</sup>

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<sup>12</sup> Ibid 48.

<sup>13</sup> Ibid.

<sup>14</sup> Heinrich Böll Foundation East Africa, *Extractive Resource Industry in Tanzania: Status and Challenges of the Mining Sector in Tanzania* (Society of International Development (2009) 21.

<sup>15</sup> Ibid 21.

<sup>16</sup> SLC Chachage, (n 13) 48.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid 49.

<sup>20</sup> Ibid.

In 1925, the interest of gold exploration by larger investors dropped in Lake Victoria area because the field considered unsuitable by its nature of alluvial, the gold price fell, and colonial state was unable to facilitate large-scale capitalist production to be profitable and opt for agriculture rather than mining.<sup>21</sup> In 1927, Company named Serenge from South Africa with concessions took mining exploration and impeded due to the low price of gold and they did not get state finance as investment incentive and ended mining operations within few months.<sup>22</sup> The same happened to London based Indian miners in the same area and failed due to communication problems, local difficulty conditions, and other foreign companies keep flowing to investing and not succeeded for the same reasons.<sup>23</sup>

Early 1940's gold was crucial economically and production increase more than agriculture outputs. Still, British rule did not benefit from royalties, rents and fees from gold mining and the money they got they use to compensate offices of mines and geological survey for deficits they incurred.<sup>24</sup> Further to that price of gold went down because minerals buyer Bank of England its demand for gold decreased, then government investment was low.<sup>25</sup>

Discovery of diamond in 1939 at Mwadui decrease gold production by two tonnes per annum and in 1945 export of diamond was accounted to be a single most significant component of export.<sup>26</sup> In 1960, gold production started to rise with little improvement in gold significance; still gold remained unprofitable for large companies although the only company continued in operation was Tanganyika Concession which closed in 1966 for financial constraints.

## **2.2. Mining after Attainment of Independence and Economic Liberalisation**

Tanganyika got its independence December 9, 1961, and became Republic in 1962. It was one party political system (that claimed a socialist orientation).

After independence, the World Bank, assist Tanzania to develop three years development plan from 1961 to 1964 on agriculture and animal husbandry.<sup>27</sup> Author of the plan suggested government to change mining policies to attract private investment through tax incentives in

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid 51.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 52.

<sup>27</sup> Ibid 53.

early stages of mining development.<sup>28</sup> The price of gold by then was meagre and went down entirely in 1972.<sup>29</sup> South African-based companies were interested in investing in mining; nonetheless, trade sanctioned imposed against apartheid from 1961 hinder their operation in Tanzania.<sup>30</sup> Those companies that were not South African were in disadvantage because they could not import cheap mining inputs from South Africa. A decline of diamond production steered close down of big companies and cause lay off employees who begun mining operations as a small-scale artisan who smuggles gold to Kenya before shipped elsewhere.<sup>31</sup>

Tanzania government established State Mining Corporation (STAMICO) to start enjoying income from gold mining. STAMICO took the production of minerals in 1971 but before they have to stimulate it and production resumed in 1981, lasted until 1989 because of economic crisis and financial constraints to run big projects.<sup>32</sup>

Early 1980s STAMICO was against the private investors and wanted to have joint venture sort of business which did not work out; enactment of the Mining Act, 1979 remove the limitations of public participation in the mining, and local small-scale miners legally allowed.<sup>33</sup> In 1984, private mining companies started operating within the Mining Act, 1979, a framework which was amended in 1982 to 1983 and 1987 to 1989 to allow privatisation of mining trade; by 1992, 67 companies licensed to drill minerals.<sup>34</sup>

In 1987 and 1989 introduction of liberalisation framework when gemstone and gold trade rationalization policy allowed for the privatisation of minerals trading.<sup>35</sup> Further, the Bank of Tanzania entered the gold buying market to offer world market prices.<sup>36</sup> These changes brought effects in the mineral sector like the formulation of Mining Policy 1997, enactment of the Mining Act, 1998 and amendment of financial laws to create a friendly environment for private investment. The policy is alleged to have attained achievement such as government revenue increased in the large-scale mining from US\$ 2 million to US\$ 78 million, the rise in

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> TA Lissu, 'In Gold We Trust: The Political Economy Law, Human Rights and the Environment in Tanzania's Mining Industry' (2001), *Social Justice and Global Development Journal*.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> SLC Chachage, (n 13) 54-55

<sup>34</sup> Ibid 55.

<sup>35</sup> TA Lissu, (n 32).

<sup>36</sup> Ibid.

employment from 1700 to 13000 workers and growth of mineral sector from 7.7% to 10.7%.<sup>37</sup> Apart from these achievements mineral sector encountered challenges such as the low contribution of the mining sector to the Gross Domestic Product (GDP) compared to the sector growth and incapability of government to administer the industry.<sup>38</sup>

At the beginning of mining operations, MNCs encountered conflict with the local small-scale artisans who were exploiting prior their contracts. The early 1990s in Ulanga Morogoro region ruby gemstone artisanal miners lost their lives by being shot by Thai mining company for accusation of invading their fields.<sup>39</sup> The Minister of Home Affairs by then asked the local miners to exploit rubies and sapphire gemstone composition from a nearby field.<sup>40</sup> They went to peg their claims to the Zonal Mining officer and District Commission informed small artisanal miners the fields they were told by the minister to do exploration belonged to someone and were required to vacate the area.<sup>41</sup> Lack of transparency caused riots and injuries and led Thai security to block roads and cause suffering to people who were looking for service such as a hospital.<sup>42</sup>

Violence erupted during structural adjustment for lack of communication from government authorities of a respective district to local miners concerning allocation of an area to Thai MNCs. Besides, non-communications of the existence of contracts with MNCs riots caused took lives of innocent people unnecessarily. Local miners were supposed to get an education about structural adjustment. The government should have alternatives for small artisanal miners who depend on mineral exploitations to meet their economic needs. Therefore, raising awareness of privatisation was crucial because even if you have good transparency laws and regulations, their implementations will not work due to riots for lack of knowledge and will amount to violations of human rights.

During the colonial time, there was no disclosure of revenue received as taxes or royalties by colonial government from mining companies. The history shows selling was done outside Tanzania mean people who benefitted were colonial government and their home countries. However, apart from colonial government, there were MNCs like those from South Africa

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<sup>37</sup> The Mining Policy 2009, 5.

<sup>38</sup> Ibid.

<sup>39</sup> SLC Chachage, (n.13) 37.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 38.



and Asian countries, were invested to prosper economically means they took money to their home countries after selling their minerals. After the decline of gold exploration the small artisanal who took over the extraction, there are no details of the supervision of the income of deductions as taxes made from the minerals they sold.

The historical background of mining in Tanzania and the current state reveals current trend has picked the practice of colonial rule for non-disclosure of mining operations. Infrastructure constructed such as roads, railways and ports to transport resources from Tanzania to overseas, which hinders the development of industry, jobs creation together with control of support found from the mineral sands, this is also taking place up to date.

### **2.3. Corruption in the Tanzania Mining Sector**

Transparency International is a global organisation advocate world free of corruption. This organisation defined what is corruption and is the definition used universally because United Nations Convention on Corruption does not give the meaning of corruption. In the making, the world free from corruption Transparency International works in cooperation with governments, business entity and the community. It is an organisation aim to create victims, and the witness of corruption listen.

Corruption is “the abuse of entrusted power for private gain.”<sup>43</sup> Division of corruption into grand, petty and political corruption, is made base on the amount of money disappear and industry where it was committed.<sup>44</sup> Grand corruption is committed by people who have the prominent position in government which break up a system of the state to function by making the leaders benefit by oppressing the public.<sup>45</sup> Political corruption change of policies, institutions, rules and procedure on the allocation of resources through the influence of political decisions makers who abuse their position to sustain status and wealth.<sup>46</sup>

Tanzania produces different kinds of minerals, but many MNCs do gold exploration, and gold is the leading quantity produced. Tanzania does not see the benefit of mining sector due to

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<sup>43</sup> How do you define corruption?

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

low deduction of taxes and other charges to MNCs to attract investors<sup>47</sup> and corruption by government officials working in the mining sector.<sup>48</sup>

Before economic liberalisation, Tanzania has a law governing corruption. The Prevention of Corruption Act, 1971(PCA) established Prevention of Corruption Bureau in 1974, and the Bureau formulated Anti- Corruption Squad in 1975. Before the establishment of the Bureau, police were investigating and prosecuting corruption cases. The Prevention and Combating of Corruption Act, 2007 (PCCA) repealed PCA, 1971. The anti-corruption bureau took duties which were done by the police. Allegations of corruption never existed in the mining sector before economic liberalisation. The cause of corruption is lack of transparency through mining contracts between companies and government which is alleged to favour MNCs. Also, tax officials soliciting bribes through tax assessment in mining.<sup>49</sup> Tax payment made without having a monitoring mechanism to know the income earned precisely by MNCs instead of assessments estimated. Officers from Division of Minerals in the Ministry of Energy and Minerals by then are professedly stated to be corrupt because of conflict of interest they have by owning minerals rights.<sup>50</sup>

Independent auditor M/S Alex Stewart (Assayers) UK based company and its subsidiary company M/S Alex Stewart (Assayers) Company (ASA) Government Business Corporation was engaged in audit amount of gold in Tanzania.<sup>51</sup> The tender awarded to these companies was improper, causes Minister of Finance and Minister of Minerals and Energy stand charged with abuse of their position by arbitrary procuring.<sup>52</sup> The ex-Minister of Finance charged for exempt ASA subsidiary company from paying taxes worth \$ 9.32 million.<sup>53</sup> ASA did not report publicly of their findings by saying the audit contract has a clause which banned disclosure.<sup>54</sup> There is no external audit of the mining laws and is considered to be expensive because ASA got paid the enormous sum.

The journalists and activists in their reports disclose corruption in the mining has been threatened death from unknown source through the phone; for instance disclosure of Buzwagi

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<sup>47</sup> M Curtis and T Lissu, (n 1)15.

<sup>48</sup> Ibid 7.

<sup>49</sup> Tanzania Corruption Report, Business Anti-Corruption Portal.

<sup>50</sup> Economic and Social Research Foundation's State of Corruption in Tanzania, 2002, 87.

<sup>51</sup> Tanzania Charge ex-ministers over the deal, Mail and the Guardian, 26 Nov 2008.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> M Curtis and T Lissu, (n 1) 23.

mining contract which was entered secretly between the government and the Buzwagi Gold Mining Company.<sup>55</sup> Another journalist his house raided arrested and charged with seditious.<sup>56</sup>

Allegations of corruption surfaced more due to secrecy in the mining sector; non-disclosure of mining contracts and lack of access to scrutinise arrangements associated with corruption and community in the mining areas not benefiting, poverty plus low tax revenue received by the government from the mining industry. The government formulated different committees which came up with suggestions for changes to be made in a fiscal and legal framework. These proposals started its progress before Tanzania joined EITI membership. The Bomani report also proposed Tanzania to join the EITI<sup>57</sup>. Tanzania membership in the EITI led the enactment of the Tanzania Extractive Industry (Transparency and Accountability) Act, 2015 (TEITA Act, 2015) which led an amendment to the Mining Act, 2010 and the Income Tax Act, 2004. These laws are advocating transparency mechanisms such as allocation of contracts and licenses, beneficial ownership, transparency in production and export volumes and values and revenue collection and allocations. Despite the fact, Tanzania is a participant to the EITI up to 2017 there were complaints about corruption in the mining and non-disclosure of the mining contracts except for the committees which peruse them in the discharge of their duties and CAG during an audit.

Even the Parliament Accounting Committee cannot access details of how much is paid as taxes and royalties by these mining companies and what is the revenue the government made in these.<sup>58</sup> Regarding mining contract, the government of Tanzania came up with The Natural Wealth and Resources Contracts (Review and Re-negotiation and Unconscionable Terms) Act, 2017 which empowers National Assembly to review contracts made by the government regarding natural resources. The parliament and government officials work on terms contained in the contract by directing the government to re-negotiate and rectify any condition they doubt agreement for the benefit of Tanzania as citizens' representatives. The idea of scrutinisation by the National Assembly is to deal with misuse of discretion given to the Minister and advocate transparency.

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<sup>55</sup> Ibid 34.

<sup>56</sup> Ibid 33.

<sup>57</sup> Bomani Report, Report of The Presidential Mining Review Committee to Advise the Government on oversight of the Mining Sector, (2008) volume 2.

<sup>58</sup> The Economic and Social Research Foundation's State of Corruption in Tanzania, 33.

## **2.4. Human Rights and Environmental Impacts in the Tanzania Mining Sector**

The operation of MNCs has a negative and positive impact, Geita Gold Mine in Tanzania has impacted human rights in different ways. The society benefits differently from mining extraction such as employment creation to people around mining areas and other regions; the employees will spend their money to procure agriculture products such as food and farmers earned income from farms products.<sup>59</sup> Operations of MNCs has led to road construction which simplified the movement of goods and services from one place to another and improves the standard of living and self-employment through the establishment of business and services.<sup>60</sup>

The mining activities cause migration of people to the mining operation areas for the search of an employment and for those who were not able to secure employment turn to be criminals and increase incidences of banditry.<sup>61</sup>

Mining operations caused land expropriation and resulted in displacement and the people from rural areas depend on land for their livelihood, this steered riots and cause death to protestors who are not armed while being confronted by the Police force who are lacking technical skills and professionalism to counter-protestors.<sup>62</sup> These people remain landless and experience poverty for failure to have land to graze their cattles, cultivating and they suffer from food insecurity.

In Geita District, there are child labours that are helping their parents or employed themselves to crash rocks without protective gear from the dust which has health risk like to suffer silico-tuberculosis and increase school dropout.<sup>63</sup>

Mineral extraction affects society through cracking, and the collapse of buildings like Geita Goldmine in Tanzania their operations cause house collapse from mining explosions.<sup>64</sup> Land degradation caused by extraction of minerals through excavating underground pits and

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<sup>59</sup> AGN Kitula, 'The environment and social, economic impacts of mining on local livelihoods in Tanzania. A case study of Geita District' (2006) *Journal of Cleaner Production* 14, 410.

<sup>60</sup> (n 60).

<sup>61</sup> AGN Kitula, (n 61) 410.

<sup>62</sup> *Ibid* 411.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* 409.

destruction of rocks using explosives destroyed land beyond economic and technical reclamation and soil become unfavourable for agriculture.<sup>65</sup>

Mining activities generate a quantity of waste for a gram of gold recovered; the waste material produced expose tonnes of gold ore into the environment, waste contains elements and minerals which may interact with water to generate contaminated fluids pollutes soils and lake Victoria with high alkaline contains cyanide as a pollution source especially during heavy rains.<sup>66</sup> Mine wastes containing heavy minerals and cyanide which negatively affect aquatic life. Mines waste accumulation in the environments, consumptions of contaminated foodstuffs, are harmful to human health, livestock and wildlife biodiversity and affects welfare.<sup>67</sup>

### **2.5. The link between Corruption and Human Rights Impacts**

Transparency once connected with human rights in a situation such as mining sector will affect accountability. In implementing EITI mechanisms, human rights considered.<sup>68</sup>

Minerals are valuable, and people who deal with transactions are government officials who are obliged to protect resources for the citizens of the country. Corruption in the mining sector is grand corruption the officers entrusted to protect the government and citizens for the benefits of the citizens divert what was supposed to be enjoyed by the public to get an advantage for himself or others.

The link between corruption and human rights violations occur because of the negative impact of corruption affects the enjoyment of human rights. A sovereign state has permanent sovereignty over all natural wealth and resources; the government responsibility is to protect interests of people and country through agreement government entered in respect of natural wealth and resources. Human rights violations result from corruption which affects financial and economic resources. Diverting of funds from development and make relocation, which interferes enjoyment of human rights, is a corruption.<sup>69</sup> Impact of corruption is broader than the violation of human rights; court in dealing with violation of human rights has to take into

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<sup>65</sup> Ibid 410.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Human Right Council, Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of the corruption on the enjoyment of the human rights, 2015 8.

account specific human rights violations and measures against corruption by having different kinds of negative impact from corruption.<sup>70</sup>

The state has obligations on human rights violations caused by corruption and government is not supposed to engage in corruption to avoid violating human rights. The government must respond to the negative impact on human rights; the reaction of state on effects of corruption is to fulfill human rights obligations.<sup>71</sup> State combat corruption through criminal prosecutions which is not a useful tool to remedy negative consequences of corruption, but to address the negative impact of corruption from an angle of human rights; which need prevention measures before effects occur.<sup>72</sup> When human rights integrated into anti-corruption, the implementation of preventive policies in connection to matters, for instance, transparency and laws on access to public information.<sup>73</sup>

Transparency and access to information assist individual to make up decisions how to monitor government expenditure.<sup>74</sup> Transparency and access to information make citizens exercise human rights and prevent corruption, any violations through bribery will be meaningful when corrupt people are made accountable through mechanisms such as prosecution for corruption and human rights violations.

The EITI functions well with the presence of MSG, which assist in data publication in connection to natural resources. However, it is necessary for citizens to be engaged in a debate on information published to hear their views. Respecting this dialogue as human rights will bring positive result in the community. Further, regarding freedom of expression gives individuals and CSO right to participate through their voice in public to meet social, economic and cultural rights. Engagement of citizens and CSO to exercise the right to access information comes up with opinions of managing revenue from mining for the benefit of the society. Media exercising freedom of expression can uncover corruption and any misuse of public funds from the mining sector.

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid 10.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 11.

However, when the report is made accessible publicly for citizens, media and stakeholders inquire how the revenue has been spent for Tanzanians no matter the payment made by the mining company.<sup>75</sup> This information is helpful to citizens, CSO and companies interested in the extractive sector to see income received by government and spent for development of the community.

United Nations Global Compact initiatives a voluntary instrument recognise corruption effect to human rights; Global compact focused on corporations responsibilities for human rights and added the tenth principle on corruption.<sup>76</sup> At the beginning corruption was not regarded as part of corporation's social responsibilities (CSR), is included due to recognition as meaningful progress in issues such as human rights which is not achievable without control of corruption.<sup>77</sup> Transfers of amounts received from resources extractions need transparency for proceeds from minerals to be enjoyed by citizens in the developing country and not in the foreign bank accounts of corrupt officials.<sup>78</sup> Combating corruption in MNCs is a key to respect human rights.<sup>79</sup> MNCs should know corruption erodes its ability to respect human rights<sup>80</sup>; MNCs in the whole supply chain has to carry out human rights due diligence to find out corruption have impacts on human rights.<sup>81</sup>

Corporations should not see anti-corruption as requirements in compliance instead; they have to take it as a CSR, as it relates to business and human rights.<sup>82</sup> The corporation has to pay attention to make sure the agent and employee are not paying the bribe but should use resources as an effort to reduce the level of corruption in the developing countries.<sup>83</sup> Companies have to combat corruption and promoting human rights because are linked notions and are complementary moral duties in the country they operate.<sup>84</sup>

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<sup>75</sup> Tanzania: More revenues from extractives despite falling prices.

<sup>76</sup> N Bishara and D Hess, *Human Rights and Corporations duty to combat corruption* (Bird RC, Cahoy DR and Prenkert. JD eds, Edward Elgar Publishing Limited 2014) 75.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 75-76.

<sup>79</sup> Ibid 78.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 85.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

Corporations are supposed to change their mindsets by not looking anti-corruption as an end, but crucial part of respecting human rights and corruption be considered as part of CSR and not legal requirements.<sup>85</sup>

The human rights abuses can be avoided by having the government with transparency mechanism within extractive industries which disclose contracts and government reporting is accessible to the public.<sup>86</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> NM Michieka and D Blackwship, *Avoiding the Resource Curse Applying the Guiding Principles in Kenya* (Martin J and Bravo K.E eds Cambridge University Press 2016) 572



## Chapter 3

### The EITI System

#### 3.1 EITI Evolution from 2002 to date

This chapter will give a general overview of EITI development as a transparency mechanism in anti-corruption by providing details of stages it has gone from its launch in 2002 to date

The purpose of this chapter is to see how different concepts in EITI linked transparency to anti-corruption and service in human rights. The study will find out; assessment of EITI Globally as tool addressing transparency in the extractive sector.

Transparency mechanism addresses specifically transparency in four aspects: allocation of revenue collection and allocations. Challenges of transparency mechanisms will be covered in depth in chapter five by looking on practicability in Tanzania and chapter six in comparison to Nigeria, and Ghana EITI member states.

Lastly, what are the reason(s) behind the introduction of beneficial ownership as transparency mechanism in 2016 almost 14 years down the line after the formation of the EITI? What are the plans ahead to reach implementations? Analysis of beneficial ownership will be in chapter four.

There were many pieces of literature on resource curse from rich-resources countries the late 1990s and 2000s where benefits realised from oil, gas and mining never benefited those countries; instead, they turned to be poor, corrupt and politically unstable.<sup>87</sup> There was concern about impacts of extractive sector investment specifically in developing countries governance structure by that time; together with the pressure by “Publish What You Pay” (PWYP a global network of CSO united in their call for an open and accountable extractive sector), campaign.<sup>88</sup>

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<sup>87</sup> Extractive Industry Transparency Initiative, “Early Beginnings”.

<sup>88</sup> J Banfield, *From Fuelling Conflict to Oiling the Peace: Harnessing the Peace-Building Potential of Extractive- Sector Companies Operating in Conflicting Zones*, (Sullivan R. (ed), Greenleaf Publishing Limited 2003) 225.

In September 2002, United Kingdom Prime Minister Tony Blair launched an EITI during the World Summit on Sustainable Development in Johannesburg by outline the idea of EITI.<sup>89</sup> The EITI is a standard for transparency and accountability management of oil, gas and mining industries. The aim was to increase transparency on payments made by companies to governments, and linked entities which are the measure to promote a 'do not harm' at a macro level.<sup>90</sup>

Stakeholders in EITI are companies, government and civil society. The United Kingdom Department for International Development (DFID) organised a meeting of stakeholders who agreed on the reporting standard developed EITI jointly.<sup>91</sup> In 2003, EITI Principles were designed to increase transparency management of natural resources; the approach was to disclose the payment and revenue.<sup>92</sup> In 2004, the Industrialized Nations asked the International Monetary Fund (IMF) and World Bank (WB) to give technical support to countries wanted to be implementers' of transparency policies.<sup>93</sup> The trust fund developed, and WB distributed funds for technical and financial assistance to EITI programmes and its activities were taken over by other organisation from 2016.<sup>94</sup>

The second conference met in London in 2005 composed of EITI Stakeholders and implementing countries, to work on EITI implementations in line with international rules for practical and credible.<sup>95</sup> The conference discussed criteria to focus on disclosure standard to be implemented by countries by reporting payments made by companies' to the government and revenue received by the government from the company, to be available in the public and comprehensive.<sup>96</sup> The meeting acknowledges the presence of CSO in addressing accountability through its engagement.

In 2009 and 2011, EITI held a Global Conference in Doha and Paris respectively, Doha Conference adopted the structure of governance for EITI, and minor changes proposed by the

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Bringing Stakeholder to the Table: Agreeing the EITI Principles.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> EITI, Drawing from Countries' First Experience with EITI: The EITI Criteria.

Board and endorsed at Paris Conference.<sup>97</sup> The EITI Validations Guide replaced with rules, which clarifies and guide through six policy notes.<sup>98</sup> The EITI Board and partners did consultation and work to improve EITI standards; this led changes to the EITI for example country has to set its objectives through MSG, and introducing new requirements in the reporting.<sup>99</sup> New requirements are the following; comprehensive and accurate disclosure; disaggregate reporting state-owned reporting, sub-national transfer, social expenditure by companies and payments from transit.<sup>100</sup> In 2016, EITI standard introduced beneficial ownership which needs an identity of the real owner of the extractive company operating in EITI member state to be known to the public by 2020.<sup>101</sup>

The EITI since its launch has 45 active member countries out of around 51 nations joined EITI, other nations delisted, withdrawn and other committed to participate. It has been a trend for EITI to be joined by rich resources countries which do not get an advantage of precious resources. Most of the participants are less developing nations with few developed countries such as Norway, Germany and United Kingdom.

### **3.2. An assessment of EITI Globally**

Board of the strategic working group met for discussion on EITI strategy review in 2011 to 2013 the board assigned the secretariat to outline various options the board is going to consider ahead of a board meeting in Jakarta October 2011.<sup>102</sup>

The evaluation of EITI questioned whether the EITI deliver well against its principles. The Board invited stakeholders to reply this question by giving their opinions on assessment and strategic direction of the EITI 3-5years ahead.<sup>103</sup> Stakeholders provided their views on improving the quality of EITI report by involving stakeholders who were engaging in the governance of the extractive industries, and other proposals stated would change the EITI objectives.<sup>104</sup> The PWYP and Revenue Watch Institute came with views of a firm legal basis for the EITI, transparency contract, disaggregate EITI reporting and licensing, in-kind

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<sup>97</sup> S Bartlett and K Andreassen, (eds), EITI Rules including the Validation guide (2011), The EITI International Secretariat, 7.

<sup>98</sup> EITI, Making the EITI meaningful: the EITI requirements.

<sup>99</sup> EITI, A better EITI Standard.

<sup>100</sup> Ibid.

<sup>101</sup> EITI, History from reports to results EITI Standards.

<sup>102</sup> EITI, Board paper 18-10, Strategy Working Group Discussion Paper.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

payments and transit revenues.<sup>105</sup> The WB suggested EITI criteria and EITI reports instead of reconciliation have to verify the payments and revenues supposed to be.<sup>106</sup>

The Secretariat after receiving these proposals they face resistance from implementing countries because not all the EITI countries convinced with desirable change, but the implementing nations have challenges in complying with requirements which were modified not long by then.<sup>107</sup> The implementing states have to implement beyond their current undertaking for improving transparency, accountability and collaborate with stakeholders.<sup>108</sup> These were considered broad, and MSG considering as complementary by taking actions to realise these principles and recognise countries taking actions.<sup>109</sup>

EITI secretariat suggested the requirements to remain as they are and validation will be replaced after continuous assessment to examine if the conditions met at minimum and performance which are beyond the minimum requirement.<sup>110</sup> The Secretariat evaluates EITI reports, MSG annual reports and quality assurance process by incorporate elements of peer review.

Different authors in addressing EITI success they are in a dilemma to tell if it has been successful. The EITI is a standard to promote transparency and accountability in the management of natural resources.<sup>111</sup> EITI is successful in openness by directing attention towards discrepancies in revenues from the extractive industry, but not contributed to a reduction of corruption.<sup>112</sup> Other findings state EITI membership succeed to mediate level of corruption in resource-rich countries like reduction of corruption in Peru after joining the EITI, but not in Mali.<sup>113</sup> The Peruvian government has a will to carry out the initiative than Mali; hence, EITI may reduce corruption in some countries, those lacking commitment will not.<sup>114</sup>

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> EITI, About who we are.

<sup>112</sup> SA Rustada PL Billonb and P Lujalac, Has the Extractive Industries Transparency Initiative been a success? Identifying and evaluating EITI goals (2017), Resource Policy 51 (151-162)160.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

Nigeria audited accounts 1999-2004 by using the EITI considered to be useful because the report found mismanagement and corruption.<sup>115</sup> Audit of 2005 discovered a difference of over US\$5 billion owed by the state-owned oil company through the difference calculated from what the company alleged to have paid as taxes, royalties and bonuses and what the government said to have received.<sup>116</sup>

EITI achieved to make government responsible for making follow up of international standard that denotes reforms and anti-corruption.<sup>117</sup> Laws and institutional framework, citizens and CSO use this tool to make the government accountable on use of revenue and publication of EITI report to raise public awareness about the extractive industry and push to have a foundation to build an improvement.<sup>118</sup>

EITI advocates transparency as it reduces political risk to investors because business transactions there are open and there are lesser accusations of corruption and coup d'état or regime change.<sup>119</sup> Accountable government and right corporate image creates conducive investment environment and attracts foreign direct investment in the development of natural resource to increase revenue and economic growth of the host developing countries.<sup>120</sup>

Liberia joined EITI and enacted legislation in 2009 which expanded the meaning of extractive industry by introducing rubber and forestry through the involvement of multi-stakeholder process.<sup>121</sup> Liberia before joining EITI extractive industry was not transparency to the local community but after joining EITI, local community access information through the multi-stakeholder process and audit.<sup>122</sup>

Liberia MSG uses EITI to examine granting of license and rights, the coverage was July 2009 to December 2011 and report stated 90% of the 68 reviewed contracts not awarded according

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<sup>115</sup> V Haufler, 'Disclosure as Governance: the Extractive Industries Transparency Initiative and Resource Management in the Developing World' (2010) *Global Environmental Politics* Volume10, Issue NO.3 by the Massachusetts Institute of Technology, 68.

<sup>116</sup> Ibid.

<sup>117</sup> BK Sovacool and N Andrews, 'Does Transparency Matter? Evaluating the governance impacts of the Extractive Industry Transparency Initiative (EITI) in Azerbaijan and Liberia' (2015) *Resource Policy*, Issue No.45, 185.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> V Haufler, (n 117).

<sup>122</sup> Ibid.

to Liberia law; another audit cover 260 contracts granted between January 2012, and June 2015 and finding was the same.<sup>123</sup>

EITI is the necessary tool in Liberia but considered not sufficient; condition for peace, stability and improved resource governance, despite Liberia success in implementing EITI still people cannot get the education, medication and better fed.<sup>124</sup> The solution for this believed the institutional capacity be improved to assure more significant, and longer-term gains from natural resources are yet to become visible fully.

Companies perceived the EITI to be a useful tool for preventing corruption but there is an absence of the mechanism to avoid it, and the members to the EITI lacks expertise, and the CSO are the ones who do not have skills.<sup>125</sup>

EITI criticised for not having completed and reliable data that needed for audit purpose. Citizens will fail to debate adequately in the absence of figures or data, which they could use to make people responsible accountable or for clarification or advise for sustainable development.<sup>126</sup> There is a complaint the data are in an aggregate form which cannot pinpoint specific figure or resource data to a particular responsible company or respective officer to hold them accountable.

There is an opinion against EITI not to be active on revenue transparency due to non-availability of local CSO; even availability of funds to support CSO could not leave the mark or impact made by the CSO.<sup>127</sup> CSO not considered as legitimate players in the field and their inquiry about use of extractive revenues are disregarded and silenced by authorities, or silenced by systematic and politically motivated intimidation and harassment.<sup>128</sup>

States members comply with transparency mechanism as a way of resource management and reduction of corruption though it cannot be said to have achieved although they have admitted

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<sup>123</sup> A Klein, 'Pioneering Extractive Sector Transparency. A PWYP perspective on 15 years of EITI' (2017) *Extractive Industries and Society* 4, 772.

<sup>124</sup> Sovacool BK and Andrews N, (n 120) 190.

<sup>125</sup> S Furstenberg, 'Consolidating global governance in nondemocratic countries: Critical reflections on the Extractive Industries Transparency Initiative(EITI)in Kyrgyzstan' ( 2015), *The Extractive Industries and Society* issue No. 2, 467.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> A Klein, (n 126) 172.

early to conclude impact of the EITI. The EITI considered not performing well on corruption in comparison to non-member states.

The Obama administration promised US would commit to EITI; in contrast, the Trump administration US has withdrawn its intention to join EITI. U.S Department of Interior has disclosed their fear to join EITI a tool of transparency of revenue which would violate business confidentiality and companies in the US are not ready to participate.<sup>129</sup> The US Attorney General was of the view America becoming part to EITI could be the matter of international leadership rather than working on corruption which he considered it to be not of significant risk.<sup>130</sup>

Extractive companies in the USA are against the mandatory disclosure rules and are reluctant to publish information about their activities specifically on payments made to host government for accessing the resources in the ground for fear of losing business.<sup>131</sup>

EITI is categorised to be weak due to a voluntary approach without a treaty but states with resources are required to comply with principles and objectives of the initiative and for it to be successful need a country commitment to integrity and transparency.<sup>132</sup> EITI conceded with the above statement but refuted by stating EITI is mandatory for companies required implementing by reporting in the member states country becomes compulsory as legislated.<sup>133</sup>

EITI as a voluntary approach regarded to cause a competitive disadvantage for companies which are bound by those principles. Other company may benefit by obtaining a license without complying with the EITI standard of transparency for non-endorsement of the EITI by non-member state country.<sup>134</sup>

EITI accused of not being able to control illicit financial flows; illegal money referred to benefit a particular group of people who are either local or foreign elites instead of public.<sup>135</sup>

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<sup>129</sup> Forbes sites, Leaving EITI is a blow to US leadership and sustainable global energy.

<sup>130</sup> Ibid.

<sup>131</sup> A Klein, (n. 126).

<sup>132</sup> AA Faruque, 'Transparency in Extractive Revenues in Developing Countries and Economics in Transition: A Review of Emerging Best Practices' (2006) 24 J. Energy Nat. Resources L. 66, 73.

<sup>133</sup> EITI: Is EITI Making Difference.

<sup>134</sup> AA Faruque, (n 133) 73- 74.

<sup>135</sup> BK Sovacool and N Andrews, (n 120) 186.

EITI has a requirement of reporting, but this cannot stop or control revenue that transferred to benefit few individuals.

EITI is said to miss component which will require the domestication of the EITI to include mine rehabilitation and closure information and ensure the mining company comply with it.<sup>136</sup> To heighten transparency the details of mine site data including land disturbance and rehabilitation liability will solve the current situation of the uncertainty of actual historical and environmental responsibility for the past, and present mining companies may be incurring.<sup>137</sup>

PWYP stated despite EITI success as transparency tool, an obstacle of EITI data published to the public are not in an open format are restricted by being locked up in pdf file format<sup>138</sup>; which is an obstacle to make comparison or cross-reference.<sup>139</sup> The format of EITI reports is a problem as is delivered in English language and one or two national languages.<sup>140</sup> Means in multilingual societies such as Nigeria society cannot contribute to the debate from making sense from EITI report.<sup>141</sup>

Voluntariness can make those corrupt countries not to join the EITI for them to commit a crime such as corruption for non-transparency unless they could have an internal mechanism such as legal transparency mechanism to prosecute them through corruption related laws.

### **3.3. EITI Transparency Requirements**

Member states to EITI are obliged to implement standards while operating in the extractive sector, the result of operations revealed in the annual report which has to be available to the public. For this study the following EITI standards will be covered; oversight by the MSG, allocations of contracts and licenses, beneficial ownership, production and export volumes and values and revenue collection and distributions.

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<sup>136</sup> AR Sequeira et al., 'Is Extractive Industry Transparency Initiative (EITI) sufficient to generate transparency in environmental impact and legacy risks? The Zambia mineral sector' (2016), *Journal of Cleaner Production*, Volume 129, 434.

<sup>137</sup> *ibid.*

<sup>138</sup> A Klein, (n 126) 773.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*



### **3.3.1 Oversight by the Multi-stakeholder Group**

The EITI standard requires MSG which is composed of the government, companies and independent, active and effective civil society. The government has to work with CSO and companies; the tripartite has to oversee the implementation of the EITI where the government has to make the invitation in the group in a transparency way and make sure stakeholders are represented sufficiently.<sup>142</sup> Stakeholders include private sector, civil society which covers civil society groups and civil society such as media and unions and other government entities such as parliamentarians; when appointing representatives take into account pluralism and diverse representation without any coercion and nomination be independent, civil society involved in EITI as MSG be operationally and independent of companies and government.<sup>143</sup>

The MSG should have good outreach activities with civil society, companies include media, websites and letters with information of government commitment to implement EITI and role of companies, and CSO and MSG shall disseminate information from EITI process such as EITI report.<sup>144</sup> The MSG is required to make approval of the annual work plans, an appointment of the independent administrator and terms of references for the independent administrator, EITI reports and annual progress reports, oversee the EITI reporting process, and participate in the validation.<sup>145</sup>

In implementing EITI decision making process be of inclusion of MSG for discussion, agree, and publish procedures for nominating and changing MSG representative, decision making, duration of the mandate and frequency of the meetings; and in a practice of per diems for representatives attending the meetings or any payments to the MSG member the practice should be transparent to avoid conflicts of interest.<sup>146</sup> The MSG before convening a meeting has to give notice in advance and timely circulation of the documents before the debate and proposed adoption and the minutes of the meeting by MSG be kept.<sup>147</sup>

In the MSG the government through the Head of state or a delegated government representative has to make a statement of intention to implement the EITI and government

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<sup>142</sup> EITI Requirement 1.4 (a) (i and ii).

<sup>143</sup> Ibid 1.4 (a) (ii).

<sup>144</sup> Ibid 1.4 (b) (ii).

<sup>145</sup> Ibid 1.4 (b) (iv-v).

<sup>146</sup> Ibid 1.4 (b) (vi).

<sup>147</sup> Ibid 1.4 (vii and viii).

should appoint a senior individual to lead the implementation of the EITI and have the confidence of all stakeholders.<sup>148</sup> The government has to engage effectively in the EITI process and senior government officials represent the MSG.<sup>149</sup>

Before joining EITI state has to make an application for EITI candidacy and sign up requirements one of the requirements is; the government commitment to work with the civil society and companies on the implementation of the EITI.<sup>150</sup> The oversight of MSG which is tripartite including the government, companies and CSO is one of the EITI requirements. The government has to make sure the CSO has a good environment for them to participate in the implementations of EITI in connection to relevant laws, regulations and rules and the engagement of the EITI must be respected.<sup>151</sup> The free participation of the CSO in EITI process, public debate in relation to the implementation of the EITI, express their opinion in a transparency way on natural resources governance issues.<sup>152</sup>

The company has to participate fully, actively and effectively in the EITI process and the government has to give the company a room to participate in accordance with relevant laws, regulations and rules in the implementation of EITI.<sup>153</sup> The company has a right to participate in the EITI through its representatives and respected, and the government has to make sure the company does not face any obstacles while participating in the EITI process.<sup>154</sup>

## **Civil Society Organisation**

### **Tanzania**

The CSO in the mining sector in Tanzania became active in early 2000 when there was a review of mining policies for the benefit of the country.<sup>155</sup> This led to the enactment of the Mining Act 2010; HakiRasilimali is the CSO working on extractive industry in Tanzania.<sup>156</sup> The challenges CSO facing in Tanzania is integrity and governance of the interest of the people they want to serve, at the community performance on transparency and accountability there are fundamental issues the government questions the authority of the CSO on good

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<sup>148</sup> EITI Requirement 1.1(a) and (b).

<sup>149</sup> Ibid 8 (c) and (d).

<sup>150</sup> EITI Rules including the Validation guide, 2011 The EITI International Secretariat.

<sup>151</sup> EITI rule 1.3 (b).

<sup>152</sup> Ibid 1.3 (c) (d) (e) (i).

<sup>153</sup> Ibid 1.2 8(a) (b).

<sup>154</sup> Ibid 1.2 (b) (c).

<sup>155</sup> Hakirasilimali Tanzania Alternative Extractive Industry Conference Report 2016, 7.

<sup>156</sup> Ibid.

governance and accountability.<sup>157</sup> The CSO requires capacity building to engage in policy dialogue with the government and the donors.<sup>158</sup> The CSO lacks financial, human and physical resources to discharge its function effectively instead of depending on the external financial support; competent staff in performing their duties, failure to do so their duties engrossed by the International NGOs and development partners and make the CSO understaffed.<sup>159</sup> The lack of resources and depending hindered CSO to debate on matters which they find donors who act contrary has sponsored them to discharge their duties.

### **Nigeria**

The NSWG in the EITI process has not met for six months which has brought a thought the MSG is marginalised.<sup>160</sup> The Nigeria EITI process has its challenge such as the CSO was not independent because the governments interfere in selecting CSO representatives to the NSWG.<sup>161</sup> The President of Nigeria was accused of nominating CSO representatives by a missing mechanism which will enable the CSO representatives to give feedback to the large CSO and affected implementation of the EITI.<sup>162</sup> Also the CSO was not consulted in making work plan design and report format this led to the broader of the CSO by formulating another CSO group in 2005 where the representatives nominated by the CSO selected from the broaden CSO.<sup>163</sup> Furthermore, in 2006 the NSWG and representatives from civil society steering committee signed a memorandum of understanding aimed to institutionalising a process which will widen CSO involvement in the EITI process.<sup>164</sup>

The CSO in Nigeria in 2006 encountered a problem with the inclusion of disaggregate data in the reconciled report they complained to lack ability to analyse and unfold discrepancies between payments and receipts and none of the companies included in the report for reasons of suffered negative commercial ramifications.<sup>165</sup> Nigeria government took its initiatives different from the NEITI by publishing transfer to the state government from the national level.<sup>166</sup> The CSO was not active to make a push for the publication to be made public over

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<sup>157</sup> The EU Country Roadmap for the Engagement with Civil Society 2014-2017, 29.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Publish What You Pay and Revenue Watch Institute, Eye on EITI 2006 Revenue Watch Institute, 11-12.

<sup>161</sup> Ibid 15.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid 15.

<sup>164</sup> Ibid 16.

<sup>165</sup> Ibid 21 -22.

<sup>166</sup> Ibid 22.

the channeling of the funds because from the beginning the government has been exercising its muscles over the MSG. The CSO considered being beyond their powers or not being able to identify it as a problem which needs their efforts for changes to be affected.

The NSWG has CSO within the MSG and those who are out the NSWG. The Nigeria validation conducted in 2006 with directive some corrections have to be made in the requirement 1.3 (a) by making sure, the CSO is active by engaging in the governance debate and making follow up on recommendations from the EITI report process.<sup>167</sup> In Nigeria, the CSO is not engaging itself in the debate as their rights to ask or give their opinions in connection to the EITI implementations. It means the progress of EITI will not be seen if the CSO will work to push on recommendations from EITI report instead the mining sector will stagnate by not see the benefits of the resources.

### **Ghana**

Ghana after it has endorsed the EITI government wanted the national CSO and NGO to appoint the representative to the NSC.<sup>168</sup> The CSO in Ghana contributed well in the EITI process and resulted in the vigorous implementation of the EITI, civil society alleged to be given opportunity in the development of reporting formats. Apart from that, CSO in Ghana was able to push for the establishment of the EITI to the sub-national level and publication of government expenditures and all these have incorporated in the report format which is good beneficial for EITI implementation.<sup>169</sup> The CSO has a communication plan on EITI targeting the media and mining communities, but the obstacle in implementing was financial support.<sup>170</sup>

However, Ghana PWYP has faced challenges such as the support from UK Department for International Development was undermined when they wanted to support the CSO by being conditioned to send money to the government which was resisted by the CSO with the reason it would compromise their independence perception.<sup>171</sup> The PWYP in Ghana revenue from mining companies transferred to the district level the disclosure of this revenue transfer was a campaign made by the CSO for publication of movement of money from the federal

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<sup>167</sup> EITI Board Nigeria Validation Board decision 2017.

<sup>168</sup> Ibid 13-14.

<sup>169</sup> Ibid 10.

<sup>170</sup> Ibid 17.

<sup>171</sup> Ibid.

government to the district assemblies; therefore, the EITI has stretched to the sub-national level.<sup>172</sup>

Ghana performance under the EITI validation carried on, and the EITI Board decision made in 2017 whereby its report does not show weakness about the CSO. This means the CSO in Ghana is doing well by being given rights by the government on nominations among the coalition's member from the beginning: though government wanted to intervene funds to support CSO operations, the CSO has an excellent base which make sure the government could not use anyway to deny the right to speak out for the benefit of Ghana citizenry.

The three country has some challenges by when CSO is included as part of MSG we have see financial constraints exist in every country and the CSO depending or relying on financial aids from developed countries. Due to this it means even if the MSG is having working plan in place still its implementation can be an uphill task because there is a time they cannot foot their bills because they need transport allowance or per diem to attend MSG meetings. This will make the MSG miss some inputs from CSO if they will not be able to attend the meeting. Also the study has not see any mechanism in place to deal with budget constraints in CSO in three countries, therefore the countries will not see positive impact of the EITI through MSG if CSO will not contribute full in their role where they can ask companies and government to advocate transparency in circumstances they are needed to do so. Therefore the CSO need to be creative by having reliable source of revenue which will enable them to do their duties for the benefits of the citizens.

The government through its commitment to work with CSO when applying as EITI candidacy but still they use their muscles to suppress CSO be it on nomination of leaders to represent CSO, work on transparency by ensuring the information in connection to EITI is made available to the public for easy debate by the citizenry. Suppression of CSO by the government is not in every country in the three countries. Other State countries CSO has knew their functions by establishing a boundary incase of any interference by the government Nigeria for instance has raised their voices against government nomination of CSO leaders which is a good progress in transparency.

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<sup>172</sup> Ibid 26.

### 3.3.2. Transparency on Allocations of Contracts and Licenses

EITI requirement 2.4 provides for implementing countries disclose agreements to the public with terms attached to the exploitations of resources. Government and company develop a relationship in the extraction of resources through terms agreed between them and include the full text of the contract, concession entered to or decided by the government, annexure or addendum to relevant exploitations and alterations or amendments.<sup>173</sup>

The contract has to disclose tax and terms of sharing risk and incentive between state and company depending on their agreement and life of the contract<sup>174</sup>; transparency contract made citizens aware of the benefits their country is getting through verification on revenue received by state and company fulfil their duties in their operations over land and environment.<sup>175</sup>

EITI is a soft law, and its member states have to incorporate the requirement of disclosure of contracts on exploitation and explorations of resources reflected in the government policy; be included in the legal provisions to show current practice and any amendment or planned one in the future.<sup>176</sup>

This requirement is supposed to be implemented by the member state still yet some countries are not complying with and other countries interpret the requirement not a mandatory instead is an option.

The member state is supposed to disclose information concerning an award of the license about the company covered in the EITI report by describing the process of granting the license, technical and financial criteria used and information of license receiver.<sup>177</sup> Information has to be open for all license awards covered by the EITI report by considering license allocated to companies not included in the EITI report; because their payments are below the agreed threshold, failure to disclose has to be documented in the EITI report and state the future to overcome such barriers and timeframe work.<sup>178</sup>

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<sup>173</sup> EITI requirement 2.4 (c).

<sup>174</sup> EITI, Contract transparency opening up slowly steadily.

<sup>175</sup> Ibid.

<sup>176</sup> EITI requirement 2.4 (b).

<sup>177</sup> Ibid 2.2 (i-iii).

<sup>178</sup> Ibid 2.2 proviso after (iv).

Licenses refer to any license, lease, title, permit, contract or concession which the company or an individual receive from the government to have a right to explore or exploit mineral resources.<sup>179</sup> The implementing country need to have a register which is accessible publicly or a cadastre system with timely and comprehensive information of licenses relating to company covered in the EITI; with name of license holder, date of application, award and duration of license, coordinates of license area plus size and location of the license disclosed in the license register.<sup>180</sup>

### **3.3.3. Transparency of Beneficial Ownership**

Due to the threat posed to banks and financial institutions, Financial Action Task Force (FATF) was developed by the G-7 Head of states to fight the trend of money laundering.<sup>181</sup> The task force formed by the Head of States or the Government and the President of European Commission to work on this. FATF in 2012 reviewed its standard and revised recommendations and expanded by adding more standards; to strengthen the integrity of the financial system by a tool to take action against financial crime and include corruption.<sup>182</sup>

In 2016, Panama Paper Scandal leaked millions of documents implicated public officials and tax evaders to use anonymous legally registered companies for hiding money laundered, corruption and bribery.<sup>183</sup> Then, EITI came up with the new requirement for disclosure of beneficial ownership in all extractive companies in implementing countries.<sup>184</sup> Before, in 2013 EITI Board agreed to have beneficial ownership disclosure in the future.

The EITI requirements reformed by introducing beneficial ownership which wants; a company applying or interested in the exploration of mining contracts in EITI country has to give the name, nationality, and beneficial owner country of residence and identify any Politically Exposed Persons (PEPs).<sup>185</sup> The member states are advised to keep a register of the beneficial owners in the corporate publicly register including their identity, level of ownership and how ownership is exercised.<sup>186</sup> In 2014, the EITI International introduced a pilot scheme that Nigeria and Tanzania are countries attended pilot study as a feasibility study of having

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<sup>179</sup> Ibid 2.3 (a).

<sup>180</sup> Ibid 2.3 (b) (i-iii).

<sup>181</sup> FATF, History of the FATF.

<sup>182</sup> Ibid.

<sup>183</sup> EITI Factsheet, Disclosing beneficial ownership, 1.

<sup>184</sup> Ibid.

<sup>185</sup> EITI requirement, 2.5 (c).

<sup>186</sup> Ibid 2.5 (a).

beneficial ownership disclosure using EITI report and identifying PEPs who are government officials interested in the mining sector.

The implementing countries are supposed to agree on roadmaps for the requirement on beneficial ownership by 1 January 2017 of which they have developed a roadmap with a definition of the beneficial ownership which covers various forms of ownership and control. The beneficial owner is the person who can either own company or control through shares, votes and other ways.<sup>187</sup> Member states have to know who has authority in company decision making and benefits from the company activities; defining beneficial owner and developed criteria to consider as the beneficial ownership which caused debate over the necessary words to capture every detail to constitute beneficial owner.<sup>188</sup> The definition of beneficial ownership should provide obligations for PEPs and in the case is a joint venture each entity has to disclose beneficial owner except for public listed company or wholly owned subsidiary of the public listed company.<sup>189</sup>

EITI requirement of beneficial ownership has to be implemented by implementing countries by 2020 where private companies have to disclose their beneficial owners as part of EITI report.<sup>190</sup>

### **3.3.4. Transparency on production and export volumes and values**

Disclosure of information on exploration and production of minerals make stakeholders aware of extractive industry significant. Transparency in exploration and production includes details about exploration actions, production and export data.<sup>191</sup> The EITI report of implementing country has to disclose data for a relevant fiscal year on production volumes and value of the production and kind of commodity by region if possible by including data on the source of production and disclosure of how they have calculated the amount of output and valued.<sup>192</sup> Member state has to unveil export data in the fiscal year EITI report which comprises of total volumes and value of exports by commodity from a specified region where it originates and

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<sup>187</sup> EITI Factsheet, (n. 99) 3.

<sup>188</sup> Beneficial ownership transparency Milestones on the road to 2020 Highlights from EITI countries, p.10.

<sup>189</sup> EITI requirement 2.5.f .iv and v.

<sup>190</sup> EITI, the improved standard for improved sector governance.

<sup>191</sup> EITI requirement 3.

<sup>192</sup> EITI requirement 3.2.



includes a source of export data by explaining how export volumes and values disclosed in the EITI report calculated.<sup>193</sup>

### **3.3.5 Transparency on Revenue Collection and allocations**

#### *Transparency on Revenue Collection*

The payments have to be made by the company through tax or royalties to the government and on receipt of the amount the government has to disclose the revenue, they have received from the company. This requirement can influence corruption if the mechanism of transparency will not be in operation.

Revenue collection means the implementing state in the act of report has to involve the MSG to agree on payments and revenues which its omission or misstatement could affect comprehensiveness of the EITI report, therefore, has to be disclosed documents.<sup>194</sup> Specify revenue stream such as profit taxes, royalties, bonuses like production and discovery bonuses, significant government payment and dividends, here the MSG has to consider the size of the revenue and streams in comparison to total revenues by disclosing them through documentation.<sup>195</sup>

Reconciliation is made between payments made by the private company and state-owned enterprise and revenue received by the government and disclosed in media agreed on.<sup>196</sup> Both government and company are required to disclose payments and receipts, except when the omission could not affect the completeness of the EITI report.<sup>197</sup>

Revenue collection has several sources with comprehensive disclosure of taxes and revenues, the sale of the state's share of production or revenues collected in-kind, barter arrangements, transportation revenues, and State-Owned Enterprises transactions, and sub-national payments, level of disaggregation, data timeliness and data quality.<sup>198</sup> The government gives aggregate total revenues received from each of the benefits streams agreed in the scope of the EITI Report including those below-agreed threshold materialities.<sup>199</sup>

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<sup>193</sup> Ibid 3.3.

<sup>194</sup> Ibid 4 (a).

<sup>195</sup> Ibid 4.1 (a) and (b).

<sup>196</sup> Ibid 4.1 (c).

<sup>197</sup> Ibid.

<sup>198</sup> Ibid 4.

<sup>199</sup> Ibid 4.1 (d).

The state-owned enterprise is required to disclose the volumes sold, revenue received, and sale of the country share part of the production and any other in-kind income collected.<sup>200</sup> Reporting communicate type of product, price, market and sale volume and MSG assign an independent auditor to reconcile quantities sold, and revenues received.<sup>201</sup>

Payments and revenues are audited by a credible and independent auditor who applies international auditing standards the same applies to the reconciliation of payments and income and auditor publish his opinion regarding reconciliation such as discrepancies.<sup>202</sup>

Implementing country produced a report on an annual basis although the first report after validation submitted within 18 months; MSG has to make data accessible online by ensuring they comply with time to produce within a time limit before a suspension.<sup>203</sup>

#### *Transparency on revenue allocation*

The member state has to disclose by describing the distribution of revenue from the extractive company by indicating the extractive industry funds come from whether in cash or in kind and this has to appear in the national budget.<sup>204</sup> Government after receiving the revenue from the mining company has to use the same for economic development to reduce poverty through sustainable development. Revenue not recorded in the national budget when allocated, clarifications are made together with the source relevant for a financial report, like, sovereign wealth and development funds.<sup>205</sup>

MSG has to assure disclosure is made when transfers between national and sub-national government entities for revenue received from extractive industries regulated by a fiscal law and revenue sharing formula used stated and the actual amount transferred to the central government and each relevant sub-national entity.<sup>206</sup> The MSG has to reconcile transfers to

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<sup>200</sup> Ibid, 4.2

<sup>201</sup> Ibid.

<sup>202</sup> Ibid 4.9 (a and b).

<sup>203</sup> Ibid 4.8 (a and b).

<sup>204</sup> Ibid 5.1 (a).

<sup>205</sup> Ibid.

<sup>206</sup> Ibid 5.2 (b).

ensure in case of transmission, which is discretionary, or ad hoc disclosure has to be made and combined by MSG.<sup>207</sup>

MSG is encouraging to give information on revenue management and expenditure by stating projects the aim is to ensure; efficiency and accountability, description of country budget and audit process in connection with information on budget, expenditure and audit report information issued in time for the public to be conversant with and debate on revenue sustainability and resource dependence.<sup>208</sup>

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<sup>207</sup> Ibid.

<sup>208</sup> Ibid 5.3 (a-c).

## Chapter 4

### The Legal Framework of the Mining Sector in Tanzania

This Chapter will analyse policy and laws governing mining sector in Tanzania with a particular focus on transparency aspects laid down in the EITI.

#### **4.1 The Mineral Policy of Tanzania, 2009**

Economic liberalisation, in the early 1990s a lot of reforms took place for foreign direct investment period. The mining sector was adjusted to accommodate changes including the Mineral Policy, 1997 and enactment of the Mining Act, 1998. The Mineral Policy gave vision for making mineral sector contributing to the GDP and reduction of poverty by integrating mining industry with another economic area.<sup>209</sup> Reform was designed to encourage foreign and private sector in the mining industry through legal, fiscal regulatory and institutional changes.<sup>210</sup> These changes attracted many mining companies on an exploration of mining and increase mineral trading in the country. The Mineral Policy, 2009 was enacted after an evaluation of 10 years on the implementation of the Mineral Policy, 1997. However, after repeal of the Mining Act, 1998, the Mining Policy, 2009 was drafted to give guidance in the mining sector to increase benefits from mining, promote and facilitating value addition to minerals and to improve the economic environment for investment and improving legal condition.<sup>211</sup> Formulation of Mining Policy led to the enactment of The Mining Act, 2010 to accommodate changes made in the policy.

This policy applicable to-date, even after lots of changes made in the sector on legal framework and membership in EITI. The policy does not reflect EITI standards because Tanzania joined EITI 16 February 2009,<sup>212</sup> the same year the policy was formulated.

Mineral policy expresses some entitlement which is human rights, articles states to give rights to government and citizens do the mineral extraction, rights to compensation and relocation and an increase of public awareness of the mining activities.

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<sup>209</sup> The Mineral Policy 2009, 9.

<sup>210</sup> Heinrich-Böll-Stiftung (n 17) 34.

<sup>211</sup> The Mineral Policy 2009, 5-6.

<sup>212</sup> History of TEITI.

The government is required to involve itself in mineral projects to get shares of fiscal benefits generated from mining.<sup>213</sup> The fiscal advantage is through a tax on profits and the dividend received from its participation in the mining projects have no guarantee as they can suffer financial loss but assured in future shares of government may rise.<sup>214</sup>

Participation of citizen in the large mining companies by buying shares locally and internationally and the government ensure companies are registering with the local stock exchange for public involvement in medium and large-scale mines.<sup>215</sup> The rationale retain earnings by MNCs to circulate in host state circulation and invested in a different project which creates jobs and income for citizens and a country instead of investing that money overseas.

The investor has to make relocations and resettlement after paying appropriate rate and proper valuation to victims.<sup>216</sup> Failure to meet these requirements and cause dissatisfaction to citizens can cause riots which will affect MNCs operations and end up operating under loss.

The mineral policy provides public awareness on mining activities. The purpose is to ensure the public receive correct information concerning mining sector and on time.<sup>217</sup> Information will assist in the implementation of the policy, and the government may involve stakeholders to improve the way of communicating information to the public for the sector to grow.<sup>218</sup>

The policy provides the legal and regulatory framework in the mining sector to be transparency as one of the features followed by predictability and minimum discretion.<sup>219</sup> These features were to echo in the current legal framework to comply with the policy.

Minerals Policy emphasised government to have cooperation with international and regional organisations<sup>220</sup> such as joining EITI. Policy stress cooperation is for the development in the mining industry through opportunities provided by the organisation.<sup>221</sup>

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<sup>213</sup> The Mining Policy 2009, 14.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid 15.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid 20.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid 13.

<sup>220</sup> Ibid 22.

<sup>221</sup> Ibid.

## **4.2 Tanzania Extractive Industry Transparency Initiative (Transparency and Accountability), Act, 2015**

Tanzania incorporates EITI in its laws TEITA Act, 2015 express transparency via reporting. The law wants the extractive companies to give accurate information to Tanzania Extractive Industry Transparency Initiatives Committee (TEITI) on yearly. Company report shall contain CSR, and local content information, failure or refusal to submit information is an offence<sup>222</sup>, the offence and penalty illustrated in section 23 of the Act.

The committees after receiving the report engage an independent administrator in reconciling and verifying the payments made by the company and revenue collected by the government, data included are investment expenditure, production and export.<sup>223</sup> The administrator after reconciliation submits a report to the committee for consideration or publication.<sup>224</sup> If the reconciler found discrepancies between payments and receipts, the committee after receipt the report shall submit the report for investigation by Controller and Auditor General (CAG).<sup>225</sup> CAG audit and come with an audit report and forwarded to the Committee and the Minister; the Committee will submit the report to the relevant authorities for action.<sup>226</sup> Relevant authority will take actions of recommendations by the CAG within 30 working days, and prepare and forward implementation report to the Committee which will submit the report to the Minister for consideration and publication.<sup>227</sup> The committee takes the CAG audit report to the relevant authority (we presume the company) to implement actions after discrepancies discovered. Relevant authority will take steps and return the report to the Committee. There is no provision to show the committee verifying the implementations done by the competent authority before its publications. The intention is to foster transparency in the extractive sector and make people accountable for the report. However, there is no explanation of the media the Minister responsible would publish the report. The Minister will table the report to the National Assembly on the implementation of the activities not more than twelve months after the closure of financial year.<sup>228</sup>

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<sup>222</sup> Tanzania Extractive Industry (Transparency and Accountability) Act 2015, (TEITA Act 2015,) section 15.

<sup>223</sup> Ibid section (17) (1), (2) and (3).

<sup>224</sup> Ibid section 17 (5).

<sup>225</sup> Ibid section 18 (1).

<sup>226</sup> Ibid section 18 (2) and (3).

<sup>227</sup> Ibid section 18 (4) and (5).

<sup>228</sup> Ibid section 19.

The committee has to cause the Minister to post in the website or media which is publicly accessible all concessions, contracts and license relating to the extractive sector, names of the people who are shareholders and have interest in the extractive companies.<sup>229</sup> The Minister for minerals has never published in the website of the Ministry of Minerals (previous Ministry of Energy and Minerals) or any other media any mining contracts, license or concessions between the government and the MNCs.

Non-disclosure of mining contracts is a violation of the right of Access to information. Tanzania enacted the Access to Information Act, 2016. The law advocates transparency and accountability yet the law has not come to force to date. The wording of the Act is to serve the interest of state when they do investigation for their interest and control private people who have to apply and pay fees to access information. The only law which seems to be exercisable is subject to limits is the Newspaper Act, 1976 which hinder the right to seek, receive and disseminate information including the context of the extractive industry it is much of newspaper information.

### **The TEITA- Regulation**

The Minister responsible in consultations with other relevant ministries empowered to make a regulation to comment on matters which are necessary or convenient to be prescribed correctly to give effect to the provisions of the Act.<sup>230</sup> The study has identified challenges that cause transparency not to be enforceable for non-enactment of regulation to regulatory provisions in the TEITA Act, 2015 by giving in-depth elaborations on the applicability of the law.

For instance, the scope of the disclosure of contracts and licenses details have to be accessible to the public, regulations could give guidelines for disclosure, like what data public access or denied for reasons of compliance with international treaties, confidentiality not to be applied broadly because the transparency of mining contracts does state scope of application.

### **4.3 The Mining Act, 2010**

TEITA Act, 2015 made consequential amendment in the Mining Act, 2010. The Mining Act generally deals of minerals by granting, renewal and termination of the mineral rights,

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<sup>229</sup> Ibid section 16.

<sup>230</sup> Ibid section 25.

payments of royalties, fees and other charges. Ministry of Minerals in collaboration with the Committee have a registry where disclosure of names of individuals or companies who won minerals rights are registered and open for public inspection after paying a prescribed fee.<sup>231</sup>

“Online transactional mining flexicadastre portal” is a web service mineral applicant, online payments, administration of mineral rights and exchange of minerals information including communication of decision made electronically.<sup>232</sup> Web service online payment and applications are categorised as an anti-corruption way because of no one to one transaction between the applicant and the officer in the institutions, therefore no favouritism or backdate applications for requirements of first to come in first to be served and no solicitation of corruption.

The Written Laws (Miscellaneous Amendments) Act, 2017 repealed Part III of the Mining Act, 2010 and replaced with new provisions. Section 25 of the Act now read to be section 26; this section is added in the consequential amendment 2015. Unfortunately, the paragraph (h) delete words with reference made to TEITI Committee. Paragraph (c) and (f) repealed and reinstate of para (f). Generally, the information furnished by the holder of mineral rights cannot disclose unless mineral right holder consent.<sup>233</sup> There exceptions where disclosure under this law made in connection with the administration of this act, legal proceedings, investigation or inquiry, preparation by or on behalf of government statistics in respect of mining or for the aim of measures taken under any written laws aims to prevent or to combat corruption.<sup>234</sup> Corruption was not in the mining law before but introduced in the amendment of 2017. TEITI Committee is given the power to acquire information from the mining companies and publish.<sup>235</sup> Therefore, even though the mineral right holder can withhold information or documents but TEITI has the power to get them and publish therefore transparency is exercised.

The Commission empowered in the Mining Act, 2010 to advise the Government on all matters relating to the administration of the mineral sector by a focus on the monitoring and

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<sup>231</sup> The Mining Act, 2010 section 106

<sup>232</sup> The TEITA Act 2015 amended section 4 (c) of the Mining Act, 2010.

<sup>233</sup> The Written Law (Miscellaneous Amendments) Act 2017 section 26 (1).

<sup>234</sup> Ibid section 26 (2) (a-f).

<sup>235</sup> The Mining Act 2010 as amended by TEITA Act 2015, section 25 (2) (f).



auditing of mining operations to maximise Government revenue.<sup>236</sup> The amendment to the Mining Act, 2010 did not amend TEITA Act, 2015 which gave the CAG power to audit which now is assigned to the Commission. For the time being, the CAG is not empowered to do auditing unless the Commission authorises CAG to do so.

#### **4.4 The Income Tax Act, 2004**

The law denies disclosure of information for reason of official secrecy, except for an officer in his official capacity may disclose a document or information required to perform duties authorised under this law.<sup>237</sup> The document or information disclosed when required by court or tribunal for administrative review or proceedings,<sup>238</sup> for any law administered by the Tanzania Revenue Authority,<sup>239</sup> needed by the person in the service of government revenue or statistical department where disclosure is necessary for the performance of official duties.<sup>240</sup> The CAG or a person authorised by him disclosure is necessary for the performance of official duties<sup>241</sup>. All authorities above have to keep documents and information secretly except to the minimum extent necessary to achieve purposes for which disclosure is permitted.<sup>242</sup>

People with authority in the course of performing government duties access documents and information under this law. The same to mining contracts which are accessed by government officials and the company.

Enactment of the TEITA Act, 2015 amended that provision. There is an error by the drafter by stating change made in section 140 (1) of the Income Tax Act, 2004 by adding paragraph (h) while subsection (1) has paragraphs (a) and (b) and subsection (2) has paragraphs (a-g). Therefore, the amendment was for subsection (2). Additional paragraph empowers TEITI-Committee to publish tax information from extractive industry companies.<sup>243</sup> This brought a transparency right to the public where individuals or non-state organisation can access information through TEITI committee who publish tax information from the mining company.

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<sup>236</sup> Ibid section 22 (j).

<sup>237</sup> The Income Tax Act 2004, section 140 (2) (a).

<sup>238</sup> Ibid section 140 (2) (b).

<sup>239</sup> Ibid section 140 (2) (d).

<sup>240</sup> Ibid section 140 (2) (e).

<sup>241</sup> Ibid section 140 (2) (f).

<sup>242</sup> Ibid section 140(3).

<sup>243</sup> Ibid section 140 (2) (h).

#### **4.5 The Economic and Organized Crime Control Act, 1984 (EOCCA)**

In 2015 during general election the ruling party Chama cha Mapinduzi (CCM) its manifestation aimed to establish the Corruption and Economic Crimes Division of the High Court,<sup>244</sup> before the division was called High Court sitting as an Economic Crimes Court.<sup>245</sup> In 2016, the amendment in EOCCA meaning of corruption offence reference made in the Prevention and Combating of Corruption Act, 2007 where these offences explained in the First Schedule to the EOCCA. The amendment introduces economic crimes offence in paragraph 30 which states the person will be guilty if he or she has committed the offence for failure to produce document or information and production of false information under sections 23 and 24 of the TEITA Act, 2015 respectively.

The rationale of charging them is to make individuals or corporations to comply with the requirement of producing information or documents which are reliable and accessed publicly through the Committee. The prosecutions of the case end by paying fine. Victims who were supposed to get information disregarded unless the magistrate uses his or her own discretion and order production of the data to the Committee.

Corruption is linked with mining contracts negotiated and concluded confidentially even the legal framework regarding mining sector before has no transparency culture. Tanzania classified corruption in the mining sector as an economic crime and grouped as economic sabotage in the Economic and Organised Crimes Act, 1984.

#### **4.6 The Prevention and Combating of Corruption Act, 2007 (PCCA)**

This Act has nothing to do with transparency in the extractive industry to curb corruption. Disclosure of information stated is on giving information on commission or intention to commit the offence.<sup>246</sup> The foreign state or government might assist to disclose information to the bureau to carry investigation, prosecution, court proceedings and information on proceeds of the offence.<sup>247</sup>

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<sup>244</sup> The Written Law (Miscellaneous Amendments) 2016, section 2, the name substituted by deleting the definition of the court. This law amended from time to time.

<sup>245</sup> The Economic and Organised Crime Act 1984, section 3.

<sup>246</sup> The Prevention and Combating of Corruption Act 2007, section 39 (1).

<sup>247</sup> *ibid* section 56.

Disclosure of the information is for measures taken by any written laws aimed at preventing and combating corruption,<sup>248</sup> here PCCA is to prevent corruption in the mining sector either disclosure will be made for investigation or any other purpose.

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<sup>248</sup> The Written Law (Miscellaneous Amendment) 2017, section 26 (f)

## Chapter 5

### Compliance with Transparency Requirements under TEITA

#### 5.1 Transparency on Allocation of Contracts and Licenses

Tanzania as a whole and local community has been posing a question to criticise mining as a priority sector, how the mining has contributed to the development of Tanzania.<sup>249</sup> The mining contracts or development agreements are out of the public, and this has intensified the matters.<sup>250</sup> The government of Tanzania has concluded agreements with MNCs engaging in large-scale mining, and these agreements reached before the enforcement of the Mining Act, 1998<sup>251</sup> and before the evolution of EITI.

The contracts are not available to the public, but through different committees or CAG auditing was accessible and alleged the agreements were drafted in favour of the investors with favourable tax to attract mining companies to invest in Tanzania.<sup>252</sup> Failure of the contracts to have terms in support of government affects the revenue contribution to the country GDP and total revenue.<sup>253</sup> These contracts purportedly to have stabilisation clause protecting investors from complying with the new social and environmental laws or mining companies has to receive compensation from the state for cost incurred.<sup>254</sup> The CAG report found MDAs of North Mara Gold Mine, Geita Gold Mine and Bulyanhulu Gold Mines concluded before enactment of the Income Tax Act, 2004.<sup>255</sup> The tax rates used in those MDAs are from the Income Tax Act, 1973 because of stability clause the rate never changed.<sup>256</sup> The CAG advise the government to renegotiate with those companies for tax adjustment due to the changes of economic variables since the signing of agreements.<sup>257</sup> The parliament amended the Mining Act, 2010 by prohibiting stabilisation arrangements entailing freezing of laws or contracting away.<sup>258</sup> The stabilisation arrangement is allowed to be specific by state the time limit and is not acceptable to have stabilisation clause in the contract

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<sup>249</sup> The Demystification of Mining Contracts in Tanzania, Policy Forum.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid 7.

<sup>253</sup> Ibid 8.

<sup>254</sup> S Andrea, 'Stabilisation Clauses and Human Rights, A Research Project conducted for IFC and the United Nations Special Representative for the Secretary-General on the Business and Human Rights'(2009) 11.

<sup>255</sup> The Controller and Auditor General, Report of Public Authorities and other Bodies 2015/2016, p.95.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> The Written Laws (Miscellaneous Amendments) Act 2017, section 100E (1).

for a lifetime in the mining instead there should be a provision for renegotiation from time to time which bases on economic equilibrium principle.<sup>259</sup>

However, the extractive industry wants transparency and accountability by disclosing mining contracts for public accessibility which neither the Ministry nor the TEITI websites uploaded them. Hence, Tanzanians does not exercise the right to have access to mining contracts.

There are writers recommended mining contract to be scrutinised by the public and before the final agreement made, be approved by the parliament.<sup>260</sup> Currently, the National Assembly empowered to review agreements made by the government in connection to natural wealth and resources.<sup>261</sup> The National Assembly may review all agreements entailing extraction, exploitation or acquisition and use of natural wealth and resources.<sup>262</sup> The National Assembly power to review has the word "may" which express the act of review is an optional and not mandatory requirement. The parliament after reviewing a contract and find unacceptable terms through resolution advice the government to rectify terms by re-negotiation.<sup>263</sup> The government has to make rectification within thirty days of the resolution by the National Assembly by informing the party to the agreement of the intention to renegotiate terms the National Assembly found inconceivable.<sup>264</sup> The government after completion of renegotiation writes the National Assembly the outcome.<sup>265</sup>

Mining operations in Tanzania carried after getting mineral rights an individual who acts, in contrast, will be fined or imprisoned, and corporate body fined.<sup>266</sup> In 2017, legal reforms in the mining sector in Tanzania affect powers of the Minister. The Commissioner for Minerals will be appointed by the President among public officers to advise the Minister on matters relating to the mining sector.<sup>267</sup> There is the establishment of Mining Commission,<sup>268</sup> which

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<sup>259</sup> Ibid section 100E (2) and (3).

<sup>260</sup> PS Magai and AM Velázquez, (2011) 'Tanzania Mining Sector and Its Implications for the country's Development' Working Paper No. 04/ 2011, 19-21.

<sup>261</sup> The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2018, section 4(1).

<sup>262</sup> The Natural Wealth and Resources (Permanent Sovereignty) Act 2017, Section 12.

<sup>263</sup> The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2018, section 5 (2).

<sup>264</sup> Ibid section 6 (1).

<sup>265</sup> Ibid section 6 (5).

<sup>266</sup> The Mining Act 2010, section 6 (1) and (3) (a-b).

<sup>267</sup> The Written Laws (Miscellaneous Amendments) Act 2017, section 20(1).

<sup>268</sup> Ibid section 21 (1).

issue license,<sup>269</sup> the issue, suspend and revoke exploration and exploitation licenses and permits.<sup>270</sup> The Minister role is monitoring the issuance by the Commission of licenses for mining activities in Tanzania.<sup>271</sup>

The Minister may refuse to grant mineral rights if applicant is; under age of eighteen, not a citizen of Tanzania or has resided outside Tanzania for four years, declared bankrupt underwritten law, convicted within previous ten years with the offence with an element of dishonesty under Tanzania law and written laws outside Tanzania and sentenced or paid fine.<sup>272</sup>

The company can be denied mineral rights when it lacks physical and postal address in Tanzania to serve notice and other correspondence and if its directors or shareholders disqualified due to bankrupt and conviction.<sup>273</sup>

The issue of granting mineral rights according to the amendment of the Mining Act, 2017 the Commission has that power, and the Minister do monitoring, the law is silent how monitoring carried. On the other hand, the Minister can deny an applicant for mineral rights permits to extract minerals. The law is not clear about who has authority when it comes to granting of mineral rights.

Mining Cadastre was established to receive and process applications for the mining rights and mineral processing licenses, and the Commission may develop regional mining cadastre offices to accept applications for mining rights and forward the applications for processing by the Mining Cadastre.<sup>274</sup> Mining cadastre maintains public cadastre registers<sup>275</sup> is a requirement in the EITI to keep records on the mineral rights which has to be accessed in a centralised online service of application of mining and mineral processing license and was not in Tanzania law before. The applicant makes the application to the Commission by filling the form provided in the schedule and submit it to the Commission, who upon receipt record the

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<sup>269</sup> Ibid section 22 (b).

<sup>270</sup> Ibid section 22 (n).

<sup>271</sup> Ibid section 19 (1) (e).

<sup>272</sup> Ibid Section 8 (1) (a).

<sup>273</sup> Ibid section 8 (b) (i and (iv).

<sup>274</sup> Ibid section 27G (1) (a) and (2).

<sup>275</sup> Ibid section 27G (1) (c).

date and time of receipt.<sup>276</sup> The reason of keeping a record of receipt is not known if is for consideration the first to come in the first to be served; this practice is not efficient as there is no authentication because the law is quite if the applicant sign to show submission to Commission office.

## **5.2 Transparency on Production and Export Volume and Value**

Tanzania mineral marketed overseas; the mineral company has to disclose the amount of the minerals the company is exporting and the value. Tanzania Minerals Audit Agency (TMAA) has powers to audit and monitoring the mineral production and has to audit the quality and quantity of the minerals produced and exported by the mining companies.<sup>277</sup>

The current President of Tanzania after he stated economic war in the mining industry, he intervened and formed two committees. The first committee dealt with unprocessed minerals impounded at the Dar es Salaam port, minerals worth Tanzanian Shillings 1.4 trillion and TMAA did not declare taxes.<sup>278</sup> The concentrate found with minerals such as gold, silver, copper and metal Sulphur, and lithium mineral which were not declared its quantities.<sup>279</sup> The quantities of gold minerals in the container were found to be seven times more than what was reported by the TMAA.<sup>280</sup>

On 31 August 2017 at Julius Nyerere International Airport, police impounded undervalued diamonds consignment to be exported to Belgium from Mwadui Diamond Mine, before the minerals left the country police intercepted. Williams Diamond undervalued the minerals their documents declared minerals worth US\$ 14.7 million while the government re-valuation came up with US\$ 29.5 million.<sup>281</sup> These minerals forfeited by order of the Minister of Finance and Planning. Two government officials charged for economic sabotage crime for the accusation of undervaluing an export consignment of diamonds and cause loss of tax revenue one was Director of state-run diamond and gemstone valuation unit and government gemstone, valuer.<sup>282</sup> However, there is no data for quantity of minerals reported by the media.

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<sup>276</sup> The Mining (Mineral Rights) Regulations 2018 regulation 3 (1-3).

<sup>277</sup> The TEITA Act 2015, section 22A (a).

<sup>278</sup> Nellist R, 'The Mineral Sands Export Saga' (2017) Britain Tanzania Society 2.

<sup>279</sup> Ibid 3.

<sup>280</sup> Ibid.

<sup>281</sup> The East African: Petra suspends mining after diamonds seizure by Tanzania, 16 September 2017.

<sup>282</sup> Tanzania charges officials with economic sabotage over seized diamonds.

The parliament committee on diamond came up with report reveals the documents from the Ministry of Energy and Minerals states diamonds extracted weighed 1.47 million tonnes, which is contrary to TMAA report which states 1.51million tonnes, the minerals were valued US\$367.3million against US\$374.6.<sup>283</sup> The committee found many discrepancies, for instance, the royalties paid between 2007 to 2016 the ministry shows to be US\$ 18 million were paid against US\$ 15 Million statement by the TMAA.<sup>284</sup> TRA registered between 2007 and 2016 diamonds weighed 942.099 tonnes were extracted different to 1.51 million tonnes reported by TMAA.<sup>285</sup>

The undervalued of the value of the minerals exported it is what has been taking place in the mining sector in Tanzania, and this has been blessed by the authority which is empowered to make sure they reveal real value of the minerals exported. The TMAA has been undervalued the minerals value exported, and government lose revenue. TMAA obligations are performed by the Commission now, but there is no an independent auditor to monitor the discharge of their duties. The government refused to, engaged independent auditor for fear of cost. However, there is no study carried to compare the revenue lost by the government in the mining sector in comparison to the cost of hiring an independent auditor. Failure to have external monitoring embrace corruption.

The Mining Commission established composed of Permanent Secretaries from different ministries, a chief executive officer of a federation of miners association, a prominent person who has to prove knowledge and experience in the mining sector and the Deputy Attorney General.<sup>286</sup>

The second committee dealt with the impact of mineral sand exported to the economy. The scope of their report was between 1998 and 2017, with estimation of containers of gold and copper concentrates exported by two mining companies and came with findings that Tanzania loses revenue through illegal export of gold and copper concentrates which was around Tanzania shillings 68.59 trillion and 108.5 trillion. The committee estimated around \$30bn gets lost. The second report commended the government officers responsible for charged, reviewing laws which will allow the parliamentarians to scrutinise the MDAs and the MDAs

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<sup>283</sup> Tanzania Daily News, Tanzania: Two Interrogated As 507.3m/ - Gold Intercepted At Port, 13 October 2017.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> The Written Laws (Miscellaneous Amendments) Act 2017, section 21 (4)



be disclosed to the public and strengthen security to reduce smuggling. Protection to avoid smuggling for Tanzanite minerals the government constructed a wall to fence Tanzanite mining field.<sup>287</sup>

The mineral right holder can make application for a permit to export minerals or samples of the minerals.<sup>288</sup> Export permit for minerals issued in respect of minerals and sample of minerals has been examined and weighed by Mines Resident officer packed and sealed in a container the outer cover sealed at every opening with the Commission.<sup>289</sup>

One of the Commission function is "monitor and audit quality and quantity of minerals produced and exported by large, medium and small-scale miners; to determine revenue generated to facilitate the collection of payable royalty".<sup>290</sup> Apart from changes and composition of the Commission, there is a need of having a mechanism of administering those officials entrusted to measure the production volume, quality and value in the process of granting the export permit. The study was not able to find out the quantity of gold and copper concentrates, which were undervalued or undeclared from the scenarios explained above.

The Commission has the power to sort and assess the value of the minerals produced and indicate prices of the minerals by looking on local and international market prices; for assessment and valuation of minerals to assess taxes and royalties to be payable to the state.<sup>291</sup> There are no procedures guide valuation of the activities approved by the Ministry, the absence of this may cause inconsistencies during valuation and may lead to error and personal judgment.

The Commission is empowered on behalf of Government to appoint a Valuator for diamonds and Government Gemstones Valuator for coloured gemstones (gemstones traded in carats or grams units other than diamonds).<sup>292</sup> The holder of a license or authorised miner making an application for a permit to export diamonds or coloured gemstones, if applicant not sold the diamonds or coloured gemstones the Commission consult the valuator concerned for approval in terms of section 89 of the Mining Act, 2010 asses a provisional payment of royalty payable

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<sup>287</sup> The Written Laws (Miscellaneous Amendments) Act 2017, Section 21 (4).

<sup>288</sup> The Mining (Minerals and Mineral Concentrates Trading) Regulations 2018, Regulation 5 (1).

<sup>289</sup> Ibid regulation 5 (2).

<sup>290</sup> The Written Laws (Miscellaneous Amendments) Act 2017, Section 22 (p).

<sup>291</sup> Ibid section 22 (r) and (s).

<sup>292</sup> The Mining (Minerals and Mineral Concentrates Trading) Regulations 2018, Regulation 14(1).

by the applicant before issue export permit.<sup>293</sup> If the applicant has sold minerals at the time of the application, he has to produce an invoice or receipt, contract or any document to prove to the authorised officer to establish sale price which will be used to calculate royalty.<sup>294</sup> Unless the Commission after consultation with the valuator approved give notices, the Commission finds the realised price does not match the price would be payable for minerals between willing buyer and seller.<sup>295</sup>

Valuator after approval the value sealed the minerals in the presence of authorised miner and handled the same to him after the payment of provisional royalty; the authorised miner after selling the minerals has to reproduce the documentary evidence and can claim for repayment this depends on price realised on the sale.<sup>296</sup>

On 9 February 2018, the Ministry reported in their website the value of minerals exported to Antwerp Belgium in the international market third auction for diamonds from Mwadui the company owned by Williamson Diamond. Carat 54,094.47 was sold for US\$ 13,607,858.72. The government from this auction received a final royalty of US\$ 816, 471.52 and clearance and inspection US\$ 136,078.59.<sup>297</sup> Provisional Royalty paid from initial valuation was US\$ 674,941.78; Clearance and inspection were US\$ 112,490.30 and US\$ 787,532.08 as export permit fee. Apart from this being made accessible publicly, charges such as 1% clearing fees imposed on the value of minerals exported which was not there before the Miscellaneous Amendments of 2017.

This practice expresses willingness to be transparency and is an excellent example to be imitated by other MNCs dealing with gold, copper and tanzanite. The public gets to know the income generated from the sale of the minerals and royalty realised. Again, the language used in the press release is Kiswahili, which is recognised by the majority of the citizenry, but the menu in the website is in English and is in publications in the press release which is challenging to figure out if there is such kind of public notice.

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<sup>293</sup> Ibid regulation 14 (2).

<sup>294</sup> Ibid regulation 14 (3).

<sup>295</sup> Ibid regulation 14 (4).

<sup>296</sup> Ibid regulation 14 (5) and (6).

<sup>297</sup> Press Release – Matokeo ya Mnada wa 3wa Mauzo ya Almasi za Mgodini wa Williamson Diamonds Limited.

### 5.3 Transparency on Revenue Collection and Allocations

Government and companies should have the practice of open publication for necessary information about the revenue they have generated and how that money spent.<sup>298</sup> The politicians or government officials through their position they collect money from mining companies they divert into their pockets or transfer to their foreign bank's accounts, instead of using the money to various development to be enjoyed by the nation and not few individuals this makes people not to see the benefits of minerals.<sup>299</sup> Due to corruption, local people will experience unfair distribution of revenue and may likely to protest, and this will affect the mining companies from operating.<sup>300</sup> There are circumstances not associated with corruption but mining companies suffer consequences because the mining companies apart from being permitted to work in the host state they seek social license to operate.<sup>301</sup> They can enjoy serving in the social context regularly if their activities are valuable to the economic and social contribution.<sup>302</sup>

Mining companies paid local government taxes fixed amount of US\$ 200,000 each year, and the company exempted from paying VAT.<sup>303</sup> This is a fixed rate while the Local Government (Urban Authorities) Act, 1982 levy is 0.3%,<sup>304</sup> of the turnover net of the value-added tax and the excise duty, which not implemented. The local community loses income for having fixed rate because the sum which they lose could be used to do other development activities apart from that the fixed rate is for years, and the minerals are non-renewable resources once they end it is over for the current and future generations sustainable development.

The Tanzania Revenue Authority (TRA) administer Tanzania mining sector and collect taxes and royalties. TRA collects revenue according to what law stipulates they exempt to charge VAT for minerals exported which known as zero rating VAT on minerals exported. This zero rating VAT on minerals makes the public to have a perception of government is favouring MNCs. The zero rating VAT recommended by the CAG in his audit, as a loophole in the

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<sup>298</sup> Report by MMSD, *Breaking New Ground, Mining, Minerals and Sustainable Development*, , (Earth scan Publications Ltd 2002) 194.

<sup>299</sup> Ibid 185.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> 'The One Billion Dollar Question: How Can Tanzania Stop Losing So Much Tax Revenue', First edition, (2012), Christian Council of Tanzania, National Council of Muslims in Tanzania and Tanzania Episcopal Conference,35.

VAT law for lack of categorisation of goods or service to enjoy incentive because the section enacted to promote domestic industries of which minerals cannot be in the category of agriculture products.<sup>305</sup> The recommendation of the CAG to remove zero rating was implemented in 2017 by exporting raw minerals mining companies are taxed VAT.<sup>306</sup> However, the word raw minerals neither interpretation in the Mining Act nor the VAT law provides for instead gold definition included the word raw gold.

Local people may develop inaccurate beliefs about the size and distribution of mining revenues when they lack accurate information and when government loses its credibility.<sup>307</sup> Then promoting full transparency in all mining revenues would reduce corruption and improve people's confidence that mineral revenues not misused.

#### **5.4 Challenges in implementing TEITA in different transparency mechanism**

Tanzania incorporated EITI in its municipal laws to include those requirements and have legal force. The provisions of principal Act sometimes cannot be used to enforce the law because further clarifications or procedures on implementations needed. For instance, the disclosure of contracts has mentioned the website and any other media; regulation was expected to give more details of those other media.

The thesis noted Mineral Policy, 2009 apart from various legal reforms done, policy has been forgotten to include EITI standards in it though has no legal force but is guidance.

The Mineral Policy wants the companies to be registered with stock exchange in Tanzania for citizens to invest in those companies stocks but how to enforce this registration and ensure the MNCs complies with this. The Corporate and Securities law has no provisions with effect to the stock exchange listing rules demanding ethical corporate behaviour or respect for human rights as a precondition for registration.

Challenges in negotiating and construe mining contracts are skills. State lawyers lack negotiations skills to come up with good terms for state benefits, and there are no funds set aside by the government for carrier development in the mining sector to attorneys. Instead, the

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<sup>305</sup> The Controller and Auditor General, (n. 242) 93.

<sup>306</sup> The Written Laws (Miscellaneous Amendments) Act 2017, section 68 (4) (d) (i).

<sup>307</sup> ML Ross, *How Mineral-Rich States Can Reduce Inequality* (Humphreys M Sachs, J.D and Stiglitz.J.E eds, Columbia University Press 2007) 247.

government waits for the mining companies to fund their studies which few of them are nominated to attend and even after their studies they resigned and went to work for the mining companies which has good package pay. A person qualifies to be a member of parliament by being a citizen, 21 years of age and know to read and write Kiswahili and English.<sup>308</sup> On top of that parliamentarians are empowered to scrutinise and comment on terms of mining contracts, Members of parliaments they will face challenges especially to construe the legal terms used and language barrier because Tanzania is not English speaking country. Although the Attorney General will represent the government in the National Assembly on legal matters, experience shows the predecessors Attorney Generals did not serve the government well as expected by signing the current mining contracts and are among public officials the second committee recommended arraignment for signing mining contracts which are not suitable for government.

The Mining Act, 2010 amended in 2017 and interpretation section introduced online payment and web service applications. The amendment has defined words without provision which express how they can be affected. Tanzania government portal online services have nothing in connection to the Ministry of Mining; there is online service payment for other Ministry. Therefore, the online service for payment in the mining does not exist.

The EOOCA, 1984 has penalised refusal or failure to give information or giving false information to be used by the committee. Verification of false information is robust to figure out. Last year, Tanzania arraigned two government officials for the accusation of undervaluing an export consignment of diamonds and occasion loss of tax revenue. An investigation done by the second committee formed by the President discovered the existence of loopholes in the mining sector by making a comparison in different institutions and realised false statement to be issued by the institutions. Through criminal prosecution for making a false statement cannot help to have transparency in the mining industry because even if they will be convicted and sentenced or acquitted the sentence is lighter and may repeat committing because of the benefit they make. The accused fate is determined, but victims are affected by the acts or omission of the accused in social and economical service which they were expected to enjoy from what has undervalued when the indicted company do the export.

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<sup>308</sup> The Constitution of the United Republic of Tanzania 1977, article 67 (1) (a).

## Chapter 6

### **The EITI in Comparative Perspective: Nigeria and Ghana**

Nigeria voluntarily signed and joined EITI in 2003 and became a candidate in 2007.<sup>309</sup> Nigeria is the first country in the world to support EITI implementation through legislation, hence enacted a law and named it Nigeria Extractive Industry Transparency Initiative Act, 2007 (NEITI Act, 2007),<sup>310</sup> for social, economic reform programme.<sup>311</sup> The decision to join EITI took place during President Obasanjo administration. The reasons why Nigeria President Obasanjo committed to becoming a member of the EITI is due to the reputation of corruption during the Abacha rule.<sup>312</sup> This makes corruption be connected with states joining EITI, and this act of the former President Obasanjo is regarded to be a political will. Nigeria joined EITI for promoting management of revenue from natural resources it has to reduce poverty and sustainable development. Nigeria accepted principles and criteria of the EITI in 2003 and launched Multi-stakeholder Group named National Stakeholders Working Group (NSWG) in 2004.

Ghana was moved to join the EITI because of the meeting on EITI initiative convened by the former British Prime Minister in London in 2003 taken to institutionalise implementation in Ghana by Kufuor administration.<sup>313</sup> Ghana is the first country to state its intention to join the EITI in 2003. It started the process and launched Ghana Extractive Industry Transparency Initiative (GHEITI) in June 2004 after meetings with various stakeholders in collaboration with Ghana Chambers of Mines and support from DFID.<sup>314</sup> Ghana joined EITI to meet global norm of enhancing transparency and accountability. After joining the EITI Ghana reformed their laws to accommodate changes such as Financial Administration Act, 2003 (Act 654), The Public Procurement Act, 2004 (Act 663), The National Anti-Corruption Plan (2012) and The Whistleblower Act, 2006 (Act 720).<sup>315</sup>

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<sup>309</sup> Brief History of NEITI.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> E Kasekende C Abuka and S Mare, 'Extractive industries and Corruption: Investigating the effective of EITI as a scrutiny mechanism' (2016) Resource Policy 125.

<sup>313</sup> N Opong, 'Transparency as Transformation? Ghana and the Extractive Industries Transparency Initiative' (2016) Department of International Development University of Oxford, 5.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

In 2005 Ghana formed a multi-stakeholder group called National Steering Committee (NSC) and Secretariat, Secretariat before was under the coordination of the Ministry of Mines now is under the Ministry of Finance.<sup>316</sup>

Before Ghana became EITI implementer, members of chambers of mine (an association of mining companies), started voluntary disclosure of information on royalty, and tax to the media.<sup>317</sup> Ghana Mineral Commission has stated its intention to cooperate with CSO in the mining sector more transparently and have a dialogue with them.<sup>318</sup> They are also working on media networking and having a website to publish a newsletter.<sup>319</sup> All this was said, but communities in Ghana are wary the activities of the mining companies and the effect they have in local development.<sup>320</sup>

## **6.2 Transparency on Allocation of Contracts and Licenses**

### **Nigeria**

The Nigeria Minerals and Mining Act, 2007 administer and manage minerals titles and licenses where applications for a license are presented in the Mining Cadasters Office (MCO). If there are several applications in the same area from two or more person on the same business day, the first application received in the proper form get priority over the others.<sup>321</sup> The MCO uses priority register to record the time and date the applicants submit their applications and receipts issued for payments; this used when there are competing applications for the same area.<sup>322</sup> The mineral license and lease are granted through competitive bidding, and the Minister is empowered to make regulations that determine an area designated as bidding competition.<sup>323</sup> MCO shall consider competitive bids, implement openly and in a transparency way, in selecting the bid the selection committee take into account the bid which will promote the expeditious and development of the mineral resources of the area.<sup>324</sup> Regulations want the Minister to give notice in a gazette or newspaper with a significant coverage about the vacant area that exploration license and mining lease shall be

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<sup>316</sup> Final Report Validation of the Extractive Industries Transparency Initiative in Ghana, Final Report, 2010, Synergy Global Consulting Ltd, 6.

<sup>317</sup> JV Alstine, 'Transparency in resource governance: The Pitfalls and Potential of "New Oil" in Sub-Saharan Africa' (2014) Global Environmental Politics, 27.

<sup>318</sup> GHEITI: Ghana is first assaying laboratory –as minerals commission unveils its strategic plan.

<sup>319</sup> Ibid.

<sup>320</sup> Ghana: Tracing mining royalties to the local government.

<sup>321</sup> The Nigeria Minerals and Mining Act 2007, section 8(1).

<sup>322</sup> Ibid section 8 (2) and (3).

<sup>323</sup> Ibid section 9 (1).

<sup>324</sup> Ibid section 9 (2).

granted by competitive bidding.<sup>325</sup> The Minister in exercise power in connection with competitive bidding, create a committee to advise him on areas minerals titles can be granted by competitive bidding.<sup>326</sup>

Granting of license and lease in Nigeria are executed in two ways however there is no clarity what reasons may make the Minister exercise one kind of lease against the other. The committee before advising the Minister it considers the area free from any existing minerals titles, minerals in that area are classified as security minerals and declared by the Minister, and the committee thinks the area is fit for competitive bidding.<sup>327</sup> There is nothing special between the mining lease and license granted by competitive bidding and first come and first to be served except for those minerals mentioned to be security minerals which the law does not provide what the security minerals are. Competitive bidding emphasised it to be open and transparent mining lease with priority there is no explanation on transparency. The regulation has explicitly express entries entered in the minerals register by the MCO who makes verification on the following identification code, date, hour and minute of submission, and the applicant or his representative signs the lease register.<sup>328</sup> The identify code, date, hour and minute of the application shall be recorded in the application forms which will be stamped and signed by the MCO and copy will be given to the applicant.<sup>329</sup> The registration book information is well documented for verifications in case of complaints of favouritism of who came first in the process of considering license applications. There is no information how bidding has succeeded in implementing transparency in the mining sector. Bidding has more significant chance to be embraced with corruption and bribe by officials who do fraud in bid evaluations process through familiarity with bidders over time, personal interest such as a gift, award criteria's are not announced or conflict of interest. Unsuccessful bidder usually complains by accusing bidding panel of irregularities.

The MCO is a body empowered to administer minerals titles and maintenance of the cadastral registers.<sup>330</sup> Nigeria has different kinds of licenses that are granted to the applicant such as

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<sup>325</sup> The Minerals and Mining Regulation 2011, regulation 24 (1) (a).

<sup>326</sup> Ibid regulation 4(1).

<sup>327</sup> Ibid regulation 4(2) (a-c).

<sup>328</sup> Ibid regulation 57 (6) (a-b).

<sup>329</sup> Ibid regulation 57 (6) (c-d).

<sup>330</sup> The Minerals and Mining Act 2007, section 5 (1).



Exploration license, Small-scale Mining Lease, Mining lease and Quarry lease.<sup>331</sup> The applicant makes the mining lease application to the Minister who after receiving the application from the qualified applicant has to issue the Mining lease within forty-five days of such application.<sup>332</sup> The Minister will not grant mining lease to the mining company applied unless the company prove they have recruited an expert with experience and qualifications in mining and Minister has to ensure when he leases the title that qualified person is in the employment of the mining company.<sup>333</sup> In case an expert with mining qualification and experience quit the job, and nobody is supervising mining operations under the lease the company has to stop its operations until the qualified person is available.<sup>334</sup> The rationale of having expert is for the company and the people advantage whose right may be violated by the extraction such as water pollution where toxic substance through exploitation for the failure of foreseen the impacts the act cause effects which can amount to a violation of human rights in the right to health. The MCO can refuse to grant mineral title if there is proof the applicant within five years before application a shareholder holding and controlling share of the applicant has been convicted under the Minerals and Mining Act, 2007.<sup>335</sup> The applicant for the mineral title has to prove he has sufficient capital to start mining operations and prove he has the technical capacity to carry the mining explorations; the applicant has to supply the MCO with information needed and failure to meet the requirements the MCO will consult the Minister and refuse to grant the application.<sup>336</sup>

The mining lease duration is twenty-five years and is renewable every twenty-four years if the titleholder will prove to meet minimum work commitments and other requirements in the Act and Minerals and Mining Regulations, 2011.<sup>337</sup> The mining lease may be renewed for further periods not exceeding twenty-five years, and a mining lease can be renewed as many times the applicants wish.<sup>338</sup> The Minerals and Mining Act, 2007 does not restrict disclosure of contracts and license by the government; unfortunately, there is no mining contract has been disclosed in any media in Nigeria.

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<sup>331</sup> Ibid, and Guideline for Mineral Title Application, Nigeria Mining Cadastre Office, section 46 (1) (a-f) and guideline.2.

<sup>332</sup> The Minerals and Mining Act 2007, section 65 (1).

<sup>333</sup> Ibid section 73 (1).

<sup>334</sup> Ibid section, 73 (3).

<sup>335</sup> Ibid section 53

<sup>336</sup> Ibid section 54.

<sup>337</sup> The Minerals and Mining Act 2007 and The Guideline for Mineral Title Application, Nigeria Mining Cadastre Office, section 66 and guideline. 2.4 The guideline time frame for renewal is every twenty years which differ with the Act. Then the Act will prevail over the Guideline because guideline has no legal force.

<sup>338</sup> The Minerals and Mining Regulation 2011, regulation 60 (2) and (3).

## Ghana

In Ghana minerals licenses are granted by mode of the first come in the first to be served, the mineral rights are awarded by considering priority on the application, financial ability and technical skills and fill in necessary documents.<sup>339</sup> Allocations of contracts have no competition; instead, the first applicant to be registered and meet the conditions will be granted the license. The launch of GHEITI come up with a recommendation to the government to have an open round bidding system which they believe has greater transparency in awarding minerals titles; the government noted the concern and working on the suggestion for the time being. The previous method applies to green fields' areas until they start to deal with brownfield grounds because the area is with essential data returned to the state then the state will be promoting the tender process.<sup>340</sup> Greenfield means a mineral field assigned from the beginning to the titleholder considered to be cost-effective while the brownfield belonged to someone who developed before and the current title holder has to refurbish and regarded to be expensive to run it.

The Minister responsible for mining has to get recommendations from the Minerals Commission to decide on granting or rejecting the application for mining rights when the applicant investment exceeds US\$ 500 million.<sup>341</sup> The Minister on refusal to grant mining license has to give reasons in writing,<sup>342</sup> and not published to the public. The discretion given to the Minister is considered to be excessive because the Minister rejection to grant mineral right could aim to favour people who are known or related or corrupted him. This mode of operation in awarding contracts can make citizen doubtful on the contracts granted, as there are no requirements of disclosing contract.

Ghana has a system called online repository-Industrial, launched in 2016, which data on minerals rights, exploration, mining, dealers and exporters license together with the payments made are being uploaded.<sup>343</sup> The manager of mineral right in Ghana is Minerals Commission who is under the Ministry of Lands and Natural Resources and the Minerals Commission publish data into their system of license managed.<sup>344</sup> Online system on mining license has

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<sup>339</sup> TN Adimazoya, 'Staying ahead of the Curve: Meeting Ghana's Commitment to Good Governance in the Mining Sector' (2013), 31 J. Energy & Nat. Resources L. 153.

<sup>340</sup> Ghana: Report 2017, Oxford Business Group.

<sup>341</sup> The Mineral and Mining Act 2006, section 49(1).

<sup>342</sup> Ibid section 5(3).

<sup>343</sup> User Information.

<sup>344</sup> Ibid.

menus such as applications, licenses, owners and payments each menu has different data which the institutions have inserted to suit their demand.<sup>345</sup> Online data maintained by Ghana is called Mining cadastre an EITI requirement which wants implementing country to keep publicly register; which is updated with comprehensive information concern each of the licenses about companies.

Ghana as EITI implementing state holder of minerals right has discretion to consent disclosure of information or documents in his or her possession.<sup>346</sup> A transaction contract involving the grant of a right or on behalf of person or body of persons to do exploitation of minerals in Ghana parliament has to approve; approval is by voting where two-thirds of all members of parliament.<sup>347</sup> Usually, there is a perception the approval of contracts by members of parliament to amount as a public disclosure. However, what the citizens always hear are burning terms during bill discussion and there is no requirement of the contract during approval to be publicised. Non-disclosure of the mining contracts causes doubt to the Ghanaian people because non-disclosure makes them believe they are suffering due to the benefits the MNCs enjoys at their expense.

The law provides for confidential information, but information can be revealed for; prosecution purpose or a consultant to the Commission or the Minister has authorised the officer to access confidential information and when the law provides so, but the person to whom the information given supposed to treat it as confidential information.<sup>348</sup> The holder of the mining title is allowed to disclose mineral right to the Commission, Geological Survey Department for the inspection and copy made to the public after the prescribed fees paid for record of mineral right holder and radioactive mineral holder report on operations.<sup>349</sup> The information disclosure has been allowed to the government institutions for inspection and copy can be made to the public, but with conditions of paying a fee, this is an exception to the rule of confidentiality but fees paid to access it hinder those who cannot afford. People around the mining area are affected with mining explorations through terms contained in mining contracts thus they could be eager to know contents of mining contract, charging fees to access the mining contracts can be interpreted as an obstacle to disclosure.

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<sup>345</sup> Ghana Online Repository- Mining Licenses.

<sup>346</sup> The Minerals and Mining Act 2006, section 20(1).

<sup>347</sup> Ibid section 5(4).

<sup>348</sup> Ibid section 13 (a-c) and (4).

<sup>349</sup> Ibid section 20 (2).

Access to information with conditions is an obstacle to stakeholders to debate as what they will get from the publication of the report by GHEITI is in aggregate and is complex information which will be difficult for them to make evaluations. Inaccessibility of information is the root where black deals made or corruption transactions.

### **6.3 Transparency on Revenue Collection and Allocations**

#### **Nigeria**

NEITI Act, 2007 came up with the legal framework for advocating transparency in reporting and disclosing revenue outstanding or paid to the Nigeria government by extractives companies in Nigeria.<sup>350</sup> The preamble of NEITI Act, 2007 states that among the responsibility NEITI has is to have a transparency framework in reporting and disclosing of revenue due or paid to the government by extractive companies. Mining companies have to report what they have paid to the government, and the government has to disclose what they have received from the company.

Objectives of NEITI are; transparency in payments made by extractive company to the government and statutory recipients, monitor and ensure accountability of revenue receipt by government from companies, eradicate corruption practices in determination, payments, receipts and transfer of revenue from extractive companies to the government and the government has to disclose the allocations of the income they have received from extractive companies and be accountable.<sup>351</sup>

The provision is much more on the transparency of the money paid by mining companies and received by the government, both parties to the transaction have to disclose the information and those who mentioned by the law entitled to receive funds. The monitoring of revenue is through auditing. The revenue auditing is carried out by an independent auditor who is appointed by the NEITI to examine all revenue accrued to the Federal Government each financial year from mining sector for determination of accuracy payments and receipts.<sup>352</sup> The auditor or audit firm cannot carry auditing in the same year or for the two years

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<sup>350</sup> C Nwapi, 'Enhancing the Effectiveness of Transparency in Extractive Resource Governance: A Nigeria case study' (2014) *The Law and Development Review* 25.

<sup>351</sup> The Nigeria Extractive Industry Transparency Initiative Act 2007, (NEITI Act 2007) section 2.

<sup>352</sup> *Ibid* section 4 (1).

consecutive.<sup>353</sup> Federal Account is an account which all revenue collected from mining companies are deposited and shared by the three tiers of government that are; Federal, states and local government.<sup>354</sup> The auditor appointed has to do physical, process and financial audit on terms and conditions approved by the NSWG.<sup>355</sup> The term Physical audit is not clear it needs interpretation for certainty to avoid debate between auditor and NEITI, which may bring different result from NSWG expectation. The auditor is supposed to submit his report together with the comments to the NEITI which will publish in public.<sup>356</sup> NEITI will forward the audit report to the President and National Assembly not more than 30 September each year.<sup>357</sup> Time computation is crucial because it has the impact of reporting to the EITI. The Auditor General of the Federation submits audit report from an independent auditor to the National Assembly by publishing any comments made or action taken by the government.<sup>358</sup> The Auditor general endorse comments for clarifications of technical aspect which citizenry cannot understand to give inputs or ask questions during the debate on resources revenue paid, received and allocated. However, there are no provision mention media of disclosing this information or document to the public for the public to access them in a comprehensible manner and in the language which enables them to understand the content composed.

Monitoring is to ensure revenue from minerals used for the advantage of whole nation and transfer is made to the government to meet various economic developments for Nigerians. NEITI empowers any organs belongs to Federal Government or Local Government to monitor revenue payments by all mining companies to the Federal Government once NEITI has identified a gap.<sup>359</sup> All in all, NEITI safeguard fiscal allocations and statutory distributions outstanding from the Federal Government to statutory recipients are made.

NEITI target to promote transparency and management of the revenues by the government; NEITI Act, 2007 has no provision establishing sub-national structure, and this makes people to lack awareness of the NEITI at the local level. There is an exception of Bayelsa state

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<sup>353</sup> Ibid section 4 (5) and (6), the aim is to avoid conspiracy between the mining company and the auditor or auditing firm which may make the Federal Government lose funds.

<sup>354</sup> The 1999 Constitution of the Federal Republic of Nigeria, section 162 establish Federal Account. Revenues that are not specified to fund for the Federal Account deposited into Consolidated Revenue Fund; this provided under section 80 of the same Constitution.

<sup>355</sup> The NEITI Act 2007, section 4(2).

<sup>356</sup> Ibid.

<sup>357</sup> Ibid section 14 (3).

<sup>358</sup> Ibid section 4 (7).

<sup>359</sup> Ibid section 3(g).

through Revenue Watch Institute it was able to establish Bayelsa Income and Expenditure Transparency Initiative in 2009; which monitor revenue and expenditure at the state and local government levels.<sup>360</sup> This initiative has a requirement where money from Federal Government channeled to the local government.<sup>361</sup> NEITI Act, 2007 lack the structure to monitor money at sub-national because the officers are not accountable for the money and corruption. Therefore, the officers at a sub-national level may use this loophole to spend money without being accountable how they spent. NEITI Act, 2007 is anti-corruption tools when there is no disclosure of revenue allocated to sub-national the practice is contrary to the law because its aims to eliminate forms of corrupt practices in the determination of payments, receipts and posting of revenue accrued.<sup>362</sup> The law has addressed corruption, but there is no mechanism in place to monitor the money posted at sub-national.

### **Ghana**

The mining sector contributes enormously to export and government revenue, stakeholders and observer interest is to see governance of revenue.<sup>363</sup> These revenues come in the form of corporate taxes, personal income taxes, dividends and royalties.<sup>364</sup> The government to increase its revenue they need to be transparency. Transparency creates a pleasant atmosphere of operations to the mining company and development, and people will have trust in the contracts entered between the government and the mining companies. IMF and WB as international financial institutions have asked some Africans nations Ghana inclusive to review its fiscal regime to raise revenue. Head of IMF in Ghana suggested ways of taxing mining sector and earn more revenue from the mining<sup>365</sup> and Ghana raised corporate tax and royalties.

Ghana CSO adopted a framework that aligned with PWYP for transparency of revenue in the extractive industry which made them work with GHEITI.<sup>366</sup> Ghana, when started to implement EITI, turned out to be the best candidate country in its reporting by including

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<sup>360</sup> S Asgill, 'The Nigerian Extractive Industries Transparency Initiative (NEITI): Tool for Conflict Resolution in the Niger Delta or Arena of Contested Politics?' (2012), *Critical African Studies* 37-38.

<sup>361</sup> *Ibid.*

<sup>362</sup> The NEITI Act 2007, section 2 (c).

<sup>363</sup> TN Adimazoya (n 309) 15.

<sup>364</sup> *Ibid.*

<sup>365</sup> MK Ayisi, 'The Review of the Mining Laws and the Renegotiation of Mining Agreement in Africa: Recent Development from Ghana' (2015) *The Journal of World Investment and Trade* 474.

<sup>366</sup> JV Alstine, (n 282) 27.

revenue flows to sub-national.<sup>367</sup> In 2007, Jubilee field was discovered, and voluntary revenue transparency mechanisms were well.<sup>368</sup> Ghana's reports were found not conform to payments and receipts of revenues; there are deficiencies in revenue distribution to the sub-national level although the report was very comprehensive.<sup>369</sup> Royalties contribute almost 99% to the sub-national level; central government authorities transfer 10% of royalties to the local government authorities and traditional land-owning authorities affected by mining activities.<sup>370</sup> The trend shows payments, which are channeled through the office of the Administrator of Stool Lands (OASL) to the district or municipal, are small in comparison to royalties paid.<sup>371</sup> It was discovered money from regional head office are not sufficiently transferred to the districts and municipalities this was way back in 2013, and the GHEITI gave recommendations and OASL work on it successful.<sup>372</sup>

Parliament amended royalty payments, punishments, and punishment for the offence of illegal mining in the Minerals and Mining (Amendments) Act, 2015 (Act 900).<sup>373</sup> The new amendment provides for the mining leaseholder has to make payments in respect to the minerals obtained from mineral operations by paying mineral income tax from mineral operations for a year of assessment taxed at 35%.<sup>374</sup>

Ghana in 2016 as implementing country got an award from global extractive industry transparency due to a fiscal change made by the government in royalty rate, corporate tax rate and capital allowance recovery.<sup>375</sup>

The money derived both from mineral sector, and other sources in Ghana are deposited into the Consolidated Fund an account which all revenue and other outstanding money to the government are paid.<sup>376</sup> The Auditor General audit Consolidated Fund income and expenditure on a monthly basis the Auditor does not audit source of funds credited in the

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<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> E Wilson and JV Alstine, 'Localising transparency: Exploring EITI's contribution to sustainable development' (2014) International Institute for Environment and Development, London 29.

<sup>370</sup> Ghana: Tracing mining royalties to the local government.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Ghana Investment Promotion Centre.

<sup>374</sup> The Income Tax Act 2015 (Act 896), para 6 of the First Schedule.

<sup>375</sup> The Report: Ghana 2017.

<sup>376</sup> Ibid.

consolidated account instead indicates how much has received<sup>377</sup> against payment. After auditing the Auditor General published a monthly statement in the Gazette, for the annual audit the Auditor General is not required to make publication in the Gazette.<sup>378</sup>

The public access monthly public accounts not annual public reports therefore for yearly accounts is not stated why the publication is not exercised and the reason behind is not provided. Right to access information as human rights is infringed; the law denies the public to have access to annual public accounts because the law does not provide for publication. Moreover, monthly public accounts do not reveal sector the money is coming from this will make stakeholders and the public in general during the debate or public opinion not be able to see the trend of revenue payment by an organisation and question any change.

#### **6.4 Transparency on production and export volumes and values**

##### **Nigeria**

The government of Nigeria does not engage in the solid mineral sector<sup>379</sup> instead, the industry is in the hands of MNCs. Production of solid minerals contributed to the economic development by then Nigeria was known for the production of coals as an energy source for electricity, railway and export. The decline of the mineral output started after nationalisation policy of the military government in the 70's and keep decreasing due to oil boom at that time. The neglect of mineral industry resulted in widespread illegal mining activities which did not operate effectively.<sup>380</sup>

The mining companies operating in Nigeria are required to disclose the cost of the production and volume of sale of minerals extracted by the company.<sup>381</sup> The aim of knowing the volume of production and value is for estimating the revenue mining company is supposed to pay a tax or royalty. After that, the government through the Mines Inspectorate Department have to do verification to prove the volume of minerals produced and do the valuation and estimate the value<sup>382</sup> for government to receive exact revenue, the company is supposed to pay to curb underestimation. The mineral right holder has to export minerals products resulting from

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<sup>377</sup> The Financial Administration Act 2003, section 40 (1).

<sup>378</sup> The Financial Administration Act 2003, sections 40 and 41 and Financial Administration Regulations, 2004, Rules 188 and 191.

<sup>379</sup> Solid Minerals Sector Audit Report for the year ended 31 December 2015, p. 18.

<sup>380</sup> Ibid.

<sup>381</sup> The NEITI Act 2007, section 3(d).

<sup>382</sup> Stephens M, NEITI Solid Minerals Report, 2013.



mining operations.<sup>383</sup> The prerequisite to get a permit for export minerals for a commercial purpose; a holder of the mineral title, application is made to the Mines Inspectorate Department after payment of royalties on the minerals, source of supply, three years Tax Clearance Certificate of the Company, prove source of supply and contractual agreement with a foreign buyer.<sup>384</sup> Nigeria EITI report of 2013 mentioned failure to reconcile export figure by companies because there is no coordination between the Government Agencies and use of different measures for information disclosure.<sup>385</sup> The Mines Inspectorate Department that stands for the government did not use procedures and systems to collect and control production data reported by mining companies.<sup>386</sup> The audit found a mismatch on quantities reported by the Mines Inspectorate Department and royalty amount paid<sup>387</sup>.

The mining sector in Nigeria worked on reconciler recommendations of 2013 and in 2014 there was no omission the 2014 EITI report covered volume of production, production value and deductions made to it plus the total output. The same applies to the value of export of solid minerals through the data submitted by the Nigeria Central Bank and the Nigeria Customs Service.<sup>388</sup> The institutions mentioned are the source of production data and information on how the production volume and values disclosed in the EITI report have been calculated. The NEITI report of 2015 uncovers production and export volume of minerals and the value of the minerals.

### **Ghana**

The mining sector in Ghana identified to be the most significant contributor to the total merchandise exports except for 2004 when cocoa took over, but the same year, the mining sector contributed 42% of the total export.<sup>389</sup> Gold export is the primary mineral exported in 2008 totaled US\$ 2.2.bn and in 2011 was US\$ 1bn in tax revenue.<sup>390</sup>

To export, sell or dispose of mineral in Ghana, the intended exporter is required to hold a license granted by the Minister and make an application in writing in a prescribed manner

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<sup>383</sup> The Nigeria Minerals and Mining Act 2007, section 68 (g).

<sup>384</sup> The Nigerian Minerals and Mining Regulations 2011, section 131(1) and (3) (ii, iv, v and vi).

<sup>385</sup> Ibid 35

<sup>386</sup> Ibid 72.

<sup>387</sup> Ibid.

<sup>388</sup> Amedu Onekpe and Company, Solid Minerals Sector Audit Report for the Year Ended 31 December 2014, 23 & 26.

<sup>389</sup> TN Adimazoya, (n. 309)150.

<sup>390</sup> Ibid.

which is attached with refining sale contract and marketing agreement.<sup>391</sup> After getting the license to export, sell or dispose of precious minerals before shipment of minerals, license holder has to give details to the Commission of the quantity and grade of minerals to be shipped, and samples of the mineral taken to the government laboratory chosen to determine the content or quality.<sup>392</sup> Ghana has different procedures when the exporter is a holder of other licenses than mining lease, the holder of the export license shall comply with the conditions specified in the license and other terms which determined by the Minister.

President Akufo-Addo of Ghana made a statement that US\$ 5bn revenues from gold exported to the United Arabs Emirates were unaccounted this makes Ghana start working on the export of minerals.<sup>393</sup> On the other hand, Vice President Bawumia said they had started a process to ensure any bar of gold leaving the boundaries are weighed, tested, valued and accounted for.<sup>394</sup>

The exporter has to apply for Kimberly Process Certificate without it the Minister may not grant export permit of rough diamonds.<sup>395</sup> The exporter has to prepare a report as the form prescribed and present to the customs officer at the time of export and copy forwarded to the Minister within seven days after the export.<sup>396</sup> The rough diamonds exported are parked in a container constructed in a manner to make impossible to reseal the container after opened it and the container marked with a serial number of the Kimberly Process Certificate attached with.<sup>397</sup> The exporter has to put records of the rough diamonds to be exported such as the number of the Kimberly Process Certificate, purchase order, invoice and if purchased elsewhere be included.<sup>398</sup>

The law is silent about monitoring mechanism from production; weight quantity produced and intended to export. The deduction of taxes and other charges before exportation can be affected for non-monitoring.

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<sup>391</sup> The Minerals and Mining Act 2006, section 6.

<sup>392</sup> The Minerals and Mining (General) Regulation 2012 (L.1. 2173), Regulation 3 (1) (2) and (3).

<sup>393</sup> Reuters: Ghana to Tighten Controls on gold exports to protect revenues.

<sup>394</sup> Ibid.

<sup>395</sup> The Kimberley Process Certificate Act 2003, section 3 (1).

<sup>396</sup> Ibid section 4 (1) and (2).

<sup>397</sup> Ibid section 6.

<sup>398</sup> Ibid section 7.

## 6.5 Beneficial Ownership

Beneficial ownership creation is to prevent corruption, tax evasion and increase government revenue. The member states are working on how they are going to disclose the real owner of companies in the different extractive sector using public registers.

A beneficial owner is a natural person, who directly or indirectly ultimately owns or controls the corporate entity.<sup>399</sup> Implementing country has to know who has authority in company decision making and benefit from the company activities; defining beneficial owner and in the process of developing criteria for an individual to be a beneficial owner has caused a big debate over the necessary words to capture every detail to constitute beneficial ownership.<sup>400</sup>

To raise awareness workshop on beneficial ownership was arranged by International Secretariat in collaboration with UK Department of International Development and took place in London, United Kingdom.<sup>401</sup> The coordinators of the workshop aimed to know from representatives of the beneficial ownership implementing countries challenges and good practice on beneficial ownership disclosure.<sup>402</sup> To disclose beneficial owners, EITI participants have to make amendments to various laws such as Company law and the domestic legislation enacted to incorporate EITI principles and rules. Therefore, MSG has to identify challenges from respective laws. Member states need to have a consultant for this change and to educate the public through media existence of beneficial ownership and its importance. Capacity building to CSO to enable them to utilise beneficial ownership data. The mining companies to be familiarised with the notion, laws in effect, implementation and information they have to produce to the required authority. In total, this involves budget to accommodate reforms.

The challenge in implementing beneficial ownership is information to be provided by extractive companies to reveal particulars of the beneficial owner and which way he or she owns. This means how to do verification on the credibility of such kind of information? What mechanism can the MSG use to probe if the details supplied to them are correct and reliable?

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<sup>399</sup> EITI requirement 2.5(f).

<sup>400</sup> Beneficial ownership transparency Milestones on the road to 2020 Highlights from EITI countries, 10.

<sup>401</sup> Beneficial Ownership Seminar.

<sup>402</sup> Ibid.

PEPs according to Ghana definition is a public officer who has an interest in the mining operations and required to declare all assets he or she owned and liabilities owed to the Auditor General.<sup>403</sup> The Electoral Commission has introduced a condition for one to contest for a parliamentary and presidential position has to declare their assets, however, this law is not enforceable and the declaration they disclosed to the public.<sup>404</sup> Some public officials register properties they own using other people names such as close relatives or their children to avoid proof of being owners. The challenge is how these relatives and close friends of public officials can be touched with what PEPs has reaped from the mining sector.

Tanzania has this practice of public officials who are in the higher positions to disclose their assets like Ghana. The fact that Tanzania is a cash-based economy which is disposed to corruption and is challenging to make follow up of money in the cash economy.<sup>405</sup> Public officials and citizens can own companies by using other people names without being registered in the company as shareholders or directors.<sup>406</sup> Hence, the definition of beneficial ownership finds a challenge on how to catch up all people in this kind of scenario.

Tanzania in working on roadmap plan they did research and collect information on company registers to find out how they disclose information on beneficial ownership. The TEITI Committee while working on formulating the roadmap for the beneficial ownership they request to interview government departments encountered with beneficial ownership through various laws before the Ministry of Energy and Minerals introduced it. Some of the government institutions sought is the Ministry of Constitutional and Legal Affairs and the Ethics Secretariat.<sup>407</sup> The aim was to get to know the challenges they have faced for instance Ministry of Constitutional and Legal Affairs through the office of the Director of Public Prosecutions they have charged public officials under the Anti-Money Laundering Act, 2006. The hurdle of prosecutions in those cases has stated some of the accused own properties, but they have registered through other people names. Their participation could have a better result without forgetting the Prevention of Corruption Bureau which dealt with the investigation of those cases. Unfortunately, TEITI was not able to meet those public institutions.

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<sup>403</sup> Ghana EITI Beneficial Ownership Roadmap October 1, 2016, Ghana Extractive Industry Transparency Initiative (GHEITI) 9.

<sup>404</sup> GHEITI (2016), Ghana EITI Beneficial Ownership Roadmap, 9.

<sup>405</sup> MM Attorneys, 'Unveiling the Mask: Disclosure of beneficial ownership of the Oil, Gas and Mining Companies in Tanzania' (2017) 2.

<sup>406</sup> Ibid.

<sup>407</sup> Ibid 5.

Ghana and Nigeria in their roadmap they have beneficial ownership register for companies, which is accessible to the public after paying a prescribe access fees and other information to a competent authority.<sup>408</sup> These countries for security reasons withheld sensitive information and supplied to the competent authorities.<sup>409</sup> Security reason mentioned by Nigeria is not apparent is it to secure ownership of the mining company from the competition? On Ghana side, they mean identity theft or social security risks from detailed information of this owner to the public.<sup>410</sup> Opening the identity of the owner in public is a requirement in beneficial ownership and can help to acquire more details of this owner what he or she owns, or control, as an investor in the mining sector and what investor did not disclose at the beginning. Public also will exercise access to information right. It is better to expose information to the public to start with the implementation of beneficial ownership and in case of any impact on the beneficial ownership changes can be made.

Nigeria mining sector before did not have a good foundation, and the citizens did not see the benefit of having mining industry for sustainable economic development.<sup>411</sup> Introduction of beneficial ownership get opposition due to an inadequate system of fighting corruption and transparency on properties acquired illegally.<sup>412</sup> For the beneficial ownership to take over Nigeria subscribes they need to do capacity building to stakeholders.

There are challenges the three-country share but other differ. In defining beneficial ownership and PEPs, the catchwords vary from country to country due to law or economy. The question of law is how they are going to prove what they have expressed through their definitions. The roadmap seems to be too general but with the development of law some unclear terms from the roadmap, they will be interpreted in-depth through regulations. Moreover, the enforcement of the law will make these EITI countries to figure out loopholes and make amendments to suit the context they are operating.

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<sup>408</sup> Ibid 12.

<sup>409</sup> NEITI, The roadmap on the implementation of Beneficial Ownership Disclosure in Nigeria, 7.

<sup>410</sup> GHEITI (2016) (n.375) 6.

<sup>411</sup> Ibid 9.

<sup>412</sup> Ibid.

## **Chapter 7**

### **Conclusions**

The EITI is a useful tool in the service of human rights and anti-corruption. The EITI lays down globally applicable standards which the implementing countries incorporate into their laws. However, for any law to work well political will is required to meet what law stipulates.

Tanzania included EITI standards in its national laws and regulations to regulate transparency in the mining sector. The available standards in Tanzania laws are not implemented by the government in the mining sector such as contracts disclosure was never made accessible to the public. Apart from that, there are laws denies accessibility of information for reasons of confidentiality or security but are encountered through power vested to the TEITI Committee by the law which authorise the committee to access information from MNCs and government to make a report which is disclosed to the public with mining sector information. Further, the laws included EITI standard has loopholes which used for corruption practices either through under-declaration or non-declaration of the volume and value of minerals produced to be exported. However, through political will, laws and regulations can be amended or enacted to fill gaps and Tanzanians to benefit from the minerals extracted.

Nigeria and Ghana laws have no much difference with Tanzania in addressing transparency mechanism. The laws are well formulated but still, there are corruption activities like illegal exportation of the minerals, non-disclosure of contracts and lack of legal mechanism in allocating of revenues from mining industry to sub-national while in Tanzania is at local government. Tanzania has fixed rate which is paid to the local government for years without complying with the percentage given while Nigeria and Ghana they have sub-national where a lesser amount is allocated or lack of a legal mechanism to monitor and make the officers responsible accountable on how money was used. Hence, unavailability of laws to supervise expenditure of income, responsible officers may use the funds for their own advantage and cause sufferings to people who are entitled to access essential service in the community by money being invested. The same applies to the fixed rate in Tanzania it raises a suspicion those who agreed with MNCs has done so to benefit themselves and society suffer for missing the income which could be deducted using percentage for sustainable development.

In addressing human rights and anti-corruption through the EITI standards, the three countries failed to give their citizenry the right to access to information to debate, how is the best way to manage resources. There are some reports uploaded in the websites of respective ministry for a debate but not everyone can access electronic information and other website in three

countries are outdated, hence non-disclosure of information from the mining sector. Therefore, non-accessibility of information is human rights violations; which gives a leeway to corruption because the authorised officer can make bad deals since he or she knows no one will challenge him or her. Thus, the three countries has to state clearly through their laws and regulations the media to access information from mining sector for dialogue. They have to consider reliable and affordable media to enable the citizenry to go through the report and give their views of how to utilise the resource for social betterment. This thesis did not find the involvement of the citizens in the debate to discuss the report which is a denial of the right of expression.

Therefore, lack of transparency for non-disclosure of information regarding mining sector causes corruption practices, and once there is corruption there is human rights violations because the two are linked. The thesis findings are that the EITI standards have no problem in addressing anti-corruption and human rights. However the implementing countries needs to have political will, commitment by public officials and good supervision of the mining operations by the authorised officers; through the standards which can be amended or enacted from time to time in case of any gap which attracts corruption by considering their operation context and take into account their scope.

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